

**WHISTLEBLOWERS AT DEPARTMENT OF ENERGY
FACILITIES: IS THERE REALLY “ZERO TOLER-
ANCE” FOR CONTRACTOR RETALIATION?**

HEARING
BEFORE THE
SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTH CONGRESS
SECOND SESSION

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MAY 23, 2000
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WHISTLEBLOWERS AT DEPARTMENT OF ENERGY FACILITIES: IS THERE REALLY “ZERO TOLERANCE” FOR CONTRACTOR RETALIATION?

TUESDAY, MAY 23, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 2322, Rayburn House Office Building, Hon. Richard Burr (vice chairman) presiding.

Members present: Representatives Burr, Ganske, Bryant, Bliley (ex officio), Strickland, and DeGette.

Staff present: Dwight Cates, majority investigator; Thomas DiLenge, majority counsel; Amy Davidge, legislative clerk; and Edith Holleman, minority counsel.

Mr. BURR. This hearing of the Oversight and Investigations Subcommittee will come to order.

The purpose of today's hearing is whistleblowers at the Department of Energy facilities: is there really zero tolerance for contractor retaliation?

We have two panels. I know that more members will be in and out because of the schedules today.

Let me take this opportunity to welcome all of our witnesses and to announce to them that we expect a series of votes in approximately 30 minutes. That series will probably last for about 45 minutes. It is a series of four to five votes. When that happens, we will take a recess for some period of time. It is my hope that Ms. DeGette and myself will have time to make opening statements and we will have an opportunity to hear the opening statements of at least the first panel before we recess. I would ask all of you to be patient with us as we work through those votes.

The Chair would recognize himself for the purposes of an opening statement.

Today the committee will review whistleblower retaliation at the Department of Energy facilities operated by its contractors. We will primarily focus on two issues: first, has the Department taken the necessary steps to ensure that contractor employees are encouraged to openly disclose violations of law, unsafe work conditions, and other examples of waste, fraud, and abuse without fear of retaliation, or has the Department's zero tolerance policy for reprisals against whistleblowers simply been a false promise that has died

due to the vacuum of leadership? Second, is the Department's policy to reimburse its contractors' legal defense costs to fight a whistleblower an appropriate use of taxpayer funds, or has the Department all too willingly funded contractor defense costs in an effort to wear down whistleblowers, regardless of the merits of the whistleblower's claim?

The committee has been studying these issues closely, and I am concerned that the Department has once again fallen into a very familiar cycle. This familiar cycle at DOE begins with a genuine understanding of a problem, then a commitment to reform, and then an announcement and lengthy press release from DOE headquarters describing how they will resolve the problem, but the Department always seems to forget to follow through on these reforms.

In 1995, former Secretary Hazel O'Leary presented a package of whistleblower protection initiatives, including a zero tolerance policy for reprisals and a proposed limitation on the reimbursement of contractors' legal defense cost in certain cases, but the implementation of these reforms at DOE sites has been inconsistent due to the lack of a clear guidance from headquarters—again, an all-too-familiar problem at the Department of Energy.

Soon after announcing these reforms, Secretary O'Leary realized that they were not being implemented. In March 1996, in a press release she quoted, "These whistleblower initiatives have not been implemented to my satisfaction, and I want to get this effort back on track."

Secretary O'Leary asked former Under Secretary Tom Grumbly to take the lead, but again implementation was derailed. In my mind, the real test of zero tolerance policy is whether contractor employees are now more willing to come forward with a legitimate workplace concern without the fear of retaliation from management and with confidence that DOE will protect them. Unfortunately, we will hear about the cases today of several whistleblowers who not only suffered acts of reprisal when they initially identified serious safety concerns, but who also, in some cases, were subject to ongoing and unrelenting retaliation by both DOE and its contractors throughout the complaint process.

In all these cases, the Department of Labor investigated the complaints and issued findings in favor of these whistleblowers. Remarkably, the Department has responded by providing virtually no support to the whistleblowers, while providing generous taxpayer support for the contractors fighting these meritorious claims.

First, the contractor and his lawyers have unlimited access to any information they need from the employee's files or from DOE files to build their case. The whistleblower, on the other hand, has to file a Freedom of Information Act request and wait months to see if DOE and the contractors will comply.

In Mr. Lappa's case, the Department has withheld access to documents and prevented Mr. Lappa's attorney from interviewing DOE personnel, forcing Mr. Lappa to file a separate lawsuit just to gain access to this information.

Earlier this month, the Federal judge in that case determined that the DOE "Acted arbitrary and capriciously in denying the tes-

timony of DOE employees” sought by Mr. Lappa to prove his case and ordered DOE to make these individuals available at once.

Second, the contractor has all the time and taxpayer-funded legal help it needs to slow down, wear down a whistleblower and the limited resources of a whistleblower.

In Mr. Walli’s case, Fluor Hanford knew it would lose its appeal of OSHA’s initial ruling, but it appealed anyway and held out for months of costly litigation until they settled the night before the trial.

Fluor Hanford has spent more than \$200,000 in taxpayer funds over the past 3 years fighting Mr. Walli and his colleagues, and in Mr. Lappa’s case the University of California has spent more than \$300,000 in taxpayer funds for outside legal help. In both cases, the contractors likely will enjoy these free taxpayer-funded legal expenses even if they continue to lose their ongoing fights against these whistleblowers.

Third, the relationship between DOE and its contractors is a close one. In many cases, the contractor receives full cooperation, strategic coordination from DOE to fight the whistleblowers. All of DOE’s resources are available to the contractor, but DOE will not return the whistleblower’s call. In Mr. Lappa’s case, the Department has even entered into a joint defense privilege with the contractor to withhold information from Mr. Lappa.

The judge in Mr. Lappa’s suit found it incredulous that DOE would claim a joint defense privilege and agreed. How can DOE be both the independent enforcer of zero tolerance and also a willing codefendant? This pattern of behavior does not represent zero tolerance, but, unfortunately, this is what we should expect when there is poor leadership and follow-through by Secretary O’Leary, Secretary Pena, and most recently Secretary Richardson.

If DOE decides to stop hiding behind its contractors and their contracts, perhaps the Department could establish a legitimate whistleblower protection policy that it is willing to consistently implement and enforce. This will require DOE to gain control of the contracts it writes and the contractors it hires, but it looks like we may have to wait for the next Secretary of Energy to provide this leadership.

I will now yield to the ranking member for the purposes of an opening statement.

Ms. DEGETTE. Thank you, Mr. Chairman, for holding this important hearing. Frankly, my statement echoes a number of the concerns that you expressed in your statement, as well.

We in Congress and those in the executive branch have frequently praised the enormous courage and unmeasurable contributions of whistleblowers to building and maintaining policies and practices in the Federal Government that guarantee that all are treated fairly and that the public’s health and safety is protected. We particularly note it—and I think it is particularly important—at our nuclear weapons and other nuclear sites, where the price of inadequate safety practices can be so costly. We do this even though we know that, once outside of the public’s eye, whistleblowers are often punished for their actions with stagnant or destroyed careers, lost jobs, lost pay and benefits, unending legal pro-

ceedings, and uncompensated legal fees, continuing retaliation, and tremendous emotional isolation and stress.

As someone who practiced employment law on behalf of workers for a number of years before I came to Congress, I know firsthand how this feels for people who are whistleblowers and who are suffering retaliation.

Even a Congressional hearing—and, frankly, we have had many in this committee—can't change the personal toll that whistleblowing takes on people.

Ernie Fitzgerald, a whistleblower from the Department of Defense, has labored in a closet for more than 15 years. Not very many people can do that.

In 1988, when Congress authorized civil penalties under the Price Anderson Act for DOE contractors who committed serious safety violations, John Harrington, the Secretary of Energy, opposed all penalties. The contractors, according to Secretary Harrington, engage in special working relationships with the Department to operate Government-owned facilities that are vital to our national security. The Secretary went on to say, "These relationships are founded on an understanding that the interests of the Department of its contractors are largely inseparable."

Mr. Chairman, I will submit that the DOE has had this attitude under both republican and democratic administrations. Not too much, unfortunately, has changed since 1988. The Department of Energy continues to reimburse its contractors for the legal fees and other expenses involved in beating down the whistleblowers. Its lawyers strategizes, we have heard, with the contractors' lawyers and create these joint defense agreements. The DOE refuses to allow its employees to be deposed in whistleblower actions, and it authorizes punitive litigation against whistleblowers.

The truth is—and this is true in government and also in private industry—no one in management wants a whistleblower around because they might tell the truth again and embarrass everybody. Frankly, it doesn't matter whether someone has worked successfully at a site for 1 or 20 years.

As we heard, following on the 1988 law Secretary O'Leary announced this zero tolerance policy and it was affirmed, in turn, by both Secretary Pena and Secretary Richardson. Some changes were made.

The Department set up the Office of Employee Concerns to attempt to informally resolve complaints. It announced a policy that it would not pay legal fees for contractors who received an adverse determination against a whistleblower action. But, as we will hear in testimony today, the Office of Employee Concerns of headquarters has only one full-time staffer and no policy for some very basic issues such as maintaining the confidentiality of hotline communications.

The 708 process is so slow, inefficient, and faulty that whistleblowers have been forced to go to the Labor Department to get a full hearing. Labor, unlike DOE, allows discovery by the whistleblower, which gives them a real chance to prove their case. Labor, unlike DOE, has orders that are enforceable against the contractor and in court. And, as one whistleblower found out when he went to court to enforce his DOE order, DOE proceedings don't provide

enforceable judgments. Moreover, the contractors have figured out how to settle the Labor cases just before receiving an adverse determination, with DOE paying all of the bills, and then they take new actions against the whistleblowers, either with retaliations or through different legal proceedings. DOE's counsel has overwhelmingly authorized these costs and cooperates with the contractors' lawyers in these situations.

We heard a little bit about Hanford, where Fluor Daniel intervened in a dispute the pipefitters had with their union resulting from their layoff. DOE paid all those bills. Now, after continued retaliation, the pipefitters had to resort to the State courts for relief, and guess who is paying those bills—right again, the DOE, which has a zero tolerance policy against reprisal. In fact, the DOE claims a joint defense policy and is strategizing with Fluor. The whistleblowers must fight on against the resources not only of Fluor, but the Federal Government.

We heard how much the whistleblowers have had to pay in legal fees. The taxpayers have spent over \$500,000 in legal fees to keep the pipefitters off the jobs.

David Lappa, another whistleblower, is fighting against the University of California in State court. Lappa, a nuclear engineer with 20 years experience, was harassed out of his job after he alleged safety violations. He, too, settled his case just before an adverse finding. The university, however, continued to retaliate. Mr. Lappa sued in State court. Who is paying the bills? Right again, the DOE. The Department said it doesn't need to investigate, it is just going to wait for Mr. Lappa to bleed himself dry financially while doing the public's work.

Joe Gutierrez also ran up against the University of California when he revealed there were no radioactive monitoring records in a particular facility. Well, guess what? He got a negative performance rating, a reduced pay rate, and work taken away for that.

Even after an adverse determination, the University still fights on. Mr. Gutierrez has amassed \$50,000 in legal fees. Mr. Gutierrez apparently violated a U.C. code of ethical conduct which required him to "exhibit loyalty in all matters pertaining to the affairs of the University of California and the Los Alamos National Laboratory," and "refrain from entering into any activity which may be in conflict with the interests of the University of California and the Los Alamos National Laboratory."

Now, \$50,000 to an individual citizen is a lot of money to have to spend in legal fees, and especially if they have to wait to have any kind of recovery until an adverse determination. And what can happen when you have a large institutional entity, like a corporation or the Department of Energy, if they can just bleed these poor individuals dry?

As far as we are concerned and can see, DOE takes no steps to protect these whistleblowers, and even most recently, in an April 28 letter for this committee, Mary Anne Sullivan said, "I believe that the review of whether LLNL reprised against the individual and therefore any response by the DOE under its contract with U.S. has worked and should await the outcome of the proceeding." It just goes on and on.

Mr. Chairman, I really am glad, as I said, we are having this hearing. I think it is an important hearing, and I am hoping it will be the first step, no matter who is in the Administration after the November elections, to making sure we protect these whistleblowers.

I yield back.

Mr. BURR. The gentlelady makes a good point. The gentlelady's time has expired.

The Chair would recognize the chairman of the full committee, Chairman Bliley.

Chairman BLILEY. Thank you, Mr. Chairman, for holding this important hearing today on whistleblower retaliation at DOE facilities.

Telling the truth about safety helps all Americans. When whistleblowers are afraid to come forward with safety concerns, the health and safety of all those within these facilities and all those who live nearby are jeopardized.

In 1995, then Secretary O'Leary announced new protections for contractor employees who disclosed safety violations at DOE sites. Unfortunately, over the past 5 years these whistleblower protections have failed to take hold. It seems that no one at DOE is really interested in strengthening the Department's whistleblower protection policies.

While Secretary Richardson again pledged a zero tolerance policy for reprisals against whistleblowers just last year, the reality is that the Department continues to show its willingness to work overtime to fight whistleblowers and to protect its contractors, even after a whistleblower's claim has been investigated and verified by the Department of labor.

One of the most glaring failures has been limiting the taxpayer funding of contractors' legal costs in whistleblower cases. In 1995, 1998, and again in 1999 the Department proposed reforms so that the taxpayers would not continue to pay a contractor's legal bill when a whistleblower's claim has merit. However, the proposed reforms were never finalized. Why? According to a recent memo from DOE's Office of General Counsel, "There is no one championing movement on this rule."

The failure of leadership has resulted in a state of confusion, with inconsistent whistleblower protection policies and inconsistent contract provisions at the Department's different sites. Because whistleblower retaliation is just as serious at one DOE site as at another, there should be one policy on whistleblower protection that applies to all contracts and to all contractors. Without tough and clear contract provisions, contractors can continue to play games with both DOE and whistleblowers and avoid having to pay any real cost for retaliation.

The whistleblower cases we will review today are not cases we have dug up from the past. These are active cases that demonstrate how far DOE and its contractors will go to fight whistleblowers who have identified significant safety issues.

When serious safety issues were raised by David Lappa, Randy Walli, and Joe Gutierrez, the Department turned its back on them. Instead of protecting these whistleblowers and investigating their complaints, the Department sided with its contractors.

When a contractor knows the Department is on its side, financially and otherwise, the contractor is encouraged to continue to retaliate against all whistleblowers. When employees find out that the DOE will work overtime to fight whistleblowers and protect its contractors, the message becomes clear: if you identify safety violations, you will be punished.

The Department claims to have zero tolerance for retaliation against employees who blow the whistle on safety violations. Zero tolerance is supposed to mean that not a single case will be tolerated, that every instance will be punished. Five years have passed, and there have been numerous cases in which whistleblowers have been retaliated against by DOE's contractors, but where is the punishment, where is the accountability? After 5 years, the examples, if any, are few and far between.

Secretary Richardson recently declared in another context that he wants to put an end to the cozy relationship between DOE and its contractors. Although we have heard that before, what better place to start than here, where nuclear safety is at issue?

Thank you, Mr. Chairman.

Mr. BURR. I thank the chairman. The gentleman's time has expired.

The Chair would recognize Mr. Ganske for the purposes of an opening statement.

Mr. GANSKE. I thank you, Mr. Chairman.

I would just echo the words of Chairman Bliley. I think it is very important that an oversight committee in Congress be able to get the information related to nuclear safety. Whistleblower protections are, I think, absolutely necessary.

Senator Grassley, the senior Senator from my State, has been a strong proponent of whistleblower protection as it relates to the Department of Defense, and even strongly supports quit-type suits.

I think it should be noted also that the House of Representatives passed a strong patient protection bill last October that had strong whistleblower protections in it, too. There are a lot of analogies between the type of whistleblower protection that we ought to have the people who are working in the nuclear industry in terms of health and safety and those who are working in the health industry, in terms of making sure that there are not abuses or risks. Those people need to be protected for stepping forward and drawing attention to potential problems.

And so, Mr. Chairman, I thank you for having this hearing, and I look forward to the testimony.

Mr. BURR. I thank the gentleman.

We do have a series of votes, and for that reason I am going to wait until we get back to bring up the first panel and to swear them in.

I will take this opportunity, as the Chair, to suggest that the problem is not cleared up even today. This subcommittee made requests of the Department of Energy for the last several weeks about other cases that we are not here to hear about from individuals, and it was specifically requests as it related to whether, in fact, the Department of Energy had reimbursed Kaiser Hill at Rocky Flats for legal fees, and we were assured that they had not and that the Department had not signed off on that issue, specifi-

cally with the Graff whistleblower case at Rocky Flats, only to be notified by the Department of Energy yesterday at 4:30 that they had discovered in the billings last week that all along they had been billed by Kaiser Hill for the legal costs of that fight.

This brings a number of questions to this committee that we will explore today. One that is obvious is who is reading the invoices submitted by the contractors to DOE that were paid and how closely are they checking them if, in fact, invoices were paid with legal fees, yet those who are responsible to account for any legal fees paid out to contractors didn't know that the Department of Energy was, in fact, reimbursing Kaiser Hill.

I am sure that we will get into this in greater depth on both sides of the aisle.

At this time, I would ask unanimous consent to enter both the original response from the Department of Energy, as well as yesterday's response clarifying their participation into the record.

Without objection, so ordered.

[The information referred to follows:]

United States Government

Department of Energy

Rocky Flats Field Office

memorandum

DATE: May 18, 2000

REPLY TO:
ATTN OF: OCC-00-0512

SUBJECT: Outside Counsel Litigation Defense Costs in *Graf v. Wackenhut*

TO: David M. Berick, Deputy Assistant Secretary for House Liaison, CI-30, HQ

This memorandum will provide the available information I have to date in response to the query on the outside counsel litigation defense costs in *Graf v. Wackenhut*. The sum of the invoices submitted by Wackenhut, L.L.C. to Kaiser-Hill Company, L.L.C. (dated from July 17, 1998 to April 19, 2000) received by my office on May 11, 2000, is \$211,673.39.

My office has approved none of the invoices, since the review of them recently commenced and is incomplete. Potentially, the aforementioned sum contains costs not related to the outside counsel litigation defense costs in the *Graf* matter. Further, it is uncertain at this time whether all of the potential outside counsel litigation defense costs is reflected in the sum. My office has made no determination as to the set of costs to be allowable by DOE. In essence, the sum costs are nothing more than a quick tallying of unreviewed invoices to which no greater credible representation is available at this time. The tally is intended to satisfy the urgent need for response to the query.

I have endeavored to provide to you as quickly as possible the outside counsel litigation defense costs that my office is considering in the *Graf* matter. As I previously described in prior correspondence, we are dedicating efforts to review the invoices (in greater priority to those of other matters submitted prior in time). We are reviewing the invoices in light of the administrative law judge's detailed, 139 page Recommended Decision and Order, and allowable cost principles. This review takes time and must be done thoroughly to avoid the risk of the determination being arbitrary and capricious. The process we are following is in accordance with our customary, routine practice of reviewing invoices to determine the actual, reasonable and allowable amount that the contractor is entitled to claim.

Your assistance in this matter is most appreciated. Please contact me at (303) 966-2026 should you have additional questions.



Mel Roy
Chief Counsel

Attachment - list of invoices

United States Government

Department of Energy

Rocky Flats Field Office

memorandum

DATE: May 22, 2000

REPLY TO:
ATTN OF: OCC-00-0516

SUBJECT: Outside Counsel Litigation Defense Costs in *Graf v. Wackenhut*

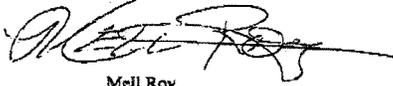
TO: David M. Berick, Deputy Assistant Secretary for House Liaison, CI-30, HQ

The purpose of this memorandum is to further respond to the query regarding the outside counsel defense costs in *Graf v. Wackenhut*. The following information is what I have confirmed to date.

The outside counsel defense costs in the *Graf* matter were included in payments to Kaiser-Hill Company, L.L.C (Kaiser-Hill) over a period of approximately twenty-two months. My office did not recommend the aforementioned costs for approval or allowability and the Department of Energy (DOE) did not determine the costs as allowable under the contract. Kaiser-Hill incorporated the costs in general subcontractor billings that were not conspicuous to DOE. Subsequent to the queries on this subject, DOE and the senior Kaiser-Hill officials became aware of the error. As I understand it, Kaiser-Hill returned the funds for these costs, a sum of \$218,613.16. Kaiser-Hill intends to process the costs internally, and later submit the appropriate invoicing to DOE for review by my office in accordance with our Litigation Management Procedures.

The invoices I received on May 11, 2000, from Wackenhut to Kaiser-Hill, were not submitted to DOE for purpose of review for payment. As I mentioned in my correspondence to you dated May 18, 2000, the invoices may include costs not associated with the *Graf* matter. Thus, my office will cease reviewing the documents since continuation is superfluous in light of the circumstances. The documents will be returned to Kaiser-Hill with the clear expectation that Kaiser-Hill must follow DOE's procedures and receive a determination as to which costs the contractor may be entitled to claim before such costs can be authorized for payment.

Dwight Cates, Investigator at the House Committee on Commerce, was particularly interested in the facts of this matter. If you would, please provide him this updated information.



Mell Roy
Chief Counsel

Mr. BURR. This hearing will be adjourned until 11:15.

[Brief recess.]

Mr. BURR. The subcommittee will come back to order.

At this time, the Chair would call up our first panel: Mr. Tom Carpenter, director, Seattle office, Government Accountability Project; Mr. Joe Gutierrez, assessor, audits and assessment division, Los Alamos National Laboratory; and Mr. Randy Walli from West Richland, Washington.

Gentlemen, welcome.

Let me first turn to Mr. Strickland for the purposes of an opening statement, if he has one.

Mr. STRICKLAND. Mr. Chairman, I have an opening statement I would like to submit for the record.

Mr. BURR. Without objection, all statements of all members will be a part of the record.

Gentlemen, it is the history of this committee to take testimony under oath. Do any of you have a problem with that?

[No response.]

Mr. BURR. It is also incumbent on the Chair to advise each of you that, under the rules of the House and rules of the committee, you are entitled to be advised by counsel. Do any of you choose to have counsel sworn in to advise you during this hearing?

[No response.]

Mr. BURR. None. Okay.

I would ask all of you to stand up. Raise your right hand. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

[All witnesses respond in the affirmative.]

Mr. BURR. Please be seated.

Mr. Carpenter, we would recognize you for the purposes of an opening statement.

TESTIMONY OF THOMAS E. CARPENTER, DIRECTOR, SEATTLE OFFICE, GOVERNMENT ACCOUNTABILITY PROJECT; RANDALL WALLI, WEST RICHLAND; AND JOE GUTIERREZ, ASSESSOR, AUDITS AND ASSESSMENT DIVISION, LOS ALAMOS NATIONAL LABORATORY

Mr. CARPENTER. Thank you, Congressman, and thank you for inviting my testimony here today about whether there really is a zero tolerance for reprisal policy against whistleblowers at Department of Energy nuclear facilities.

I am an attorney and the director of the Seattle office of the Government Accountability Project, and I am primarily responsible for overseeing the activities of the Department of Energy nuclear weapons production facilities, a position I have held since 1985.

Our organization provides nonprofit legal counseling and support for whistleblowers who suffer reprisal for exposing health, safety, and environmental abuses. With over 20 years of experience in successfully representing literally thousands of government and corporate employees who have challenged unsafe, fraudulent, and environmentally unsound practices, our organization has developed a unique and effective strategy for helping whistleblowers.

Based in Washington, DC, GAP opened an office in Seattle in the summer of 1992 to effectively respond to the growing number of

cases and issues at the Hanford nuclear site. We also represent or have represented employees at various Department of Energy sites nationally, including at Los Alamos in New Mexico, Knolls Atomic Power Lab in New York, Hanford in Washington, Oak Ridge National Laboratory in Tennessee, Savannah River site in North Carolina, Rocky Flats plant in Colorado, the Fernald site in Ohio, Idaho National Engineering Labs, Lawrence Livermore National Laboratories in California, and Pantex in Texas.

The ability of employees to raise concerns is fundamental to safe and efficient operations, especially at nuclear facilities. The Department of Energy has for a decade recognized the important concept of protecting whistleblowers, but has not taken the necessary steps to change the culture to make a policy shift more than window dressing. In fact, in total contradiction of its oft-cited zero tolerance for reprisal policy, the Department has assisted its contractors in every possible way to fight whistleblowers, even when they prevail in court.

After years of a zero tolerance policy, can the Department point to a single instance where the policy has actually been enforced?

The Department has effectively dismantled safety oversight and regulation of its contractors in many ways, but has removed qualified safety professionals from the management chain for its most dangerous operations.

The problems surfaced by whistleblowers are troubling symptoms of the lack of safety enforcement and in absence of safety professionals who are empowered in the management chain to heed the concern of whistleblowers.

Since 1993, the Department of Energy has enacted a policy of zero tolerance for reprisal against whistleblowers. This started with Secretary Hazel O'Leary, who announced a set of whistleblower initiatives in 1994 and 1995 to address what she called a "miserable, miserable history" of reprisal within her agency. Her reforms were echoed and embraced by Secretaries Federico Pena and the current Secretary, Bill Richardson.

Among the reforms pledged to by the Department was a commitment to curtail the practice of reimbursing contractor litigation expenses associated with whistleblower cases. Many contracts within the Energy Department were subsequently modified to explicitly disallow the payment of contractor costs associated with litigation in cases where an adverse determination was found against the contractor. Where costs were advanced by the Department of Energy and the contractor lost, the DOE required the repayment of any advanced fees.

The Department has consistently ignored its own policies on zero tolerance. The agency continues to reimburse contractor costs, even when the whistleblower prevails.

Earlier we talked about the case of David Lappa. Mr. Lappa is a nuclear engineer. He was formerly employed at the Lawrence Livermore National Lab. His case is a prime example of how the DOE has failed in its policies.

Mr. Lappa refused to engage in a coverup of nuclear criticality safety violations as part of an Investigation Committee. The University of California removed his name from a final report, of which he was a part. Mr. Lappa was then removed from his position and

subjected to harassment and intimidation. He filed a complaint with the U.S. Department of Labor, which investigates claims of whistleblower reprisals, and after an extensive investigation the Labor Department found that management had illegally retaliated against Mr. Lappa and ordered the lab to pay damages and to cease its harassment campaign.

U.C. did not appeal this finding. It became the final agency order of the Labor Department. Yet, the Department of Energy refused to recognize this finding and reimbursed all of the University's expenses associated with Mr. Lappa's complaints.

When the University continued to harass Mr. Lappa and denied him meaningful work, Mr. Lappa filed a lawsuit in State court. The Department continues to side with the University and has actively sought to block access to information and witnesses to Mr. Lappa, while at the same time paying the University's legal bills.

It took a Federal judge to order the DOE to produce documents and to make DOE officials available for deposition. Meanwhile, Mr. Lappa, who has appealed for help repeatedly from the Department of Energy in his case, has been insulted and rebuffed by U.C. management and DOE. DOE managers have told him that they didn't put credence in the Department of Labor's findings and have attempted to create a joint defense relationship with the contractor in order to hide documents and witnesses from Mr. Lappa.

After suffering repeated harassment and mental anguish, Mr. Lappa finally resigned due to the emotional toll and refusal of the university to provide him meaningful work.

It is cases like this that have led to many employees within the Department to characterize the DOE's true whistleblower policy as "zero tolerance for whistleblowers."

For an agency with such critical safety and health responsibilities, effective financial management controls are also essential. The U.S. GAO describes DOE's contractor oversight as an undocumented policy of blind faith in contractors' performance, which it calls its "least interference policy." This is no more apparent than at the DOE's Hanford site in Washington State.

Over the past several years, David Carba, a former accountant for the Westinghouse Hanford Company, reported that Westinghouse was deliberately inflating cost, adding up to over \$100 million, in violation of the Federal accounting system. These findings were subsequently verified in September, 1997, by the Defense Contracting Audit Agency. The agency also found that Fluor Daniel Hanford Company, which succeeded Westinghouse, not only continued these fraudulent practices, but refused to correct them.

Shortly after the Hanford audit was completed, an internal request called a "form 2000" was filed to initiate a fraud investigation, but, for reasons that have not been provided, it was not acted upon.

Despite these actions, the DOE has done little, if anything, to correct these and has closed ranks against Mr. Carba, who filed a False Claims Act case against the contractors.

Given DOE's consistent blind faith in its contractors, we are concerned that DOE may be paying contractor legal fees to defend a False Claims Act case for the same contractors that were found to

have violated the Federal acquisition cost accounting standards now subject to litigation.

The Department of Energy could act differently. It need look no further than the Nuclear Regulatory Commission for help. The NRC, which is responsible for the commercial nuclear industry, has enacted policies that promote a safety-conscious work environment at commercial nuclear operations. Under NRC rules, licensees and contractors are routinely subjected to civil penalties and even license suspension and revocation for chilled reporting atmospheres.

The DOE would be well advised to follow the NRC example if it is serious about changing its 50-year culture of reprisal.

Protecting employees who speak about illegality, threats to public health and safety, mismanagement, and fraud deserve protection and encouragement. Congress can do its part by beefing up protection for these workers, which remain inadequate, and by passing legislation that resolves a conflict of interest situation at DOE by affording external regulation of these facilities to OSHA and the NRC.

Thank you for inviting my testimony today.

[The prepared statement of Thomas E. Carpenter follows:]

PREPARED STATEMENT OF TOM CARPENTER, DIRECTOR, SEATTLE OFFICE,
GOVERNMENT ACCOUNTABILITY PROJECT

INTRODUCTION AND BACKGROUND

Thank you for inviting my testimony today about whether there is really "zero tolerance for reprisal" against whistleblowers at Department of Energy nuclear facilities. My name is Tom Carpenter, and I am an attorney and the Director of the Seattle Office of the Government Accountability Project. I am primarily responsible for overseeing the activities of Department of Energy nuclear weapons production facilities, a position I have held since 1985.

Our organization provides non-profit legal counseling and support for whistleblowers who suffer reprisal for exposing health, safety, and environmental abuses. We also work to ensure that whistleblower concerns are addressed through by appropriate federal agencies, public exposure in the media, Congress, and the courts. With over twenty years of experience in successfully representing over thousands of government and corporate employees who have challenged unsafe, fraudulent, and environmentally unsound practices, GAP has developed a unique and effective strategy combining first-hand investigation of whistleblower concerns with broad public education, grassroots coalition-building, congressional action, media pressure, and selective litigation. Moreover, our efforts have brought together diverse groups to press for reforms, such as industry, workers, local unions, grassroots organizations and citizens who face toxic exposures from nearby facilities.

Based in Washington, D.C., GAP opened an office in Seattle in the summer of 1992 to effectively respond to the growing number of cases and issues at the Hanford Nuclear Site. GAP also represents or has represented employees at various Department of Energy sites nationally, including: Los Alamos National Laboratory in New Mexico; Knolls Atomic Power Laboratory in New York; Hanford Nuclear Reservation in Washington; Oak Ridge National Laboratory in Tennessee; Savannah River Site in South Carolina; Rocky Flats Plant in Colorado; Fernald Site in Ohio; Mound Laboratories in Ohio; Idaho National Engineering Laboratories in Idaho; Lawrence Livermore National Laboratories in California; and Pantex Nuclear Weapons Assembly and Disassembly Plant in Texas.

In addition to providing legal representation to whistleblower employees, the Government Accountability Project also advances policy reform within the Department of Energy. For instance, in 1990, we filed the Rulemaking Petition that led to the establishment of the DOE's whistleblower protection program under 10 C.F.R. Part 708, and we have commented extensively on similar reforms. We have also affected policy reforms through Congress, where we helped draft and advocate for changes to the Nuclear Whistleblower Protection Act, to provide whistleblower protection to DOE contractor employees in 1992.

At Hanford, the Department's most contaminated and dangerous site, I have represented dozens of employees who have blown the whistle on illegalities, threats to public health and safety, mismanagement and environmental abuses since 1987.

I serve on the Hanford Advisory Board, which advises the Department of Energy, the Washington State Department of Ecology, and the Environmental Protection Agency on matters related to environmental cleanup and remediation and health and safety issues at Hanford.

I was also instrumental in the formation and continued operation of the Hanford Joint Council for Resolving Employee Concerns, a highly successful and unique mediation board that resolves cases of whistleblower allegations and personnel actions at a low level, in a manner that protects the employee and the interests of the company and the government and in a full, final and fair resolution.

GAP's Work with DOE Employees and Contractor Employees

It has been repeatedly demonstrated that employees who have raised environmental, safety and health concerns (whistleblowers) at DOE nuclear weapons production facilities have subsequently experienced significant workplace reprisal that has impacted their careers, financial stability, and personal and familial relationships. Frequently, they are courageous people of integrity who have observed and documented health-threatening safety and environmental hazards, and refused to remain silent despite adverse consequences. Society should protect and applaud whistleblowers, who, in looking beyond narrow self-interest uphold a professional code of ethics, save lives and preserve not only public health and safety but also vital fiscal resources.

The historical policy of retaliation against whistleblowers throughout the DOE complex has been well-documented. Reprisals have come in the form of poor performance appraisals, terminations, psychiatric evaluations, physical threats, harassment, creation of hostile working environments, transfers, layoffs, security clearance abuses and salary cuts.

On November 6, 1993, Energy Secretary Hazel O'Leary, at my invitation, attended a national conference entitled "Protecting Integrity and Ethics." The conference, held in Washington, D.C., was co-sponsored by the Government Accountability Project and Public Employees for Environmental Responsibility. Secretary O'Leary met privately with a number of DOE whistleblowers, and then gave the keynote address of the conference. She stated,

And finally, not just to make whistleblowing acceptable, but to celebrate it. To have, not just me and you, but every manager and every employer in the DOE to understand that whistleblowing is simply being proactive. That's what it is. It's being proactive. It's saying, 'for God's sake this is a problem let's handle it.'

* * * * *

Here's my commitment. I've talked a lot in my life about zero tolerance for discrimination. How about zero tolerance for reprisals, doesn't that get everybody under the same tent? Now that's my piece and I own that... What we are going to do here is agree that that's the goal and we're going to stick on it... I commit today, zero tolerance, zero tolerance for reprisal.

—SECRETARY HAZEL O'LEARY, *November 6, 1993, Holiday Inn, Bethesda, Maryland, at the Protecting Integrity and Ethics Conference.*

Secretary O'Leary's commitments were an invitation to the public and the workforce to encourage the Department to examine and improve its own policies and practices in regards to whistleblower protection.

Secretary O'Leary's commitments translated into a series of reforms which she adopted as "Whistleblower Initiatives." On August 9, 1995, the DOE issued a press release announcing the adoption of a series of reforms to protect whistleblowers. The reforms were meant to carry out Secretary O'Leary's policy of "zero tolerance for reprisal." The DOE announcement stated:

The reforms adopted by O'Leary include measures to ensure that whistleblowers are not retaliated against by misuse of security clearance procedures; a limit on payment of contractor litigation costs in whistleblower cases, and establishment of an enhanced "employee concerns" program which would have the effect of strengthening DOE policies and programs to ensure that employee concerns are given full attention by DOE and DOE contractor managers and supervisors.

The whistleblower reforms, and particularly the "zero tolerance for reprisal" policy was recognized by Secretary Federico Pena, and subsequently Secretary Bill Richardson, who issued a "Safety and Accountability Policy Memorandum" to all employees on March 10, 1999. The policy stated,

There must be open communication between management and employees and a zero tolerance policy for reprisals against those who raise safety concerns. Free and open expression of employee concerns is essential to safe and efficient accomplishment of the Department's missions.

However, the DOE's commitment to these reforms has flagged. Secretary O'Leary, in sworn testimony in a whistleblower case involving a DOE Resident Inspector in 1998, observed,

"...[W]hat I was after was what I then knew and know even more deeply after having spent four years in the Department of Energy, as the longest Secretary of Energy in this history of the government, has been a practice of repeated and long-term reprisal that visits the employee in the place that he or she is most vulnerable and that is, first of all, in the questioning of the employee's competence to do his or her work, and once that happens to any employee, that individual is almost dead in terms of promotion or having people even attend what is being said."

DOE'S POLICY ON REIMBURSING CONTRACTOR LITIGATION FEES IN WHISTLEBLOWER CASES

As part of the new era of employee protection ushered in by Secretary O'Leary, the Department took action by requiring the insertion of language in new contracts made by the Department specifically limiting the payment of contractor litigation fees in whistleblower cases.

Subsequently, the Department issued a new regulation under its procurement rules, called DEAR (Department of Energy Acquisition Regulations) regulations, mandating the insertion of clauses relating to whistleblower cases against contractors in site contracts throughout the complex.

Pursuant to 48 C.F.R. Part 970.2274-1(d) of the DEAR regulations, a contractor may not submit for payment by the Department costs incurred in connection with a final decision in Departmental whistleblower findings under 10 C.F.R. Part 708. Additionally, 48 C.F.R. Part 970 (h) states that contractors "shall not be reimbursed if such liabilities were caused by contractor managerial personnel's (1) Willful misconduct, (2) Lack of good faith, or (3) Failure to exercise prudent business judgment," including in actions brought by employees.

The DEAR regulations, however, only mention proceedings under 10 C.F.R. Part 708 proceedings, and are silent on other actions brought in other fora, such as a Labor Department or state court proceeding.

Additionally, the Whistleblower Initiatives signed by Secretary O'Leary after an opportunity for public comment, clearly stated the Department's policy, and many site contracts were modified throughout the complex reflecting these new policies. However, a review of the various site contracts reveals little consistency in this area.

For instance, the Hanford Site and the Savannah River Site contracts state that DOE may reimburse contractor litigation costs in connection with whistleblower cases before an adverse determination, which is defined as an initial determination under 10 C.F.R. Part 708, a finding by an Administrative Law Judge in the Labor Department, or a state or federal court ruling. If an adverse determination against a contractor is filed, the DOE will not reimburse costs or expenses associated with the case, and in fact requires the repayment of any such costs that were "fronted" by the Department for the litigation. The Hanford Contract states:

- C. Litigation costs and settlement costs incurred in connection with the defense of, or a settlement of, an employee action are allowable if incurred by the Contractor before any adverse determination of the employee's claim, if approved as just and reasonable by the Contracting Officer and otherwise allowable under the contract. Costs incurred in pursuit of mediation or other forms of alternative dispute resolution are allowable, if approved as just and reasonable by the Contracting Officer, and no adverse determination of the employee's claim has occurred. Additionally, the Contracting Officer may, in appropriate circumstances, reimburse the Contractor for litigation costs and costs of judgements [sic] and settlements which, in aggregate, do not exceed any prior settlement offer approved by the Contracting Officer and rejected by the employee.
- D. Except as provided in Paragraphs C, E and F of this clause, any other cost associated with an employee action (including litigation costs connected with, a judgement [sic] resulting from, or settlement subsequent to the employee action) are not allowable unless the Contractor receives a judgement or final determination favorable to the Contractor. In such event, reasonable litigation costs incurred by the Contractor are allowable, and the Contractor may submit a re-

quest for reimbursement for all such costs incurred subsequent to the adverse determination.

Project Hanford Management Contract, Contract No. DE-AC06-96RL13200, Section H-40.

The contract at the Rocky Flats site in Colorado is more open to interpretation. There, the contract provides, in whistleblower or labor actions, that “if the dispute was occasioned by contractor actions which are unreasonable or were found by the agency or board ruling on the dispute to be caused by unlawful, negligent or other malicious conduct, the costs would be unallowable.” The DOE has apparently ignored the policy enumerated in the Whistleblower Initiatives at Rocky Flats and in the DEAR regulations, which prescribe the insertion of a clause in all DOE contracts that prohibit reimbursement of claims reimbursed “if such liabilities were caused by contractor managerial personnel’s (1) Willful misconduct, (2) Lack of good faith, or (3) Failure to exercise prudent business judgment.”

The contract covering Lawrence Livermore National Laboratory and the Los Alamos National Laboratory is the most convoluted. While disallowing costs associated with whistleblower claims when there is an adverse determination, there are a few loopholes that still allow reimbursement. For instance, where the DOE “approved the Contractor’s request to proceed with defense of the action rather than entering into a settlement with the employee or accepting an adverse determination or other interim decision prior to a final decision,” the costs are allowable.

The Livermore contract provides for the ability of the contractor, subsequent to an adverse determination, to obtain “conditional payment from contract funds upon provision of adequate security, or other adequate assurance, and agreement by the Contractor to repay all litigation costs if they are subsequently determined to be unallowable.”

In our experience, the current DOE policy on reimbursement of contractor litigation fees, however well-intentioned, serves to actually frustrate the Department’s stated policy of “zero tolerance for reprisal” against whistleblowers.

As an initial matter, taxpayers should not be subsidizing illegal retaliatory activities by contractors. Subsidizing a contractor’s legal costs in these circumstances sends the wrong message to the work force as well as the contractor that DOE will support the contractor, until proven guilty. This policy actually promotes lengthy and expensive legal battles since the contractor can always count on a well-funded defense campaign that will financially and personally wear down the worker, who typically does not have access to large law firms or a big war chest.

Typically, legal fights in administrative fora, such as that provided by the Department of Energy’s 10 C.F.R. Part 708, can take years to ever reach a Hearing Officer. A final decision in Part 708 cases can literally take as long as ten years, accounting for the contractor’s right to file an appeal of an agency action pursuant to the Administrative Procedures Act—a six year statute of limitations.¹

Even if the contractor realizes that it is culpable, it may decide to wait to settle the claim until the last possible minute before an adverse decision is rendered that might prevent the contractor from recovering its legal fees from the DOE. The advantage to the contractor using this strategy is multi-faceted:

- the complainant is not at work during the period of the pendency of the legal action, and the contractor may reason that it has successfully removed a “troublemaker” who was raising inconvenient safety or health issues;
- the absence of the complainant during the years of litigation sends a powerful message to the rest of the work force that those who raise concerns will face termination and a lengthy period of costly and stressful litigation—it is a deterrent to other employees to not raise health and safety issues;
- in many instances, the contractor may actually profit from the expenditure of litigation funds by adding on a “cost-plus” adder on expenditures (the more you spend, the more you make);

In short, for the DOE to indemnify the contractor’s legal fees in some cases actually facilitates and encourages reprisals and lengthy legal battles by subsidizing contractor malfeasance. This alone flies in the face of the Departmental policy on “zero tolerance for reprisal” against whistleblowers.

¹In one case, involving a whistleblower named Larry Cornett, the DOE took over four years to issue a final decision in his favor, at which time the contractor, who was no longer employed by DOE, refused to pay. A district court likewise declined to order the agency to honor its commitment under 10 C.F.R. Part 708 to enforce the judgment on the contractor. Negative publicity against the agency and imminent Congressional action eventually forced the agency to itself pay Mr. Cornett’s damages on behalf of the contractor. In the opinion of the author, the actions of DOE did not serve as much of a deterrent against contractor malfeasance.

There is another troubling aspect to the Department's current policy in that there are several cases where the policy has been ignored or subverted. In several recent high-profile cases, the contractor was adjudged guilty of reprisals, but still had its fees reimbursed by the DOE.

This includes the case of David Lappa versus the University of California, where the Secretary of Labor issued a Final Agency Decision that found that the Lawrence Livermore National Laboratory contractor (UC) had violated the law by engaging in retaliation and discrimination against Mr. Lappa. Mr. Lappa, a twenty-year veteran of the Lab and an accredited nuclear engineer raised concerns about nuclear criticality violations. Ironically, DOE investigated Mr. Lappa's substantive concerns and issued a civil finding under the Price Anderson Act against the University of California for deliberate violations of nuclear safety protocols. Yet inexplicably, DOE has paid, and continues to pay, all expenses related to Mr. Lappa's claims against the University of California. The best that can be said about the DOE's attitude towards Mr. Lappa's case is that it is "gaming" the system to come up with the result that it wants—to reimburse the contractor no matter what.

The Government Accountability Project therefore recommends that the DOE enact clear, comprehensive and effective rules that prohibit the payment of litigation fees in whistleblower cases in any circumstance other than when a contractor can clearly show a written directive from a DOE official ordering the behavior complained of by the whistleblower.

NEED FOR A SAFETY CONSCIOUS WORK ENVIRONMENT AT DOE

It is fundamental to the mission of the Department of Energy that it protect the public safety and health in the regulation and control of its nuclear weapons production facilities. It is also fundamental to DOE's safety programs that DOE and DOE contractor employees be encouraged to voice environmental, safety and health (ES&H) concerns without experiencing reprisal. Past and recent revelations of long-standing ES&H deficiencies in DOE operations, along with a continuing stream of DOE and DOE contractor employees who allege reprisal for voicing concerns, indicate that DOE has not achieved what the commercial nuclear industry calls a "safety-conscious work environment" which is fundamental to DOE reliably accomplishing its mission.

A safetyconscious work environment is defined as a work environment in which employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees. Attributes of a safetyconscious work environment include (1) a management attitude that promotes employee involvement and confidence in raising and resolving concerns; (2) a clearly communicated management policy that safety has the utmost priority, overriding, if necessary, the demands of production and project schedules; (3) a strong, independent quality assurance organization and program; (4) a training program that encourages a positive attitude toward safety; and (5) a safety ethic at all levels that is characterized by an inherently questioning attitude, attention to detail, prevention of complacency, a commitment to excellence, and personal accountability in safety matters.

Indicators of lack of a "safety-conscious work environment" at DOE include:

- The deficient safety programs and situations described in the current annual Defense Nuclear Facilities Safety Board (DNFSB) report to Congress (as well as previous annual DNFSB reports).
- Wide-spread environmental, safety and health (ES&H) deficiencies at sites such as Hanford and Pantex, which represent a direct threat to the safety of the work force and the public.
- The numerous well documented cases of whistleblower reprisal for voicing ES&H concerns in DOE, as documented in independent studies such as by the National Academy of Public Administration (NAPA).
- Deficient implementation of employee concern programs by the responsible managers, as detailed in the audit by the NIC Corporation performed for headquarters DOE, which analyzed employee concerns programs at the Hanford Site. (See, Employee Concerns Program, Hanford Site Assessment Performed for the U.S. Department of Energy, Richland Operations Office, National Inspection & Consultants, Inc. (NIC), November 1996.)
- The many deficient safety and management conditions that led to the tank explosion at Hanford in May 1997, which unnecessarily exposed over a dozen Hanford workers to toxic and hazardous vapors and conditions, and led to the imposition of a \$110,000 fine from the State of Washington.

- The DOE Environment and Health (EH) review of the radiation protection program in Transportation Safeguards Division (TSD) identified a complete breakdown in the employee concern program, noting that management threatened to fire employees who persisted in raising concerns about the lack of radiation protection provided in their jobs as nuclear materials couriers.
- The recent highly publicized allegations about deficiencies in DOE's safeguards and security program at Rocky Flats, and the recent Labor Department ruling that a high-ranking officer in the guard force was illegally retaliated against by management for voicing concerns.
- Tens of tons of plutonium 239 and highly enriched uranium remain in unsafe or questionable storage containers around the country. Unresolved problems abound—unstable nuclear solutions, residues, metals, and powders in deteriorating containers and tanks; nuclear weapon parts in ill-suited containers; a wide variety of fire and explosion risks; degraded equipment and safety systems; and deteriorating storage facilities—some dating back to World War II. Skilled personnel who can safely fix these problems are disappearing.
- The July 28, 1998 death of a worker severe injuries suffered by others when a high-pressure carbon dioxide fire suppression system unexpectedly went off in a facility at the department's Idaho National Engineering and Environmental Laboratory. Within seconds 13 workers found themselves struggling to escape a lethal atmosphere under zero visibility. The rescue team was put at great risk as they entered the building without breathing equipment. An investigation found that the accident could have been avoided. Several similar accidents at the laboratory, including two very serious ones, had been ignored. The investigators concluded that management "had not been aggressive or effective in monitoring contractor performance...or in ensuring that corrective actions and improvements in hazard and work controls are completed or consistently applied."
- The recently publicized dissenting safety report by Frank Rowsome, a senior Energy Department safety expert, who wrote, "The case of DOE's nuclear weapons program has been made particularly acute by some vicious circles... Those of us who help to cover up deficiencies are rewarded, and those that bring them to the fore... are at best ignored, resented, or dismissed as troublemakers." In his February dissent, Rowsome said that Energy Department officials heavily censored safety reports while engaging in wholesale removal of safety experts from the nuclear weapons management chain. "No one in our management hierarchy is a safety professional today," he said. Many safety professionals "are disaffected and are seeking to leave." In calling for the shutdown of Pantex, Rowsome also wrote, "We have seen nuclear weapons accidentally destroyed but not exploded at Pantex in recent years. We might see an accident in which the chemical high explosive is detonated or burned while still in a nuclear weapon. That would destroy one bay or cell at Pantex, and kill the technicians... and possibly a few outside." Rowsome believes that an accidental nuclear detonation, even if it is a fizzle, would have much more serious consequences:
It "would destroy Zone 12 at Pantex, and kill the several hundred workers there, and induce the chemical explosive to go off in a few dozen other nuclear weapons, but probably not detonate them. It would produce radioactive fallout not unlike those resulting from one of our above ground nuclear weapon tests in the 1940s and 1950s." Higher-yield nuclear explosions are substantially less likely, he says, but they could create more radioactive fallout because they might "vaporize the many plutonium pits" stored at the site.

Employees like Frank Rowsome are far and few between in attempting to warn the bureaucracy about the potentially fatal consequences of ignoring safety. Such actions suppress, or "chill" the reporting of concerns because employees understandably become fearful of suffering reprisal when they report a concern. The systematic dismantlement of safety systems within the DOE, and the suppression of the safety professionals like Mr. Rowsome will likely only lead to future preventable nuclear catastrophes.

Even the DOE facilities with the most sophisticated programs and the most experience with employee concerns issues have been found to be in failure mode. The Hanford Site, which boasts a DOE employee concerns office with four staff members, the support of upper management, and a large array of contractor employee concerns mechanisms, was audited by the National Inspections and Consultants, Inc. at the request of DOE Headquarters in late 1996. NIC's report, entitled, "Employee Concerns Program Hanford Site Assessment," concluded that senior management did not support the program and that "the lack of support by management has not promoted a work environment in which workers were comfortable in identifying concerns to their supervision." Additionally, NIC reported—

- there was a lack of training for program investigators;
- employee concerns staffing was inadequate;
- the program did not address concerns in a timely manner;
- employees who used the program were not informed of their case status;
- concerns filed by employees were turned over to the organization or manager that the employee had accused for investigation in a third of all cases reviewed;
- evidence was not available or maintained in the case file supporting disposition of the concern;
- all of the program users interviewed stated that their confidentiality was not maintained.

A recent review by my office indicated that many of these problems persist. In over a third of the cases that come to the Hanford employee concerns program, the employee was simply referred back to the contractor, a practice that was harshly criticized by the NIC team. In many other cases, the Concerns Program simply decided that it did not have jurisdiction over the concern, and closed the concern without further action. More disturbingly, the Employee Concerns office at Hanford has divulged the identity of employees against their wishes, subjecting them to reprisals, and in one case even sent a warning letter to a contractor that an employee was seeking outside legal help and was likely to file a lawsuit against the contractor.

This dismal assessment of the DOE's flagship site for handling employee concerns underscores the urgency of the need for immediate and deliberate reform. But appeals to the DOE bureaucracy have gone unheeded.

ZERO TOLERANCE FOR WHISTLEBLOWERS

For nearly seven years, the Department of Energy, through the commitment of three Energy Secretaries, has pledged to institute a policy of "zero tolerance for reprisal" against those who raise employee concerns. Although the Department has made some efforts towards reform, the de facto policy of the Department, as embodied by the behavior of its personnel and its actions, remains a zero tolerance policy for whistleblowers. Several recent cases illustrate this point.

I. DAVID LAPPA

David A. Lappa v. Regents of the University of California, et. al.

Alameda County (CA) Superior Court No. V-015785-4

Background

A square-mile complex of buildings southeast of suburban Livermore, California, Lawrence Livermore National Laboratory (LLNL) is one of three Department of Energy labs that conducts nuclear weapons research. It is run by the University of California on a long-term contract with DOE. But unlike nuclear power plants and other private, commercial users of radioactive material, which are monitored by the Nuclear Regulatory Commission, the lab's compliance with environmental and safety regulations is monitored by the Department of Energy itself. And while it doesn't take whistleblower David Lappa to realize that self-monitoring is a dangerous prescription in work involving deadly materials, both his disclosures and his subsequent treatment reveal exactly how wrong the continuing experiment can go.

In the summer of 1997, manufacturing workers at LLNL's plutonium facility were preparing wafers of plutonium to be shipped to Nevada for underground nuclear weapons testing. Officials ordered an emergency work stoppage, however, when they discovered that some employees were placing excessive amounts of plutonium in enclosed handling platforms called glove boxes. Such actions placed the metal in danger of criticality, or uncontrolled nuclear reaction, in which the silvery substance explodes and/or releases lethal amounts of radiation into the surrounding environment.

Following the incident, DOE officials appointed an Incident Analysis Committee to investigate what happened, and in July 1997, David Lappa, a nuclear engineer with 20 years service to the Lab, was appointed to the committee.

To his shock, Lappa found that the statements of workers involved in the incident suggested that some of the safety violations were intentional. Lappa was convinced that the committee's report should explore the veracity of the allegations and publish its findings.

The final report, however, contained no mention of possible deliberate violations. Lappa refused to sign it.

Alan Copeland, the head of the IA-Committee, deleted the "willful violations" thesis from the report while Lappa was on vacation. When Lappa refused to sign the redacted report, Copeland threatened, "I'll be damned if there's going to be a blank

signature line on the cover of this thing.” Copeland then whited out Lappa’s name from the report and U.C. In pretrial discovery in whistleblower litigation filed by Lappa against U.C. in state court, U.C. has now taken the position that Lappa was not really on the IA-Committee and did not have to sign the report, rather than admitting that Lappa was removed for dissenting.

Later, during pretrial discovery in the state case, Lappa discovered that Ron Hoard, Lappa’s immediate supervisor, who had him transferred after this dissent, sent two performance evaluations on Lappa—one positive version for Lappa and for general consumption, the other a negative secret evaluation that was critical of Lappa his activities on the IA-Committee. The secret evaluation contained the following direction: “FYI—kindly destroy this after reading it.” The secret evaluation explained that Lappa’s reports of safety violations has made U.C. customers “somewhat reluctant to continue offering [Lappa] assignments.” The negative evaluation was circulated to managers.

Lappa filed a Department of Labor administrative complaint, on which he prevailed. It is worth noting that throughout that investigation U.C. withheld production of the secret evaluation. Lappa found that job assignments were withdrawn from him and anticipated pay raises were withheld. Supervisors moved him into his new “office”—an isolated, windowless storage closet. After he contacted national DOE officials and the DOE Office of Inspector General’s office about the situation at LLNL, supervisors told him that he should not have done so and that he was “unemployable.”

Seeing no action taken on his concerns and the work environment around him becoming “unbearably hostile,” Lappa filed a discrimination complaint with the Department of Labor in the spring of 1998. OSHA investigators found that the “weight of evidence” indicated that the lab was retaliating against Lappa, and ordered the lab to protect Lappa from further reprisal, eliminate negative references in his personnel file during the time in question, and provide him \$32,500 for counseling and legal fees.

While LLNL did not appeal the ruling, it also refused to address the hostile working environment against Lappa, and harassment continued. Continuing retaliation forced Lappa to sue LLNL in state court to protect himself and obtain remedy for the damage LLNL did to his career.

During the pending suit, Lappa was forced by stress and exhaustion to quit his job at the lab on February 4, 2000. Quoted in the San Francisco Chronicle, Lappa said: “It’s pretty clear I have no future at the laboratory.”

Current Status

Lappa’s suit against the University of California, which manages LLNL, is currently in discovery. GAP attorneys are to uncover evidence demonstrating the scope of the unlawful retaliation against him after he raised safety concerns at the lab. The case is slated for trial in September 2000.

DOE’s Involvement in the Case

Despite its avowed policy of “zero tolerance for retaliation” against whistleblowers, and despite DOE spokeswoman Susan Houghton’s statement that “perceptions may not be realities,” DOE has conspired with the University of California in David Lappa’s case to punish him for seeking a full investigation (per the Incident Analysis Committee’s mandate) into evidence suggesting that dangerous safety breaches at LLNL involving plutonium—one of the deadliest substances known to humankind—were willful.

The evidence is both plentiful and damning. DOE officials—

- Have continually resisted Lappa’s requests for permission to interview DOE’s investigators and public documents necessary to his civil action against the University of California without offering justification. Lappa was forced to sue the agency under the Freedom of Information Act (FOIA) in U.S. District Court. His recent victory in that case, after several months of litigation, vindicated his assertions. Judge Maria-Elena James found the DOE’s refusal to allow its investigators to be interviewed “arbitrary and capricious,” and, citing Department of Energy Secretary Bill Richardson’s own memorandum calling for “open communication between management and employees” and “zero tolerance for reprisals,” criticized DOE for its demonstrated failure to live up to its word. *As of this document’s preparation, DOE is continuing despite the District Court decision to prevent GAP’s attorneys from conducting depositions with its officials that were slated to occur on Wednesday, May 24, 2000, in D.C.*
- Waived \$153,000 in fines that the University would otherwise have had to pay the government for safety violations discovered by the DOE during its own investigation of the plutonium handling incident.

- Pledged to reimburse the University's legal fees in the lawsuit unless Lappa wins (in which case the university would have to pay its own legal fees and any judgment Lappa is awarded).
- Neglected to investigate Lappa's original disclosures to DOE officials and the DOE Office of the Inspector General.

Should this Committee, or the public, care about the fate of David Lappa? The Government Accountability Project argues that employees like David Lappa are the public's first line of defense on nuclear safety. Without conscientious employees who are willing to challenge and expose safety and health threats, the public would often only discover these violations after it is too late—as happened in Tokaimura, Japan.

On September 30, 1999, the worst nuclear accident in Japanese history occurred just 87 miles northeast of Tokyo after workers loaded 35 pounds of uranium into a mixing tank, nearly eight times the proper amount. The material reached criticality, and a self-sustaining nuclear reaction continued for more than 18 hours. Forty-nine workers were exposed to high levels of radiation; 160 people were evacuated, and 313,000 people were warned to stay indoors. Twelve hours after the accident began, radiation levels at one mile away from the plant measured 15,000 times greater than normal. Two workers have died as a result of the accident.

In the aftermath of the nuclear criticality accident at the Tokaimura uranium plant in Japan, can a similar tragedy take place in the United States? After the accident, eyes are now turned to comparable commercial uranium processing plants in the United States, licensed by the Nuclear Regulatory Commission (NRC). Certainly, these facilities need to be carefully reviewed to ensure that a similar problem isn't lurking. However, what is not fully appreciated is that if such an accident were to take place, it would most likely be at a government-owned facility operated by the U.S. Department of Energy (DOE).

Nearly all U.S. criticality accidents have occurred at federal facilities. DOE is responsible for one of the world's largest inventories of concentrated fissile materials. Hundreds of tons of these materials—principally plutonium and highly-enriched uranium produced for nuclear weapons and nuclear energy research—are stored at DOE sites across the nation.

Nuclear criticalities are among the most serious accidents in the nuclear industry. A criticality event occurs when a relatively small amount of fissile material (as little as a pound of plutonium or highly-enriched uranium) is concentrated and starts a nuclear chain reaction. This small nuclear explosion has a characteristic blue flash, produces levels of radiation in the form of neutrons and gamma rays lethal to nearby workers, and may release significant amounts of radioactive fission products to the environment. Controls to avoid a nuclear criticality accident in storage and processing facilities are of paramount importance.

Unfortunately, these essential safety controls are diminishing at DOE sites, as tens of tons of fissile materials remain in unsafe or questionable storage modes. Since 1994, several official reviews have identified significant complex-wide environmental, safety and health vulnerabilities associated with DOE's storage of fissile materials—many of which remain to be corrected. Dozens of problems were identified at sites such as the Hanford nuclear reservation in Washington, the Rocky Flats facility in Colorado, the Oak Ridge nuclear complex in Tennessee, the Los Alamos National Laboratory in New Mexico, the Idaho National Environmental and Engineering Laboratory, the Pantex weapons facility in Texas, the Savannah River Site in South Carolina, and Lawrence Livermore National Laboratory in California. They include unstable nuclear solutions, residues, metals and powders in deteriorating containers and tanks, nuclear weapons parts in ill-suited containers, fire and explosion risks, degraded equipment and safety systems, deteriorating storage facilities (some that date back to World War II), and a growing number of inadequately trained workers.

Last year, the General Accounting Office found that: "*Leakage from corroded containers or inadvertent accumulations . . . pose health and safety hazards, especially in aging, poorly maintained, or obsolete facilities.*" The Y-12 nuclear weapons plant at the DOE's Oak Ridge, Tennessee site is a case in point. It holds the largest quantity of highly enriched uranium (HEU) of any DOE site, over 189 metric tons, or the rough equivalent of 9,450 Hiroshima-size atomic bombs. Sixty percent of the drums containing HEU at the Y-12 plant have never been opened. In fact, some HEU materials at Y-12 have been in their present storage form for almost 40 years. A very large amount is stored in decades-old wooden buildings that are vulnerable to fires and provide little protection if an accident occurs.

According to a December 1996 DOE safety review, "*At some of the Y-12 buildings, the available information is insufficient to determine if HEU is stored within nuclear criticality safety limits.*" The review concluded, "*The lack of controls necessary to ensure that systems are being kept fully operable jeopardizes barriers relied on to sepa-*

rate HEU from workers, the public and the environment.” A subsequent follow-up in September 1998 by DOE’s Office of Environment, Safety and Health found that “...criticality risks remain unchanged” for one of Y-12’s most hazardous buildings.

Of additional concern, skilled and qualified personnel needed to ensure safe storage and processing of fissile materials in the DOE are rapidly disappearing. “Some sites are in danger of losing this expertise through retirement and have not implemented provisions to maintain the necessary knowledge base,” says a September, 1998 DOE oversight report. This problem is made worse by contractor and DOE management blunders. At DOE’s Hanford site, some 3.5 metric tons of unstable plutonium are stored at the Plutonium Finishing Plant (PFP), which was closed in 1996 because of criticality safety problems. The following year, in order to grab a financial incentive for cutting costs, the site-wide contractor, Fluor-Daniel Hanford Inc. (FDH), greatly weakened the site’s nuclear safety function by moving key criticality experts off their payroll. As a result, DOE found in 1998 that “the FDH Nuclear Safety organization does not have sufficient resources to staff an effective NCS [nuclear criticality safety] program.” To date, this problem has yet to be fixed.

Despite the fact that almost all of these problems were identified years ago, lengthy delays in fixing a large backlog of serious nuclear material safety vulnerabilities plague the system. As a result, the GAO finds that “DOE is unlikely to meet its commitment date for stabilizing and storing plutonium...” and concludes that “These delays result in continued risk to workers’ health and safety and have increased costs to DOE and taxpayers and likely will continue to do so.” A major reason why these delays persist is that DOE has yet to establish an adequate tracking and safety enforcement system to ensure that these problems identified years ago are being corrected.

In response to the Tokaimura accident, DOE recently launched a “Nuclear Criticality Safety Self-Improvement Initiative.” True to form, the DOE is, once again, investigating itself using an “honor system” without any enforcement follow up. What is needed is a truly independent assessment of the DOE’s nuclear material risks. Finally DOE and the Congress must take immediate steps to hold people accountable for failing to address these long-standing and unacceptable safety problems. Otherwise, the growing risk of yet another “blue flash” awaits.

The public’s first line of defense against nuclear accidents is the workforce in our nuclear facilities. Employees must be free to speak out when there are violations; they should not be forced to choose between preserving safety and preserving their jobs. Tokaimura happened, in part, because workers willfully violated safety rules at the direction of their managers. A similar situation may have happened at Lawrence Livermore National Laboratory, and the American public has the right to know the truth about such events.

The public owes employees like David Lappa its full support, and the laws protecting their careers should be enforced. Secretary Bill Richardson would do well to honor his commitment to a safety-conscious work environment that protects whistleblowers from reprisal, and encourage disclosures of wrongdoing, instead of assisting the University of California in its legal case with Mr. Lappa.

II. HANFORD PIPEFITTERS

Brundridge et. al. v. Flour Daniel, Inc. et. al.

Benton County (WA) Superior Court No. 99-2-01250-7

Background

The Hanford Site has a long history of controversy regarding the issue of employee freedom to raise concerns either internally or externally without fear of reprisal. An open, non-retaliatory employment climate is critical to safety and environmental protection at Hanford. Recent developments have contributed to the perception that the Hanford employment climate chills safety disclosures by employees.

As the U.S. government’s first largescale plutonium production site, Hanford occupies 560 square miles of steppe, sand and sagebrush in southeastern Washington. Over the decades, about 50 tons of plutonium were produced there and as a result, some 440 billion gallons of contaminated liquids were poured into the ground—enough to create a lake the size of Manhattan, 80 feet deep. There are 177 large underground high-level radioactive waste tanks—the many which are 40 to 50 years old and are in significant states of deterioration and have leaked over 1 million gallons. Also, Hanford has some 1500 soil dumping sites containing very large amounts of radioactive and hazardous wastes, including as much at least a half ton of plutonium. Since the last free running 51-mile stretch of the Columbia River runs through the site, contamination from Hanford of this largest fresh water artery of the Pacific Northwest is not a trivial matter.

In 1989, the Department entered into a tri-party environmental compliance agreement with the State of Washington and the U.S. EPA. The agreement sets forth several milestones that focus on waste stabilization, storage and removal actions. The two highest risk-based priorities in the agreement are:

- Stabilization and removal of some 3,000 metric tons of deteriorating spent nuclear fuel from leaking the K-reactor basins in near the Columbia River; and
 - The conversion of wastes in Hanford's high-level radioactive waste tanks into glass for disposal—known as the Tank Waste Remediation System (TWRS).
- Other compliance milestones of importance include:
- Removal of as much liquid as possible from single-shell high-level waste tanks to reduce environmental contamination risks from aging and leaking tanks.
 - Removal of soil that pose contamination risks to the Columbia River.
 - Deactivation and interim entombment of 8 closed reactors near the Columbia River.
 - Characterization and stabilization/removal of contaminants in soil disposal sites, mostly in the center of the site.

In addition to environmental compliance requirements Hanford has a large amount of unstable nuclear materials, which pose significant safety risks. Some 4,000 metric tons of plutonium are stored in unstable forms, in questionable storage modes at a deteriorating facility, known as the Plutonium Finishing Plant.

In the 200-West area of the Department of Energy's Hanford Nuclear Site, located along the Columbia River in eastern Washington, pipefitters and other workers labor amidst fields of massive storage tanks holding millions of gallons of the most radioactive waste in the custody of the U.S. government. Several years after whistleblower disclosures forced DOE to concede that dozens of the tanks were leaching contaminants in the porous soil beneath, DOE is undertaking emergency measures to transfer waste from the oldest, most decayed tanks into newer ones. And, while inherently dangerous, such transfers become even more hazardous when safety rules are dismissed.

In May 1997, seven pipefitters—Terry Holbrook, Clyde Killen, Pete Nicacio, Shane O'Leary, Dan Phillips, James Stull, and Randy Walli—discovered management's disregard for basic safety firsthand. Employed by Fluor Daniel Northwest (FDNW), the principal contractor at Hanford, the seven were instructed to work under conditions both dangerous and illegal. Their concerns included:

- Supervisor's instructions, despite the pipefitters' protests, to install underrated valves in pipes which were destined to carry high-level nuclear waste liquids from old tanks into new storage facilities
- Working in an area where another subcontractor's crew was performing high-intensity x-ray testing of pipe welds, despite regulations requiring that areas undergoing such testing be evacuated and guarded to prevent unnecessary radiation exposure
- Working in "confined space" areas, which are enclosed areas where air supply is limited, and workers are susceptible to gases that can displace oxygen and cause rapid suffocation, without proper adherence to federal safety regulations
- Workers were especially concerned about the installation of the underrated valves, because the failure of the pipes could result not only in death for workers in the immediate vicinity, but also jeopardize the structural integrity of the massive storage tanks themselves.

Two days after the seven refused to install underrated valves, management notified them that they would be laid off. A week later, on June 5, 1997, they were unemployed.

The Government Accountability Project (GAP) took on the representation of the Hanford pipefitters and filed a complaint in July 1997 pursuant to the Energy Reorganization Act with the Department of Labor (OSHA).

Each of the original seven pipefitters sought to use the DOE-subsidized Hanford Joint Council, a mediation board that is supposed to resolve Hanford whistleblower cases at an early stage. Even though the contractor was a member of this Council, it refused to utilize the services of the Council, and chose to litigate instead—using free taxpayer money supplied by the Department of Energy.

In October 1997, OSHA found that five of the seven had been retaliated against. Rather than undergo the administrative hearing set for February 1998, after extensive pre-trial discovery, Fluor Daniel settled with the pipefitters the day before the hearing, granting each reinstatement, full back pay, compensatory damages, and attorneys' fees.

In order to "make room" for the returning pipefitters, however, Fluor Daniel laid off seven employed pipefitters. Evidence indicates that this layoff was not only unnecessary but also deliberately designed to create hostility toward them. Notably,

four of the seven who were laid off—Don Hodgin, Ray Richardson, Jessie Jaymes, and Scott Brundridge—were vocal supporters and witnesses in the pipefitters’ original claim. These four filed complaints with OSHA alleging that they were retaliated against for supporting their co-workers.

Finally, having returned to work as part of the original settlement, the seven pipefitters found a hostile work environment. Not only were the pipefitters given discriminatory job assignments, denied overtime, and given strict surveillance, but they were told by fellow employees that they had to “watch their backs” around one particularly irate foreman and were laid off less than a year later.

The Department of Labor is charged by Congress with investigating nuclear whistleblower complaints through the Energy Reorganization Act, 42 U.S.C. § 5851. The Labor Department has tasked OSHA with the initial investigations of such complaints.

The regional OSHA office, after an extensive investigation into the pipefitter allegations, found that Fluor Daniel NW had established and maintained a hostile working environment to retaliate against the pipefitters after raising safety and health concerns. The decision cited a handwritten statement signed by the pipefitters’ foremen which reflected the resentment of the foremen about the reinstatement of the pipefitters to their jobs pursuant to a settlement agreement in March 1998. The same foremen chose the whistleblower-pipefitters for layoff within six months, and then immediately replaced them with other pipefitters.

The decision also cited disparaging remarks made by foremen who directed the work of the pipefitters. In one case a foreman was quoted as saying “. . . the complainants should have stayed laid off. I’ll do anything in my power to get rid of them.” The decision stated, “Another foreman was so vocal in his hostility towards the complainants, they were warned by other employees to ‘watch their backs’ around him.” Fluor Daniel refused to make available key foremen for OSHA to interview, stated the report.

The Labor Department ordered Fluor Daniel Northwest to immediately reinstate the pipefitters and pay them back pay, compensatory damages and attorney fees and costs. It also ordered—

“Immediate and continuing cessation of harassment and intimidation and all acts of reprisal against complainants, or anyone of them, or anyone who acknowledges their support of the complainants for instituting or causing to be instituted any proceeding under the [Nuclear Whistleblower Protection Act].”

Fluor Daniel was also ordered to implement “training and/or formal discipline for respondent’s agents and representatives” to ensure that they are aware of employee rights to raise concerns. Fluor Daniel refused to implement the findings, and filed an appeal.

In March 2000, ten pipefitters who either raised safety concerns or supported their co-workers in doing so filed a state civil lawsuit against Fluor Daniel, Inc., and its local subsidiaries, alleging wrongful discharge and civil conspiracy against them for their terminations after having raised serious safety concerns.

Current Status

Due to strategic considerations involving the disclosure of key evidence, GAP attorneys and their clients decided that the administrative hearings that had been set for April 2000 to consider both the complaint of the second group of pipefitters and the second complaint of the original group of pipefitter whistleblowers should be dropped in order to focus attention on the larger, more significant civil case now pending in Benton County Superior County in Washington. The case is currently in the discovery phase, with GAP attorneys working to bolster an already-solid set of evidence documenting Fluor Daniel’s violation of state employment law. The case’s trial date is set for September 2000.

Meanwhile, as the discovery process continues, more employees step forward with ever more incriminating information against the company. During the first deposition, taken on June 11, 1999, Fluor manager Ivan Sampson produced a page from his journal dated March 9, 1998. This was the same time period in which the original seven pipefitters had been reinstated, and the second set laid off. Sampson testified that Jim Holladay, the Construction Operation Manager for FDNW (at the time), called Jerry Nichols, a foreman, while Sampson was in the room. Sampson could overhear the conversation. According to the Sampson, Nichols told Holladay that he had a place for a couple of the pipefitters who were being laid off. Holladay responded, “no, you don’t.” Nichols persisted in trying to explain that he could find work for some of the pipefitters, and Holladay responded, “you are going to lay off seven.” Holladay then stopped and asked Nichols who else was in the room. Nichols responded that Sampson was in the room. Holladay told Nichols to tell Sampson that he “would tear off [Sampson’s] balls” if Sampson were to tell anyone about the

call. Sampson stated that he felt intimidated and feared that he would be retaliated against.

On July 2, 1999, the deposition was reconvened. At that deposition, Mr. Sampson produced even more journal entries. He stated that on September 10, 1998 that he had been called into a meeting by Jim Holladay, along with two others, and told that the meeting was to be considered confidential. Holladay stated that they were to be members of a new audit team. Holladay stated that the FDNW auditor, a man named Arslanian, was “a fucking idiot,” and that he did not want “that stupid motherfucker looking over his shoulder,” and making him fill out 900 pages of paperwork.

Holladay stated that he would call with an incident to investigate, and they were “to drop everything and come running.” Holladay stated he did not want them to take more than two or three hours looking at anything, but to make a quick overview and report it. Sampson stated, “We would have no findings.”

Sampson testified that there had been three “events”—a rigging event in the 100 Area, an asbestos event in the 100 Area and “some event at S Plant.” “We were told that specifically, there would be no findings,” by Jim Holladay. Sampson stated that the goal was audit the event before it “got too big” and Arslanian got involved. When asked—

Q. Was it your understanding that the purpose of your doing the audit was to somehow coverup what may have been improper conduct?

A. Cover up anything. That we were to have no findings.

Q. So did you understand at the time that Mr. Holladay was asking you to do something that was against company policy?

A. Yes, I did.

Later, Sampson testified that he attended a meeting on September 29, 1998, at the Jadwin Building (FDNW HQ) with “a bunch of big managers” including Holladay. Sampson testified that the managers were all worried that the three events on site could be perceived as “setting a trend and had any possible liability for the Price Anderson Act.” Immediately following the meeting, Holladay, in the presence of two other managers, stated, “that we would go out and come back with a conclusion that they were just dumb mistakes, which was a quote.”

When asked why he had failed to report this obvious wrongdoing, Sampson stated that he had considered making the report but decided against it. He then related an event in 1995 (or 1994, which was when Kaiser was in charge, not Fluor Daniel) where he had walked into a meeting where top-level managers, including Dave Foucault, the Construction Manager for FDNW, were gathered around a conference table listening to a tape recording of a man’s voice. A manager came over and informed Sampson that “We’re listening to the recording from DOE trying to figure out who made the call.”

Sampson stated, “And that pretty much floored me, and I left. From that point forward, I never figured you could call any of these hot lines with any privacy.”

The testimony offered by Sampson, which is documented by his daily journal, evidences a high-level corporate conspiracy to not only deliberately establish a hostile working environment against employees who report safety concerns, but to deliberately engineer a cover-up of potentially significant safety events in order to evade the Price Anderson Act.

DOE’s Involvement in the Case

Despite its avowed policy of “zero tolerance for retaliation” against whistleblowers, DOE has shown its willingness in the case of the Hanford pipefitters to facilitate Fluor Daniel’s efforts to retaliate against them, undoubtedly silencing in the process other employees at Hanford with crucial safety and health disclosures.

More specifically, the DOE:

- Not only failed to investigate the concerns of the pipefitters, otherwise intervene in Fluor Daniel’s retaliation, or hold them accountable following adverse Department of Labor investigative findings, but actually reimbursed Fluor Daniel nearly \$500,000 for expenses the company incurred in settling the original pipefitter case and in a frivolous suit against the pipefitters for filing union grievances, which was dismissed with costs assessed against Fluor Daniel by a Federal District Court.
- Has ignored the extraordinary findings of fact by a sister federal agency, and the finding of a hostile working environment that impacts safety at Hanford.
- Pledged to reimburse Fluor Daniel for legal costs associated with the current civil case.
- Participated, and continues to participate, in litigation strategy meetings with attorneys representing Fluor Daniel, and has entered into a “joint defense” rela-

tionship with the contractor despite the fact that DOE has not been named as a party.

- According to the testimony of a Fluor Daniel manager, allowed answering machine tapes from its own “anonymous” hotline for reporting safety disclosures at Hanford to fall into the hands of Fluor Daniel managers. FD manager Ivan Sampson testified in a July 1999 deposition that he accidentally interrupted a meeting where senior managers were listening to a tape of one such call, trying—as one of the senior managers informed him—to determine the identity of the worker who made the call.
- Mishandled and corrupted an investigation into the allegation of the alleged hotline interception testified to by Sampson, and claimed that there was “no evidence” to support the allegation. However, a review of the DOE’s investigation file turned up an e-mail message from a witness who had been interviewed by the DOE team who complained to DOE that the legal counsel Fluor Daniel had been allowed to attend his interview. The employee complained that he felt intimidated, and stated that he is sure that DOE will obtain “the results you are looking for” in its investigation.

In summary, what started as a crew of seven pipefitters with a simple safety concern has tragically blossomed into major litigation involving over fifteen pipefitters, most of whom no longer work at Hanford, with a clear message to all Hanford employees that the price of making a safety disclosure is your job and years of expensive litigation—all paid for by the Department of Energy. Far from evidencing a “zero tolerance for reprisal” policy, the Department’s behavior is more akin to a co-conspirator in that it has counseled the contractor, paid the contractor’s attorney fees in violation of the Hanford Site contract, and stood by mute as the career death toll has mounted as more and more employees were laid off by the contractor because of their support for the original crew of seven.

III. DAVID CARBAUGH AND THE \$240 MILLION FRAUD CASE

The U.S. Department of Energy is responsible for the government’s largest and most dangerous enterprise. With more than 2.4 million acres of land, some 100,000 employees and about 25,000 fixed assets, Energy would rank in the top 30 of America’s “Fortune 500” corporations. If it were privately held, DOE would be filing for bankruptcy. Major elements of the DOE’s complex are closing down leaving a huge unfunded and dangerous mess. As a result of a half century of making nuclear weapons, DOE possesses one of the world’s largest inventories of dangerous nuclear materials and has created several of the most contaminated areas in the Western Hemisphere.

Currently, two thirds of DOE’s annual \$17.4 billion budget goes for nuclear weapons activities and to address the daunting environmental, safety and health legacy of the nuclear arms race. Inadequate investments were made to upgrade facilities, infrastructure, waste management and environmental protection. These failures in recent years created a very large environmental liability for the DOE estimated in the range of \$230 billion to a trillion dollars over the next 50 years.

The single largest and most expensive environmental challenge in the United States is at DOE’s Hanford site in Eastern Washington. Hanford site is one of the most contaminated areas in the Western Hemisphere and is responsible for roughly half of the DOE’s volumetric environmental contamination. Estimated to cost of some \$50 billion dollars over several decades, the Hanford environmental cleanup effort rivals the Apollo Moon program in complexity and scope. Currently, the site spends about \$1 billion a year which is about 5 percent of the DOE’s total annual budget.

For an agency with such critical safety and health responsibilities, effective financial management controls are essential. There are at least 20 different contractor cost accounting systems, which make it virtually impossible for DOE to match them up and estimate basic expenses, like overhead costs, or compare the performance of contractors against each other. In essence, DOE is an early Cold War throwback that isn’t even remotely comparable to the Defense Department (not exactly a paragon of financial management itself.) In the Defense Department it is possible to discover that a hammer costs 600 dollars and why it costs this much. In DOE, not only is it impossible to know how much a hammer costs, it is equally impossible to know if the hammer even exists. The U.S. General Accounting Office (GAO) describes this as “an undocumented policy of blind faith in its contractors performance, which is called its ‘least interference policy.’”

For ten years, the U.S. General Accounting Office has identified the DOE as one of the government “highRisk” agencies susceptible to waste fraud and abuse. According to the GAO.

- “DOE has had difficulty Completing Large Projects. From 1980 through 1996, DOE terminated 31 of 80 mission critical projects costing over \$100 million, after expenditures of \$10 billion. Only 15 percent of these projects were completed, most of which were behind schedule and over budget.”
- “DOE’s organizational structure allows challenges to go uncorrected. DOE’s ineffective organizational structure blurs accountability allowing problems to go undetected and remain uncorrected.”
- “Contract management remains vulnerable to Risk. DOE relies on contractors to perform about 90 percent of its work. In addition, although DOE originally planned to shift risk from the federal government to private contractors, as a means of enhancing its performance, it now considers risksharing more appropriate.”
- “DOE staff lacks technical and management skills. At an Idaho facility, DOE turned to a private contractor, in part because it lacked the inhouse expertise needed to evaluate technical cleanup proposals. At the Hanford site, where DOE entered into a multibilliondollar fixed price contract for the next 20 years [with BNFL], DOE has no experts in fixedprice contracting.”

In October 1998 the DOE Inspector General’s Office underscored the GAO’s concern about the Department’s high risk to waste fraud and abuse because of the growing number of False Claim Act complaints filed against DOE. That year there were 25 open claims, “the highest number ever”, ranging from \$400,000 to \$100 million. The number of complaints increased by 85 percent in that year alone and doubled over the past five years.

Lack of Contractor Accountability

From the 1940’s to the 1980, DOE contractors were provided with blanket indemnification, even for acts of willful negligence. This changed over the past decade as DOE Secretaries attempted to impose greater contractor accountability with limited success. In April 1999 the DOE’s Office of Inspector general reported that, “The Department has not been successful in protecting the Government against contractor created liabilities in 16 of its 20 major forprofit operating contracts. Also the Department has not recognized the implications of adding contract reform liability provisions without obtaining a performance guarantee with indemnification provisions from parent companies of the Department’s major operating contractors. As a result, the Department may be liable for monetary awards resulting from liabilities such as fines penalties, third part claims and damages to or loss of Government Property.”

Financial and Project Management Problems at Hanford

Hanford has been plagued with delays and cost overruns on several critical projects. In 1994, the DOE’s Contract Reform Team acknowledged that DOE’s staff were not prepared to oversee contractors. The sites two most expensive and highest priorities the KBasins and the TWRS Projects have experienced the greatest problems. The KBasins project costs have ballooned from \$274 million to more than \$1 billion in three years and the completion date has slipped by 19 months.

Because of cost and management problems, Congress enacted legislation creating a separate Office of River Protection to manage the TWRS project which involved several billions of dollars. Contractor cleanup work, with some exceptions, is behind schedule in the range of \$100 million annually. There are several reasons for DOE’s failures that stem to a large extent from inadequate financial management.

For several decades the DOE has been exempted from the contracting and financial management statutes and regulations required of other major federal agencies. DOE has used its own Department of Energy Acquisition Regulation (DEAR) which was originally formulated to provide maximum flexibility to produce nuclear weapons and develop nuclear energy technologies. Because of the high importance given to nuclear weapons, combined with the need for experimental latitude involving ultra hazardous technologies, the DEAR, in effect required little contractor oversight and has vague enforcement policies and authorities subject to individual interpretation by DOE field offices. In September 1998, the DOE Office of Inspector General “found varying interpretations of existing DEAR provisions” The IG also noted that, “the DEAR did not define or explain,” policies and procedures to analyze the propriety of contractor fees. Thus, the DEAR is a product of the early cold war and has institutionalized cost maximization practices that remain deeply embedded in the agency.

Only recently has DOE agreed to adopt the Federal Acquisition Regulation (FAR), a. more consistent and enforceable financial management requirement. The FAR was established to codify uniform policies for the purchase of products and services by federal agencies. Additionally, the DOE is now required to comply with Cost Ac-

counting Standards (CAS), codified by the Congress. These standards require formal written and transparent a cost accounting that is consistent with proscribed regulations. It is the primary tool for the U.S. government to exercise budgeting, procurement and financial management.

By the late 1980's the DOE began to adopt the FAR in its contracts, and now has policy that requires the FAR to apply to its contracts. However, in practice the DEAR, "implements and supplements the FAR for the Department's unique needs." In effect the DEAR remains an integral element of DOE's financial and contract management, while compliance with the Federal Acquisition Regulation and the Cost Accounting System is not enforced by DOE field sites or Headquarters.

At Hanford there appear to be several shortcomings in DOE's efforts to adopt the Federal Acquisition Regulation.

- DOE financial management staff lacks technical competency to apply Federal Acquisition Regulation and Cost Accounting System principals.
- The inability to provide effective oversight of public funds.
- Failure to hold contractors financially responsible for deliberate CAS noncompliance.
- Inability to effectively control unallowed indirect costs bill to the DOE by contractors.
- Limited presence by the Defense Contracting Auditing Agency (DCAA) DOE sites to ensure compliance with the FAR and CAS.
- Refusal of DOE staff at field sites to follow FAR and CAS Principals.

David Carbaugh Uncovers Hanford Contractor's Systematic Cost Inflation

David R. Carbaugh was first employed as an accountant at the Hanford site in 1979, and he served as an accountant there until his termination in April 1997 for reporting false claims against the government by his employers. During his tenure, Mr. Carbaugh served in the accounting departments of both Westinghouse Hanford Company and Fluor Daniel Hanford.

He received a Masters degree in Business Administration from Washington State University. In 1992, he was licensed by the State of Washington as a Certified Public Accountant. Prior to his termination for attempting to blow the whistle, Mr. Carbaugh's served as a budget rate analyst for employee fringe benefit costs.

Mr. Carbaugh discovered the fraud as part of his responsibilities to help ensure that the contractors' annual congressional budget requests fairly represented their expected costs and complied with federal Cost Accounting Standards. What he came to realize is that Westinghouse, and later Fluor Daniel, were actually bilking the government for millions of dollars each year by inflating their annual budget requests with phantom costs. Mr. Carbaugh learned that the contractors' financial accounting system, the Financial Data System or FDS—double charged fringe benefit "absence" costs—paid vacation holiday and sick leave, charging these "absence costs" once against regular time hours and then once again against the overtime. As a result, the FDS was creating fictitious statements of costs and building these into the contractors' statements of indirect costs in their annual budget requests.

Once Mr. Carbaugh learned that the paid absence rates were being double charged against both regular time and overtime, he attempted to have Westinghouse reprogram the FDS to apply the absence costs rate solely to regular time hours. After Westinghouse refused to correct the double billing, he attempted to alert persons in DOE's Richland Office (DOE-RL) about the budget inflation caused by the FDS. Westinghouse used retaliation and harassment to prevent Mr. Carbaugh from communicating with DOE. As a result, Mr. Carbaugh was forced to file a qui tam False Claims Act suit in April of 1996.

The September 1997 Defense Contracting Auditing Agency Report

Mr. Carbaugh's suit is not mere supposition. The double charging of absence costs in the budgeting system has been documented in a Defense Contracting Auditing Agency (DCAA) audit and Fluor Daniel has actually acknowledged that it is wrong. In fact, a federal district court has recently ruled that there is sufficient evidence of budget inflation to allow Mr. Carbaugh to prosecute the quarter of a billion dollar case. However, DOE's oversight of its management contractors is so lax that it completely ignored the audit, and the contractors, coming to rely on DOE's "least interference policy," have brazenly requested that the agency reimburse their legal expenses for attempting to quell Mr. Carbaugh's False Claims Act suit.

The DCAA audit which confirms the double charging that Mr. Carbaugh alleged was submitted to DOE in September 1997. The DCAA was asked to perform a baseline assessment of contractor accounting at the time when DOE was in transition from a Management and Operating Contract it held with the Westinghouse Hanford Company (WHC) and a new Management and Integrating contract with the Fluor

Daniel Hanford Company (FDH). The DCAA audit was done to evaluate “ whether FDH has complied with the CAS Board’s rules, regulations and standards, and FAR Part 31.” Specifically the purpose of the DCAA Audit “ was to determine if FDH has complied with the requirements of CAS 407, the Use of Standard Costs for Direct Material and Direct Labor.”

The DCAA audit disclosed four major areas of non compliance with respect to CAS 407. According to the Audit:

1. FDH does not have written practices as required by CAS 407 which describe the setting and revising of its labor rate standards, the use of such standards, or the disposition of variances from standard labor costs. The absence of such written practices has resulted in or may result in a material misstatement or misallocation of costs to final cost objectives...Because of its failure to meet basic documentation criterion, DH cannot use a standard costing system to estimate, accumulate, and record the cost of direct labor.
2. FDH does not set labor rate standards in accordance with labor grouping requirements of CAS 407. The failure to properly set such standards has resulted in or may result in a material misstatement or misallocation of costs to final cost objectives...in setting its standard rates for each [subcontractor]...FHD includes all employees in the groupings...The presence of highly paid indirect employees in the groupings will skew cost estimates, accumulation of labor upward. Consequently, there is no assurance that FDH cost estimates, accumulations of labor costs, and reported costs...are accurate or reasonable...
3. FDH does not record variances on the basis of production units as required by CAS 407. FDH does not accumulate variances in separate labor cost variance accounts for each production unit. The failure to properly record variances has resulted in or may result in a material misstatement or misallocation of costs to final cost objectives an entire company consisting of management, employees, engineers, accountants, and other professionals, scientists, skilled technicians, journeymen union employees, unskilled workers, and clerical employees cannot be considered a “production unit” in the sense defined in CAS 407...there is no assurance that labor costs reported, accumulated and estimated at standard are either accurate or reasonable, and there is no assurance that labor accounting and estimating practices are being followed in a consistent manner from one accounting period to another.”
4. FDH does not dispose of variances at the level of the production unit as required by CAS 407. FDH does not allocate variances related to direct labor on the basis of labor costs at standard...Finally, a pension liability from the predecessor contractor, Westinghouse Hanford Corporation, was transferred to FDH at the beginning of the contract. FDH proposes to ‘passback’ this liability in FY 1997 or FY 1998. This disposition would be in noncompliance with the requirement that variances be disposed of annually...The Hanford pension plan is fully funded and at the end of FY 1995 and FY 1996 there was no funding obligation on the part of WHC [Westinghouse Hanford Company] to satisfy its fiduciary responsibilities with regard to the pension plan. Nevertheless, during FY 1995 and Fy 1996, WHC made entries in its books representing an \$8.0 million over accrual of its pension liability...FHD plans to use the FY 1995 and FY 1996 pension variance to offset FY 1997 and FY 1998 program costs...on August 25 and August 29 [1997], in spite of our conversations with all interested parties. FDH “distributed” the \$8 M million overaccrued pension cost...the \$8.0 million...indirect expense was “passed back” as direct labors to offset program costs...to the targeted programs as follows:

Tank Waste Remediation Program	\$2.975M
Waste Management	1.415.5M
Spent Nuclear Fuel	.742M
Facility Stabilization	2.559M
Other Programs	.316M
Total	\$8,007M

Furthermore according to the DCAA report: “ The distribution of overaccrued FY 1995 and FY 1996 pension cost violates CAS 406, CAS 407, CAS 412, GAAP, and ERISA. In the distribution process, FDH simply changed the costs from pension costs to direct labor and in so doing changed indirect to direct.”

DOE approved this transfer of funds in direct violation of law and regulations, on the basis of a “White Paper” submitted by FDH. The DCAA found that , “the FDH “White Paper” sent to DOERL [Richland Operations Office]...contains misstatement of fact, including its reference to the appropriateness of the use of cash basis accounting...CAS, FAR, ERISA and FSAB 87 all specifically state that cash basis accounting for pension cost is not acceptable.”

The Audit concluded that:

"The labor accounting practices followed by FDH and the major PHMC [Project Hanford Management Contract] subcontractors under its responsibility are not in compliance with the requirements of CAS 407. " The contractor accounting system is not adequate for estimating, accumulating and reporting costs based on standards on government contracts... In our opinion, FDH does not meet any of basic CAS 407 criteria and consequently, FDH cannot use a standard costing system to estimate, accumulate, and report its costs of direct labor... FDH did not contest the fact that its practices... are not documented. FDH's response does not indicate any intention to correct this current CAS 407 noncompliance"

DCAA recommended that DOE: "(i)... make a determination that FDH is on non compliance with CAS 407; (ii) require FDH to provide cost impact of the non compliance and (iii) disapprove of those portions of FDH's accounting system related to the use of standard labor costs in estimating, accumulating and reporting labor costs."

The DCAA Report was not circulated and stamped "Official Use Only" to ensure that it could not be obtained under the Freedom of Information Act. The audit remained effectively secret until 1999.

A DCAA Request for a Fraud Investigation at Hanford

Shortly after the Hanford audit was completed, a "form 2000" or "Suspected Irregularity Referral Form" was filed by the DCAA employee who performed the audit. The form is meant to initiate an investigation based on "information which suggests a reasonable basis for suspicion of fraud, corruption, or unlawful activity affecting Government contracts..." Several irregularities were identified to justify further investigation including mischarging through the "use of Standard Costs in Estimating, Accumulating, and Reporting Direct Labor", accounting mischarging involving improper transfers through disposition of labor variances, Unallowable costs though the improper use of indirect funds in violation of CAS 407 and possible fraudulent performance fees.

According to the investigation request:

- Mischarging the government "FDH [Fluor Daniel Hanford] uses standard costs to estimate, accumulate, and report all labor costs. The FDH standard labor rates are composed of a base average rate, an "absence adder" factor to overtime and a 'Continuity of Service' adder... It is not appropriate to apply [sic] the 'absence adder' factor to overtime labor. Application of the 'absence adder' to overtime labor results in overstated labor cost and cost estimates for fee proposals, baseline budget estimates, control point budget estimates, indirect expense forecasts, indirect cost budgets, estimates to complete, and final certified contract cost proposals... FDH's application of the 'absence adder' to overtime labor results in a significant overstatement of both estimated and recorded labor costs... FDH management knows that it is improper to apply the 'absence adder' to overtime labor... FDH management knows that the 'absence adder' applied to overtime labor will generate a standard labor cost for which there can be no of setting payroll cost. FDH management staff members told the auditor they knew application of the 'absence adder' factor to overtime was wrong.
- Improper Transfer of funds "We are most concerned that the capability to manipulate the targets receiving 'passbacks' of variances is built into the [Project Hanford Management Contract] 'passback' program. FDH management can use the 'pass back' of 'pure' variances to offset 'troubled programs' ie., overrun program costs. It appears the adjusting troubled program costs using 'pure' variances will help earn contract performance fee"

The effective lack of control by the Department of Energy of its contractors' manipulation of the contracting system at the expense of the U.S. taxpayer is in and of itself an outrageous breach of the public trust. Compounding the outrage, however, is DOE's apparent willingness to reimburse the litigation costs of the contractors accused of defrauding the government.

The Major Fraud Act, 41 U.S.C. section 256 disallows costs associated with fraud cases brought against contractors by either the government or a relator on behalf of the government in False Claims Act cases. "Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or had pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification)."

DOE's regulations contain a provision which was not a part of the 1988 Act and is not in s 41 U.S.C. section 256(k). Specifically, DOE's regulations allow advancement of costs so long as the contractor repays them if it loses:

"During the pendency of any proceeding covered by paragraphs (b) and (f) of this section, the Contracting Officer shall generally withhold payment and not

authorize the use of funds advanced under the contract for the payment of such costs. However, the Contracting Officer may, in appropriate circumstances, provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreements by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.”

48 C.F.R. 970.520461(g). This provision does not appear to be expressly in conflict with federal law but there is no evidence that the lawmakers intended that agencies should be free to adopt such a provision by regulation. Indeed, it appears that NO other agency has enacted any such regulation, and the general FAR provisions are silent about advancement of litigation costs under these circumstances.

It would be ironic indeed if the DOE were to reimburse the contractor litigation costs in claims where the contractor is accused of defrauding the agency. This is tantamount to a business paying the attorney fees, expert witness costs and associated trial costs of an accountant accused of embezzlement.

IV. JIM BAILEY AND THE NUCLEAR COURIERS

In their daily travels along the nation’s highways, few Americans realize that they may be sharing the road with a live nuclear warhead secured in an unmarked government vehicle. Until recently, the public had little reason to know-or worry about the activities of the U.S. Department of Energy’s Transportation Safeguards Division, which ferries nuclear materials between military bases and nuclear weapons facilities. GAP whistleblower Jim Bailey has changed all that.

Bailey was one of 238 special agents within the Transportation Safeguards Division (TSD) charged with transporting nuclear materials between sites. Through the bomb-building years of the Cold War and its aftermath, TSD couriers have traveled millions of miles along America’s highways, logging over 3 million in 1996 alone.

The work is grueling and dangerous; the couriers call themselves “road warriors.” The risks-of terrorist attacks or accidents-are detailed in government documents. “The Department of Energy,” reads one document, “has taken the position that it is not a question of if a nuclear weapons shipment will be attacked, but when.”

The government has worked hard to prevent such a catastrophe. Couriers are trained to protect their cargo from the inherent dangers of transporting nuclear devices, including accidents and terrorist sabotage. Their schedules and activities are shrouded in secrecy. They carry badges and are permitted to use deadly force. They travel in convoys that include well-armed tactical teams of up to 23 agents.

The tractor-trailers that carry the nuclear materials are technologically designed to protect their cargo. The armored 18-wheel “Safe Secure Trailers” are built to withstand devastating collisions. They can endure raging fires without endangering the nuclear materials they carry. The trailers are accompanied by special vans carrying additional couriers and equipment ranging from night-vision goggles to pistols, M-16 rifles and 12-gauge shotguns.

SST, or Safe Secure Transport Truck Carrying Nukes

These safeguards arguably have served the government and the public well. The agency reports no terrorist attacks or deadly accidents involving a nuclear weapons shipment to date. The drivers, however, may not be so lucky. Evidence gathered in the case of whistleblowing courier James Bailey indicates that couriers suffer not only from punishing working conditions, but from potential exposure to dangerous levels of radiation. The bombs are protected. The public is protected. But who protects the protectors?

For eight years, Jim Bailey ferried nuclear cargo around the country for the TSD’s Southeast Courier Section, based out of Oak Ridge, Tennessee. Then, in March 1995, Bailey’s wife gave birth to their first child, a daughter they named Kelly. The baby was born with a rare form of brain cancer. Afflicted with three aggressively malignant tumors at birth, Kelly survived for four painful months. By the time she died, her head had swelled to adult size.

The shock of Kelly’s illness and premature death led Bailey to question his potential exposure to radiation on the job. He was concerned about the hazards posed by some of the nuclear materials he had transported and the time his job required him to spend in contaminated areas. “I wasn’t hauling watermelons at the time,” he said later. “That ought to make the alarm bells go off.”

Bailey sought the advice of several medical experts, including Dr. Jay Hunt, a cancer specialist with expertise in genetic mutations. Dr. Hunt had Bailey tested and discovered chromosomal damage consistent with radiation exposure. After consulting with other medical experts in the field of pediatric genetics, Dr. Hunt advised Bailey that if he intended to father another child, he should take appropriate measures to protect himself. “You’ve already had one child with a brain tumor,” the doctor told Bailey, according to his later court testimony. “There’s absolutely no rea-

son to take a chance. There's no reason to be driving these trucks without adequate monitoring."

Bailey took his doctor's advice and refused to continue his courier travel. He used several months of leave time and performed light-duty desk work. After a few months, however, Bailey's supervisor told him to get ready for trip duty in the near future.

Bailey was not about to give in, however. He wrote his congressional representative, Rep. John Duncan, in December 1995, describing his many concerns about radiation exposure and working conditions on the job. And he studiously gathered evidence from other couriers about the hazards they faced on the job.

His coworkers described a range of health and safety concerns. Some involved the harsh working conditions, the stress and exhaustion experienced on 36-hour road trips. More troubling to Bailey were the tales of possible radiation exposure. Couriers are in routine contact with nuclear materials; they are required, for example, to enter the trailers to check that their cargo is securely tied down en route. Yet they travel in street clothes in order to deflect attention, protected only by dosimeter badges designed to register radiation exposure. The badges virtually always register "zero," according to the couriers.

Bailey learned of cases of contamination requiring officials to confiscate couriers' clothing and shoes. Some couriers were warned by management to "get in and get out" when they check tie-downs inside the trailers, raising fears of radioactive exposure. On occasion, tractor-trailers had set off radiation monitors located at the entrance and exit of DOE bases and ports of inspection at state borders. Couriers had observed workers at nuclear plants wearing full-body protection with respirators while loading, unloading, or positioning materials inside their trailers.

Bailey's concerns mounted, along with his frustration at the DOE for failing to act on the health and safety hazards he reported. One DOE Health and Safety Manager told him bluntly that if the agency were to take inexpensive steps to protect couriers's safety—such as increasing radiation training, providing laundry facilities at work, and offering routine bioassay tests—the result would be to threaten couriers' morale by leading them to believe that there was reason for concern.

Bailey's superiors, meanwhile, were not taking his resistance quietly. One of his supervisors publicly described Bailey's actions in raising health and safety concerns as tantamount to "committing jobicide."

In late June 1996, Bailey was told to report for travel duty. He refused the travel assignment, citing DOE's failure to correct unsafe practices. Bailey was fired on September 13, 1996. Soon afterward, he filed a complaint under the federal Whistleblower Protection Act challenging his removal, and asked the Government Accountability Project to represent him.

Bailey's hearing began in late March 1997. The judge heard damning testimony about agency practices. Under cross-examination, the DOE's own expert witness, Gene Runkle, could not explain why a dosimeter badge did not register exposure even after suspicious couriers had positioned a badge on a known radiological source. He said only that the badges had to be placed "just right" to receive a reading.

The judge was not persuaded by the agency's arguments. In an April 6 decision, he concluded, "I find that a reasonable, prudent person would heed [Dr. Hunt's] advice and conclude that courier duties, without better health and safety measures, posed a specific and objective danger to health. I can imagine that anyone, having just lost an infant daughter to three types of rare brain cancers, and with chromosomal damage consistent with radiation exposure, would not come to the same conclusion the appellant did: that it was not safe for him to return to work."

Showing little regard for the health and safety implications raised by the judge's decision, the Department of Energy refused to reinstate Bailey to his job, and appealed the ruling. The fallout from the Bailey case, however, forced the DOE to conduct a review to investigate the radiological safety practices of the courier program.

The DOE's investigative panel issued its final report on the courier program in November 1997. Its findings are extremely damaging to DOE. The report confirms that couriers were subjected to radiological conditions that could result in unmonitored exposures to contamination. It points to the removal of monitoring equipment from TSD tractor-trailers in September 1996, for example, and identifies several potential contamination hazards in the "bone yard," where vehicles are parked and the break rooms located.

DOE management responded to the findings not by correcting the problems, but by retaliating against couriers who had taken part in the investigation. The retaliation was sweeping and systematic. Three managers formed a "Blue Ribbon Panel," which met with every courier in the Oak Ridge Division. All courier assignments out of Oak Ridge were suspended until the panel had interviewed everyone. Couri-

ers were told to answer three questions and informed that their answers would be reviewed and their futures in the program would be adjusted accordingly.

Not surprisingly, the investigation had a chilling effect among the couriers at Oak Ridge. One courier described the experience to GAP investigators, "I answered 'don't know' to all three questions on the survey, and would soon regret it during my hearing before [the supervisors]. I spent approximately 35 degrading minutes before these individuals, who told me that my answering 'don't know' would result in my [security clearance] being rescinded. I was provided a new questionnaire, which I hurriedly filled out the way they wanted (yes responses) and said, put me in the good guy club. I want to keep my job. Coercion. There was no question in my mind that this entire humiliating and debasing experience was done to seek out persons not considered loyal to the management of TSD. . ."

At stake is the health and safety of a large group of DOE employees. The couriers should have a right to question DOE's inexplicable failure to perform radiation testing on employees who have consistent and routine contact with radioactive materials and who risk extreme exposures in case of an accident of attack.

Jim Bailey does not regret his decision. After he stopped working as a courier, the damage to his chromosomes disappeared. The Baileys gave birth to a healthy child in 1996.

Bailey's fellow couriers, meanwhile, are still working continuous shifts of up to 36 hours and are expected to check tie-downs in trucks carrying radioactive cargo without protection. Their confidence in DOE's concern for their safety is lower than ever.

In February 1998, ABC National News aired a story critical of the Department's handling of Mr. Bailey's concerns and raising questions about the TSD program itself. The Departmental response was swift and overwhelming. Every single courier was ordered to report for a polygraph test, and to submit to a line of questioning that included such questions as to whether or not they agreed with Jim Bailey, whether they had been in contact with the news media, and other questions of an unconstitutional nature. Eighteen of the couriers refused to answer the questions, calling the investigation a witch-hunt for whistleblowers. They obtained counsel, and, two years later, remain on paid, suspended leave from their jobs.

Meanwhile, I appealed to Secretary of Energy Frederico Peña to conduct an independent assessment of the situation and take immediate corrective actions. On February 4, 1998, Peña agreed and appointed a Management Review Panel to undertake a "comprehensive review" of operations of the TSD program. The six-member panel, led by Gordon Moe, issued its report in July 1998, vindicating the couriers' concerns. The Panel not only found serious management problems, but prescribed sweeping organizational changes and management fixes to address the problems. In November 1998, Gordon Moe and I met with Assistant Secretary Victor Reis to give him an update on the progress—or rather lack of progress—in implementing the changes. Secretary Reis promised action. However, as of this update, no action has been taken of any magnitude. Specifically—

- Settlement has not been reached with Jim Bailey on outstanding legal issues, despite the Moe Panel recommendation;
- The 18 suspended couriers remain on leave, even though the FBI review is reportedly at an end;
- TSD management continues to rule through intimidation, hostility, and threats.
- Couriers are constantly warned to not complain to outside parties, and specifically told not to contact Gordon Moe.
- No settlement has been reached or even attempted in the Southern Cross training/exposure incident where numerous couriers allege that they were exposed to toxins, resulting in health effects.

In conclusion, the Department's intolerance of employee's raising of safety and health concerns is by no means restricted to contractor employees—the Department has shown that its own employees will suffer egregious reprisals whenever they challenge the system. Even a DOE-sponsored investigation which found a prevalent culture of hostility and mismanagement was ignored, and the recommendations forgotten. Meanwhile, eighteen couriers who once had productive careers twist in the wind—at taxpayers' expense.

SOLUTIONS: THE MODEL OFFERED BY THE NRC

The commercial nuclear industry has a long history of dealing with the issue of employee concerns, and during the past 15 years has evolved principles and procedures that establish work environments encouraging safety reports and prohibiting retaliatory conduct that could chill such reports. The primary regulator of the nuclear industry is the Nuclear Regulatory Commission (NRC), which defines its mis-

sion as the protection of the public safety and health in its regulation of commercial nuclear facilities. Last year, DOE announced that it intended to put its nuclear safety program under NRC regulation, and pilot programs toward this end have been announced recently.

One example of the NRC's approach to its regulation of licensees in the area of employee concerns involves a Connecticut nuclear station called Millstone, which has three reactors. Since the late 1980's, Millstone Nuclear Power Station has been the source of a high volume of employee concerns and allegations related to safety of plant operations and harassment and intimidation of employees. Following a TIME magazine cover story in March 1995 about the situation, in which the NRC IG faulted the NRC for not recognizing that the reactors had been operating outside their license requirement for many years, the Nuclear Regulatory Commission (NRC) concluded that the large number of deficiencies identified at all three Millstone sites implied that some employees were reluctant to identify safety issues.

In an Order issued on August 14, 1996, the NRC mandated independent, third party oversight to address licensee noncompliance with regulatory requirements concerning, among other things, employee safety concerns. In this Order, the NRC directs that, prior to resumption of power operations, the Licensee shall develop, submit to the NRC, and implement a comprehensive plan for reviewing and dispositioning safety issues raised by the Licensee's employees and ensuring that employees who raise safety concerns are not subject to discrimination. Additionally, the Licensee was ordered to retain an independent third party, subject to the approval of the NRC, to oversee its implementation of a comprehensive plan. The plan for independent third party oversight will continue to be implemented until the Licensee demonstrates by its performance, that the conditions which led to the requirement of that oversight have been corrected to the satisfaction of the NRC.

At commercial nuclear facilities, the NRC has made a clear and cogent determination that the ability of employees to raise concerns is integral to the protection of public health and safety. The hazards at DOE nuclear facilities are no less dangerous, and yet throughout the DOE complex, reprisals against employees continue unabated, and hostile working environments are instituted without challenge from the DOE. The DOE should take notice of the NRC's actions and promptly incorporate the NRC methodology for protecting employee concerns at its facilities. If DOE is serious about improving its operations consistent with its mission and in accomplishing a work environment that has a "zero tolerance for reprisal" in fact and not just in rhetoric, it will study and implement the NRC model. For instance, the DOE could—

1. Establish Departmental policy in the Code of Federal Regulations that mandates the establishment of a "safety-conscious work environment" which actively encourages employees to report health, safety or environmental and other employee concerns at DOE-owned sites;

This procedural step is necessary to clarify and formalize DOE's policy on prohibition of reprisals against employees who raise concerns. The Nuclear Regulatory Commission codifies its policy in 10 C.F.R. Part 50.7. The NRC's statement of policy could easily be modified to suit the purposes of the Department of Energy. A DOE version of this policy could read like this:²

Employee protection.

- (a) Discrimination by an **agency official, or a contractor or subcontractor of the Department** against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, **and in Departmental regulations codified at 10 C.F.R. Part 708** and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

- (i) Providing the **Department** or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;
- (ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

² The language that is in bold typeface is different than that already appearing in the NRC's Statement of Policy at 10 C.F.R. Part 50.7.

(iii) Requesting the **Department** to institute action against his or her employer for the administration or enforcement of these requirements;

Testifying in any **Department** proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding **as provided in Departmental regulations codified at 10 C.F.R. 708** or in the Department of Labor. The administrative proceeding must be initiated within **60 days** after an alleged violation occurs **with the DOE, and within 180 days** with the Labor Department. The employee may do this by filing a complaint alleging the violation with the Department of Labor, **Occupational Safety and Health Administration**. In either proceeding, the **agency** may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a contractor or subcontractor of **the Department** may be grounds for—

(1) Denial, revocation, or suspension of the **contract**.

(2) Imposition of a civil penalty on the **contractor or subcontractor**.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each **contractor or subcontractor** shall prominently post the **provisions of this policy at DOE-owned facilities**. This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work.

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with **either** the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, **or pursuant to a proceeding initiated under the provisions of 10 C.F.R. Part 708** may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the **DOE** or to his or her employer on potential violations or other matters within **DOE's** regulatory responsibilities.

2. Empower the existing Office of Employee Concerns with the authority and the resources to set DOE policy on the issue of all agency and contractor employee concerns. Specifically, the Office of Employee Concerns—

- should report directly to the Secretary of Energy, and must standardize DOE policy across the complex.
- should be given adequate funding and staffing and the authority to implement policy, conduct investigations, levy sanctions, and order corrective actions to abate violations.
- should institute rules, procedures and regulations requiring DOE managers and supervisory personnel as well as contractor and subcontractor employers to maintain a safety conscious work environment where employees are free to raise employee concerns without fear of reprisal.
- should require facilities to conduct independent and reliable employee surveys to measure whether employees feel free to raise concerns free of reprisal on a company-by-company basis (including at DOE) to use as a basis for determining whether corrective actions should be undertaken.

Currently, the DOE's HQ Office of Employee Concerns is a shell of an office, with one full-time employee (the Director, Bill Lewis) and one and half Full-Time Equiva-

lent (FTE) employees who are mostly contracted from the outside. The very existence of this Office is in constant doubt. The Office of Employee Concerns is window-dressing. In its current incarnation, it cannot effect change.

The Office of Employee Concerns should have, at a minimum, a Director, one administrative support person, two policy staffers and two full-time investigators. The Office should be responsible primarily for setting and enforcing Departmental policy. Other duties should include—

- developing language to insert into the Department of Energy Acquisition Regulations requiring contractors to maintain a safety conscious work environment;
- developing posters and employee communication vehicles to distribute for posting around the complex;
- inspecting and evaluating each facility in the complex to ascertain that the standards set by the DOE in the area of employee concerns are being reached;
- investigating and correcting extraordinary cases of hostile and chilled work environments, high-profile cases, or facilities experiencing a large number of discrimination complaints alleging reprisals for raising concerns.

A revitalized and effective Office of Employee Concerns is of paramount importance for achieving employee protection and safer work environments.

3. Require DOE and DOE contractor ES&H and quality organizations to implement “Differing Professional Opinion (DPO)” processes, using NRC’s DPO process as a model, to increase the autonomy of safety professionals employed by DOE and DOE contractor organizations.
4. Amend existing contract(s) at its nuclear weapons production and former nuclear materials production sites to “incentivize” the establishment and maintenance of a safety-conscious work environment, and to put contractors on notice that the contract can be conditioned, suspended and/or revoked upon a finding by the DOE that a company has engaged in a pattern and practice of whistleblower reprisals or has failed to maintain a safety-conscious work environment;

This proposal follows the lead of the NRC, which has put licensees on notice that the license to operate the facility hinges upon maintaining a retaliation-free work environment. As the Department moves away from the Management and Operating (M&O) contracting model, and towards the performance-based contracts, there is a greater need to spell out DOE’s policies in relation to prohibition against reprisals *in the contract* and to tie specific awards to this performance.

The recent history of reprisals at Hanford, Oak Ridge, Rocky Flats and Pantex, illustrate that contractual financial incentives and penalties are necessary to encourage a climate free of reprisals. A substantial portion of every DOE contract in the nuclear complex should depend upon employee freedom to report and resolve employee concerns.

5. Address “hot spots” where the chilling effect now exists, based upon the investigative reports of the Labor Department, Office of Special Counsel, MSPB, OCEP, or OHA and where there may be a strong perception among employees that there will be reprisal. Corrective actions could include:
 - training of supervisory employees and workers by employee concerns experts;
 - developing guidelines for use of the “holding period” concept recommended by the Nuclear Regulatory Commission for contested proposed job actions;
 - instituting a “personal accountability” rule to hold individual managers accountable for reprisals.

These recommendations come from the “Independent Panel Review” of the Millstone Plant licensee action levied by the Nuclear Regulatory Commission. They represent “state of the art” thinking of some of the most experienced employee concern professionals in the nation.

6. Require the Department of Energy’s Office of Enforcement and Investigation, Environment, Safety and Health, to ascertain, through its normal inspection duties or upon request from the Office of Employee Concerns, whether departures from a “safety-conscious work environment” or a *chilling effect* on employee concerns exists at a specific facility or within any DOE division, and to order corrective actions to remedy such environment.

Periodically, the Office of Oversight conducts inspections, evaluations and assessments at sites around the complex. A key part of their mission should be to assess the existence of a “safety-conscious work environment” and where departures from it exist, to require corrective actions. Failure to maintain such an environment, especially in a nuclear safety context, could lead to findings of violations under the Price-Anderson Act.

In summary, the Department can only salvage its credibility on the whistleblower issue by—

- establishing Departmental policy that calls for the positive presence of a “safety conscious work environment in its facilities;
- instituting rules, procedures and regulations requiring DOE managers and supervisory personnel as well as contractor and subcontractor employers to achieve and maintain a “safety-conscious work environment;”
- requiring the Department of Energy’s Office of Oversight, Environment, Safety and Health, to ascertain, through its normal inspection duties or upon request from the Office of Employee Concerns, whether a demonstrative “safety-conscious work environment” exists at a specific facility or within any DOE division, and to order corrective actions to remedy departures from such an environment;
- requiring DOE and DOE contractor ES&H and quality organizations to implement “Differing Professional Opinion (DPO)” processes, using NRC’s DPO process as a model, to increase the autonomy of safety professionals employed by DOE and DOE contractor organizations;

CONCLUSION

The ability of employees to raise concerns is the key to safe and efficient operations, especially in nuclear facilities. The Department of Energy has, for seven years, recognized this important concept but has not taken the necessary steps to change the culture to make the policy shift more than a rhetorical chimera. In fact, in total contradiction of its oft-cited “zero tolerance for reprisal” policy, the Department has assisted its contractors in every possible way to fight whistleblowers, even when they prevail in court. After seven years of a “zero tolerance” can the Department point to a single instance where the policy has actually been enforced? The Department has yet to take a single action against a single contractor or individual who has been found guilty of reprisal. The cases of David Lappa, the fourteen pipefitters at Hanford, Mr. Jim Bailey and many others testify to the ongoing state of affairs at the DOE—where the true message seems to be “zero tolerance for whistleblowers.”

Congress needs to get serious about reforming, or getting rid of, this agency. The General Accounting Office has pointed out for nearly twenty years in numerous reports that the Department is seemingly incapable of managing itself, much less its contractors or the massive cleanup job that lies ahead. Protecting employees who speak about illegality, threats to public health and safety, mismanagement and fraud deserve protection and encouragement. Congress can do its part by beefing up protections for these workers, which remain inadequate, and by passing legislation that resolves the conflict of interest situation at DOE by affording external regulation of these facilities to OSHA and the Nuclear Regulatory Commission.

Thank you for inviting my testimony today.

Mr. BURR. I thank you, Mr. Carpenter.

The Chair would recognize Mr. Walli for purposes of an opening statement.

TESTIMONY OF RANDALL WALLI

Mr. WALLI. Thank you. Thank you for inviting my testimony today. My name is Randy Walli. I am a pipefitter by trade. I’ve worked 24 years in the construction industry. Some of my jobs have been at the Hanford Nuclear Reservation in southeast Washington State.

I have come here today on my own accord and at great expense to my family and myself. Unlike some that will testify here today, I am not being paid to be here. But I am hopeful that, by being here today, that somebody is finally taking these matters seriously.

I grew up in the Hanford area and my family is from the Hanford area. I have lived there and watched the Tri-Cities revolve around the ups and downs of the Hanford site.

The last 3 years have been a real bad experience for me and my fellow pipefitters. This is because we believed in safety and we thought we had the right and the duty to talk and practice safety in our workplace. But because of the stand that we took on some

safety issues in the tank farms, we have been labeled as “whistleblowers.” “Whistleblower” is a very tough name to live with once it has been pinned on you. People misjudge you. They don’t want to be seen with you. They leave the room when they see you. They feel that they have to choose sides when they are around you. We’ve lost friends over this, and we’ve put great burdens on our families. We are still right in what we did and what we are doing.

The Department of Labor has twice seen that we were wronged by this company, yet no one else beside the Government Accountability Project people have stepped in to help us fix these problems.

This whole process has driven concerned people into the shadows because they have seen what happens to people who raise concerns. I have seen people demoted, transferred, laid off, harassed for bringing up concerns. This makes for a very bad work environment.

In my case as a pipefitter foreman in the 200 west area of Hanford, we had a few issues come up. The last one was a safety issue related to under-rated valves in a radiation contamination zone. This issue was of great importance, because the use of the wrong valves—these were test valves—on a high-level waste transfer line could cause personal injuries and/or environmental contamination. If the valves failed, they could flood the nearby underground high-level waste tanks, which is both a safety and environmental concern.

Two working days after, as a crew, we refused to use the wrong valves and stopped work over this issue on this project, we were told the entire crew was being laid off. At the end of that week, my crew and I were terminated. But the job was not over, because there was a DOE milestone to be reached in October of that year, and this was the first of June, so we were replaced by other workers.

We ended up going through numerous avenues, where we found the Government Accountability Project people and ended up at the Department of Labor. The Department of Labor, after several months of investigations, found in our favor. The company appealed it, and, after months of discovery and depositions, settled it out of court the day before trial.

They agreed to take us back under the Whistleblower Act, so we were supposed to be treated fairly. We were not.

I’ve also learned that the Department of Energy has paid the cost of that settlement and the legal fees associated with it. The company paid us a total of \$334,000 and hired us back to our former jobs. The company then sued myself and the other pipefitters because of union complaints that we filed. The Union complaints had nothing to do with this company, but the company held up our settlement checks and dragged us into Federal district court, saying we had breached the settlement. We hired lawyers to fight back. The Federal court ruled against the company and made the company pay the settlement amount with interest, as well as our attorney fees. Again, DOE paid for that, as well.

It seems we are fighting a company and DOE and/or the company with DOE’s money. A little over 6 months after being rehired, we were laid off again. That’s not unusual for construction people. That’s part of our lives. The first day we go to work, we’re working ourselves out of a job. But Hanford is our home and some

of the people that we worked with there in construction have worked there continuously for 20-plus years. It is nice to be able to work at home and be able to come home to our families. Most of us have young families. But we have been labeled “whistle-blowers” and we might not ever be able to work there again. Most of the people at the Hanford site, if they support us, it’s from the back door. It is done quietly, because they don’t want to be seen talking to us. Yet, they’ll call us at home and want us to hear their concerns.

We stood up for numerous safety issues and concerns and tried to keep people from getting hurt, but these companies and DOE don’t seem to want to listen. They put window dressing on safety first, and that there is no price tag on safety—and there really is no price tag on safety if you’re doing it the wrong way if DOE is going to keep paying for the contractor’s mistake.

After we were terminated a second time, we ended up going a different avenue, the Hanford Joint Council. This is a mediation board set up to resolve issues at the Hanford site.

Fluor Daniel, the company that we work for, is a member of this DOE-supported council. Some of the gentlemen and I that worked together went to the Joint Council, told our story, and tried to resolve it out of court. Fluor Daniel Northwest, the company we were working for, refused in writing to meet with this agency to try to resolve these issues, so we pursued things through the legal system again, the Department of Labor ruled in our favor again, and the company appealed it again.

The Department of Labor handed down an amazing finding, one of the stiffest findings ever handed a company, and yet here we are, we’re going through it again. We are on our way to court in September, and we have got a lot more evidence this time than we ever had the first time. We’ve got documents that show malice, cover-ups, and how they have treated people that worked with us. We had people that were in carpools with us and just associated with us that were laid off.

This is the new atmosphere at Hanford. This is the atmosphere that DOE is helping or allowing to create.

When I grew up in this community, there was a great deal of pride. There was pride that Hanford was part of the war effort. This was the town that gave a day’s pay for a bomber. There was a great deal of pride in this community. I don’t believe you’ll find this there again.

You know, it is a sad thing that some people have to stand up alone and put so much on the line to try to make safety work. There are some sincere, honest people working out there, but they are not up front.

We’ve got proof that DOE’s counsel is helping the company fight us again, and this means that the people sitting in this room today are paying to fight us, the public.

There was a DOE manager that once said in an interview, “I don’t expect we’ll get zero concerns being raised.” The zero is not for concerns raised. It’s supposed to be zero tolerance for reprisals against those who bring them.

Mr. Richardson also stated that there must be zero tolerance policy for reprisals linked to the contractor safety records of their performance reviews. I thought that would be a fine, not a payment.

DOE should be out there guiding these companies and not paying for their mistakes. This is not the way to do business.

There are a lot of good, skilled people out there. Let's back the workers. Let's clean up the mess and make it in a safe manner so that we can watch our children grow up.

Thank you.

[The prepared statement of Randall Walli follows:]

PREPARED STATEMENT OF RANDALL WALLI

I have worked numerous jobs at the Hanford Site in southeastern Washington for different contractors over a number of years. I grew up near Hanford. My family is from the Hanford area. You know, we have lived there and watched the Tri-Cities grow, and revolve around Hanford. We have seen a lot of people testify to the pride of this community. It's been a bad experience for me and some of my fellow pipefitters over the last three years, because we took a stance at the Hanford Site over some safety issues. We've since been labeled as whistleblowers. Which is a bad term for people that were concerned over safety issues or their fellow workers.

In my case I was a pipefitter foreman, 200 West Area. We had some issues that came up over some testing of some new pipe systems that were being put in. And subsequently we were terminated. The whole crew that worked for me was terminated.

We ended up going through numerous avenues, including lawyers, over a period of time. We tried to go through what we call the Hanford Joint Council, which is an agency that is set up to try to resolve issues here at the Hanford Site.

Some of the gentlemen that I worked with, we all met with the Joint Council, told our stories, tried to get it resolved by keeping it out of court, kind of an in-house deal.

The company we worked for refused in writing to meet with this agency that DOE has set up to handle these issues.

We then pursued things through legal systems. The Department of Labor ruled in our favor. The company appealed it. The company, the day before we went to trial, settled this out of court. They agreed to take us back under the whistleblower acts. We are supposed to be treated fairly. I have learned that the Department of Energy paid the costs of that settlement and the company's legal fees associated with it.

Then, the company sued myself and the other pipefitters because we filed a union complaint. The complaint had nothing to do with the company. But the company held up our settlement checks and dragged us into federal district court, saying that we breached the settlement. We had to hire lawyers to fight back. The federal court ruled against the company and made the company pay the settlement amounts, with interest, as well as our attorney fees. Again, the Department of Energy paid for that, as well.

Six months and four days after we were rehired, most of us were laid off again.

It's not a big deal to construction people to be laid off. I mean, it's part of our life. We know the first day we go to work, we are working ourselves out of a job.

But to work near home was an honor. Most of us have families, young families. It would be nice to stay home once in a while and work with them, play with them, watch your kids grow up.

But because we have been labeled as whistleblowers, we can't work out there anymore.

Most of the people out there at the Hanford area, if they do support us, it's around the back door, it's quietly, they don't want to be seen talking to us, but yet they want us to listen to their concerns.

We stood up for some safety concerns, numerous different safety issues, to try to help keep people from getting hurt.

And these companies don't want to really listen to this. They put on a window dressing all the time about safety first, there's no price tag on safety. But it seems like it's window dressing.

There are some very concerned people working out there, but they are getting harder and harder to talk to, and most of them are going into hiding, because if they bring up a safety issue, they are either demoted or they are replaced.

After we were released the second time we ended up calling the Department of Labor again. They came in, looked at it. They handed down an amazing finding on our behalf again. One of the stiffest findings they have ever handed the company. Six months after they hired us back. And yet here we are, we are out of work, we are going through it again. The company has now appealed it again. And it will be a matter of time, we will be back in court. And we have got a hundred times more evidence this time than we had the first time. We have got truckloads of paperwork, documents that shows malice, cover-ups, how they've treated people that have worked with us.

We have had people that were in car pools with us and just because they associated with us, they got laid off.

This is the new atmosphere at Hanford. And I tell you, from people that have grown up here, thought Hanford did a good thing for this country, I mean, this was the town that gave a day's pay to buy a bomber for the war effort.

I don't believe that would happen again, you know, and it's a sad thing that you have to have people that have a little bit of backbone and can stand up to a company and take it through the court system to try to make safety work.

I know there's some sincere, honest people out there, but they're not up-front. And I just wish that maybe DOE could step in and help the workers instead of the company.

We've got proof that DOE counsel is helping the company counsel fight us on our own lawsuits.

That means that you people sitting there, your tax dollars are going to the government to help fight ourselves. My own tax dollars, I'm fighting myself. You know, this shouldn't be.

DOE is supposed to be out there guiding these companies. I think they should step in and make them either toe the line or kick them out. This is not the way we do business. There's a lot of skilled people out there that know their jobs and they're willing to do their jobs. Let's get a company in here that will back the workers, let's do the work to clean up this mess that we've got sitting in our back yards so that our kids can grow up in a safe environment.

Mr. BURR. Thank you, Mr. Walli.

The Chair would recognize Mr. Gutierrez for the purposes of an opening statement.

TESTIMONY OF JOE GUTIERREZ

Mr. GUTIERREZ. Good morning, and thank you, Mr. Chairman. Thank you for inviting me to give this testimony.

My name is Joe Gutierrez. I reside at Los Alamos, New Mexico, specifically White Rock. I have completed 11 years of employment with the University of California at Los Alamos National Laboratory.

Since October 1992 through the present time, I have collected information about the management practices of officials and managers at Los Alamos National Laboratory, the University of California, the Department of Energy, some supporting government agencies, and, as I've heard today, I must add one more party. And let me preface my statement by stating that there is no I am castigating or criticizing Congress. We need your help. We are the ultimate body that we can defer to for help. However, I must include and ask you to investigate the relationship between those representatives and Senators who have a DOE facility located in their Districts, because that relationship is one that I feel, at least in my experiences, has a big bearing in this issue, because that is an underlying reason why the Department of Energy and the University of California, in particular, is remiss in not enforcing and implementing these zero tolerance safety policy. I will address that in more detail here in a minute.

Let me state that in 1996, October 1996, I found it necessary, after having disclosed some information that the University of Cali-

for California and the Los Alamos National Laboratory was perpetrating a deception to the surrounding Los Alamos community and the Nation, as a whole. There was a claim that Los Alamos National Laboratory was in compliance with the Clean Air Act. I had personal knowledge and documentation to clearly show that that was not the case, so I found it necessary to blow the whistle. That was in 1996.

In the spring of 1997, I met with Senator Pete Domenici, at his request, to address some very important and very critical employee concerns at Los Alamos. In that meeting, Senator Pete Domenici pointed at me in anger because I had blown the whistle. In his view, he felt that I had given the laboratory a black eye. But he completed his statement by stating that, "I tell the University of California and Los Alamos to fight you guys to the hilt, and I'll give them all the support and all the money they need." And taking a pause and realizing what he said, he then added, "Only if they're right." Well, who is making sure that they are right? Certainly he's not and certainly the DOE is not.

That was in the spring of 1997. By the end of that year, during the August timeframe, when I received a performance appraisal, I detected some subtle retaliation. I pursued to investigate, and, in fact, I felt that there was retaliation being perpetrated against me and I filed a claim in November of that year.

By the spring of 1998, the Department of Labor had made a determination and gave a favorable determination in my behalf. The University of California appealed that determination.

In the spring—January 1999, after a 5-day hearing, again the administrative law judge for the Department of Labor issued a 72-page ruling on my behalf, again a favorable ruling in my behalf and determination on my behalf.

The University of California has appealed that ruling, and I am now going through that appeal. If—the Administrative Review Board has that appeal in front of them. If that ruling should again be in my favor and the University of California chooses to again appeal, I am facing, as I understand it, in the 10th District, a potential 10-year wait before my case gets in front of that court.

Again, not only do I have to wait and incur additional expenses, but at the end of that I am still probably expecting a large expense, and who knows how much longer for a final outcome in my favor. I'm hoping it will be in my favor.

In closing, I would like to make two comments, one relating to recommendations and the other perhaps—it has been fashionable for officials at DOE to refer to these laboratories as the "crown jewels of this country." I think we need to take a pause, in light of this issue, in light of the issues that surround this concern. We need to really stand back and take a look at it.

What benefits are derived from the technical innovations at those laboratories I believe are greatly undermined and perhaps even there's a detraction from that benefit due to the waste, fraud, and abuse that surrounds the management of those technical endeavors.

With that, I think I would like to close. I'd like to just add that I was quite impressed about the statements that were made this morning by you, Mr. Chairman, and the rest of the panel. They are

quite strong, and I'm hoping that, in fact, there will be follow-up and corrective action.

Mr. BURR. I thank you, Mr. Gutierrez.

Let me make two comments.

One, the purpose of this subcommittee and specifically this hearing is to try to get at the truth and to make sure that a zero tolerance policy, if has not been adopted, is adopted, because that's the stated objective of the Department of Energy.

I'm sure that Mr. Carpenter will be very informative to this committee, because I think that he helped to set the draft policy with Secretary O'Leary, who I believe was well intended with her drafting.

The second statement would be I thought I was very controlled in my comments this morning, much more controlled than last night at 11 when I was not only walking through today's testimony but looking at the hearing that we had a year ago and the answers that I got from the Department of Energy then that are inconsistent with the actions that have taken place since then, and with the testimony that I had in my lap in my bed last night reading. I can assure you that I think we will be much more specific and hopefully as controlled as this hearing goes on.

The Chair would recognize himself for the purpose of questions.

Mr. Carpenter, you did participate with Secretary O'Leary in the draft proposals, didn't you?

Mr. CARPENTER. Yes, sir.

Mr. BURR. And share with everybody here what she intended to accomplish with those proposals, in your estimating.

Mr. CARPENTER. Secretary O'Leary attended a conference sponsored by our organization to look at the issue of whistleblower protection in 1993 and she became the keynote speaker at this conference and met privately with a number of DOE employees and DOE contractor employees following or right before that speech, and she was personally affected by what she heard and committed at that point in time with the zero tolerance for reprisal.

So she recognized that this was bad business for the Department to countenance reprisal against whistleblowers. She committed to addressing that and tried to come up with a set of initiatives and policies that would change the course of the Department.

Mr. BURR. Did you feel that her initiative was genuine?

Mr. CARPENTER. Absolutely.

Mr. BURR. And did you ever read the points that she attempted to set?

Mr. CARPENTER. Sure. I read and commented on those points repeatedly and had numerous meetings with her and tried to tell her where they were falling down.

Mr. BURR. How many of those points that you remember were in her initiative have been implemented at the Department of Energy?

Mr. CARPENTER. Well, to a degree, some of the points have been implemented, but, in my view, none of them have been implemented fully or effectively.

Mr. BURR. How many of them have been enforced?

Mr. CARPENTER. Same answer, which is that, even when it comes to what was a no-brainer at the time to Secretary O'Leary and her

staff, which was the contractor reimbursement policy, everyone agreed that this sent the wrong message. And this was the strongest thing she heard from whistleblower after whistleblower at her meetings, was: why is it that the Department is funding this litigation? And our position is that they ought not fund the litigation, even in advance, because most agencies don't fund their contractors' litigation for whistleblower discrimination cases and in advance of a ruling.

So this was one that we thought—where we felt comfortable where there were going to be some changes made, and, in fact, the changes that were made occurred on a haphazard basis. I recently reviewed the contracts at the various sites—Los Alamos, Rocky Flats, Hanford, Savannah River—and took a look at the language in those contracts, and they are all different and they say different things, but generally they allow reimbursement of these cases for the contractors' costs until an adverse ruling, and then, at the point of an adverse ruling, it's supposed to cutoff and even cost paid back, but that hasn't happened.

Mr. BURR. Clearly, an adverse ruling and the willingness to participate in an appeal of an admitted violation or an adverse ruling are two different things. Correct?

Mr. CARPENTER. Yes.

Mr. BURR. Let me ask you specifically, on the contract with U.C. as it relates to Mr. Lappa and his case at Lawrence Livermore, do you feel that the Department of Energy has the ability under Price Anderson to do a notice of violation?

Mr. CARPENTER. Clearly. In fact, the Department, in—I believe it was December 1988, through its Environment and Health and Safety Office, put out a notice to all contractors saying—recognizing a Department of Labor ruling in favor of a whistleblower in the case of a man named Casey Rudee at the Hanford site, and said, "Here is an example of the case where the Price Anderson Act allows the Department of Energy to take enforcement actions and civil penalties against contractors who engage in reprisal, and in the future you are on notice, contractors, that this might happen." So notice was given to the contractor community, but there was no follow-up.

In Mr. Lappa's case, it was even more egregious, in our opinion, that it wasn't done, because Mr. Lappa was a witness to the very Price Anderson Act enforcement investigators that ended up issuing a notice of violation for the underlying safety problems and the nuclear criticality violations at the laboratory, and so he was a helpful witness to the DOE.

Mr. BURR. Let me ask you, the 1st of January 1999 the Department of Energy was prepared to send a notice of violation, or at least a proposed notice of violation, to U.C., and I've got an e-mail—1/6/2000, excuse me—where—from Keith Christopher to Sharon Hurley. Let me just read you a portion of it. And this is referring to a decision that Ms. Sullivan has made.

"I advised her that, during the enforcement and conference and in responding to any subsequent PNOV, if one were issued, the lab would have an opportunity to make their case. Sullivan stated that she felt this process was inadequate due process without DOE con-

ducting another separate investigation of the case, regardless of DOL findings.”

I would only ask you, in your opinion, do you believe that the Department of Labor’s findings are substantial enough for them to pursue a notice of violation, even a proposed notice of violation, or is Ms. Sullivan’s counsel right that they have not allowed due process?

Mr. CARPENTER. They were certainly allowed due process. The University of California, if it disagreed with the findings of the Labor Department, had an opportunity to appeal. They chose not to exercise that option. What resulted was a final agency order of the Department of Labor, which was, again, not appealed. So the due process was there. The University simply chose not to pursue it, and, in my view, admitted to the violations, which was an even stronger result than having an ALJ come out and make a finding.

This was a great case for the Department to be able to vindicate zero tolerance for reprisal policy, but, instead, chose to, I think, getting the system to support the contractor.

Mr. BURR. Let me read one additional sentence and just get your comment on it. This is the next paragraph.

“Sullivan stated that the laboratory was pressured by DOE to accept the DOL findings and did not appeal the findings, and had that not been the case the laboratory would have appealed DOL’s findings.”

The Department of Energy pressured U.C. to accept DOL’s findings, yet turn around and participate in continued litigation, unlimited, possibly, based upon the wording of a contract.

Mr. CARPENTER. I actually didn’t know that the DOE had pressured the laboratory to—

Mr. BURR. I’m only going based upon somebody at DOE’s e-mail referencing the meeting they had.

Mr. CARPENTER. That would be amazing to me in that the DOE has taken the position that the Labor Department finding has no credence to them. If they’re going to tell the contractor to do one thing and accept this as a finding and let’s all move on, and then turn around and fund their litigation, what kind of message is that sending to the rest of the workforce and to the contractor community? I think the message is, “litigate these cases.”

Mr. BURR. And if I remember some of the comments of Secretary O’Leary, the intent was to make sure that we sent a loud message to employees that if you work in unsafe areas, if there is retaliation we want you to feel comfortable to come to the Department of Energy. We want you to feel comfortable to use whatever means you need to voice that opposition, with the confidence that no contractor will retaliate against you.

Does that pretty much sum up some of the—

Mr. CARPENTER. That was the intent of Secretary O’Leary, and the reality is that there is a great deal of fear out there, and we advise clients not to go to the Department of Energy with safety and health concerns. It is not the right place to go. The Department has a very bad track record of supporting whistleblowers.

Mr. BURR. The Chair would ask unanimous consent to enter a significant amount of records into the record. My understanding is that minority and majority have—

Ms. DEGETTE. Reserving an objection, let me just review that. Thank you.

Mr. BURR. The Chair has one additional question and then he will turn to the ranking member for questions.

Mr. Walli, you remember those valves that you refused to put in?

Mr. WALLI. Yes.

Mr. BURR. Are they in today?

Mr. WALLI. No, they are not. Those valves—

Mr. BURR. Did they ever go in?

Mr. WALLI. Yes, they did.

Mr. BURR. For how long?

Mr. WALLI. A matter of hours.

Mr. BURR. And they took those valves out why?

Mr. WALLI. The valves that we were objecting over were given to us as test valves. They were just to test the new systems that we were putting in. We were going to run a hydro test on them.

When they were first given to us, we noticed right away that they were not rated for the pressures that we were going to be putting against them. We objected. We raised the concerns. We went through our company and through our management and our safety department and they tried to force us to use them. They backed myself and my colleagues, my crew into a corner, stating that, "Yes, that was a—they weren't rated, but they were still okay to use."

We agreed. I agreed that we could go ahead and use them if none of my personnel or the people I was responsible for were going to be anywhere near those valves when they were under pressure, and that they, as the company, took sole responsibility for anything that might happen to the system and/or the environment where they were going to be used.

It came to a head to the fact that we either had to quit or use them. When they assured me that none of my personnel were going to be close to them and the safety of the personnel which I was responsible for would not be injured, we agreed to use them, but these were solely for test purposes.

It came time to use these valves. The scope of work changed, and any time you change the scope of work from what the plan of the day was, you're supposed to stop work, reassess what is going to happen, and either make a new plan and have a new meeting and then move on.

We went down there. We had what we call the "pre-job." The scope of work changed. They wanted my personnel and the personnel of another company that had charge of this tank farm to go in and operate these valves under these high pressures that they were not rated for, which had changed from the agreement that we had said that we would install these valves.

Now they wanted us in the confined space in the contaminated radiation zone operating these valves under the pressures that they weren't rated for, and that's not what we had agreed we would do.

Now my personnel and these other people that were assisting us would be at danger if those valves come apart, blew up, or just let go.

This was also at the end of two lines that had about three-quarters of a mile of water against them, that if those valves let go all

that water would end up in the pit where they were at, which was just feet from the drain that went into the 101SY tank, which was one of the Hanford's watch list hydrogen tanks at the time.

At that time, we stopped the work. We found out that the sub-contractor that was working with us had the right valves all along, like we had been telling the company—my people in the company were out there some place.

The company managers came down there, after yelling, cursing, throwing what we call an "animal act" on me and my personnel, got us the right valves. We installed those valves. We went ahead and did the test, like should have been done the first place, and we pulled the test off like was required.

At the end of that test, we drained the system in the normal manner that we would have.

Mr. BURR. I just want to make sure all the members understand. You objected to the installation of the valve originally because the valve was not rated at the pressure that you knew the system would be tested. Given an assurance of this safety of your personnel during testing, you agreed to go ahead and install the valves, and it wasn't until your people were put back in what might have been a dangerous position that you stopped work.

Mr. WALLI. Yes, that statement is true.

Mr. BURR. And I would only ask one last question before I recognize Ms. DeGette.

Mr. Carpenter, given that that was nuclear safety related solutions, or whatever was going through there, would this also be a Price Anderson violation?

Mr. CARPENTER. You bet, sir. This is a nuclear safety issue and it impacts the safety of a nuclear system at the Hanford site. There's probably no more sensitive nuclear area than the high-level nuclear waste tanks at Hanford, which, if you fool with those tanks, if you add materials to these tanks, they can become unstable. Millions of curies reside in these tanks. It could be an environmental disaster of the first magnitude.

Mr. BURR. Are you aware of any investigation by the Department of Energy relative to Price Anderson authorities?

Mr. CARPENTER. No. And, in fact, we have been asking the Department of Energy to investigate and take action on these issues, and the Department of Energy has consistently refused to do so.

Mr. BURR. Ms. DeGette has been very patient, so let me at this time recognize her.

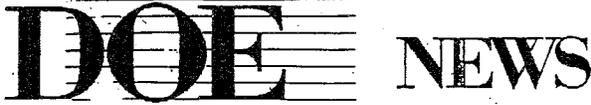
Ms. DEGETTE. First of all, Mr. Chairman, we have no objection to your entering—

Mr. BURR. Without objection, so ordered.

Ms. DEGETTE. Thank you.

[The information referred to follows:]

Document #	Name of Document	Date
1	DOE Press Release entitled, "DOE Adopts Reforms to Protect Whistleblowers"	8/9/95
2	DOE Press Release entitled, "Energy Department Accelerates Whistleblower Reforms"	3/26/96
3	DOE's Summary of Lappa issue	undated
4	Email from Keith Christopher to Sharon Hurley	1/6/00
5	Email from Keith Christopher to David Michaels and Mary Jo Zacchero	2/9/00
6	Amy Roiden memo on reimbursement of litigation costs	1/11/00
7	May 18 Memo from Mell Roy to Dave Berick	5/18/00
8	May 22 Memo from Mell Roy to Dave Berick	5/22/00


 The logo features the letters 'DOE' in a large, bold, serif font, with horizontal lines passing through the letters. To the right of 'DOE', the word 'NEWS' is written in a smaller, bold, serif font.

NEWS MEDIA CONTACT:
Joanna Stancil, 202/586-5806

FOR IMMEDIATE RELEASE
August 9, 1995

DOE ADOPTS REFORMS TO PROTECT WHISTLEBLOWERS

The Department of Energy (DOE) announced today that it has adopted a series of reforms to protect "whistleblowers." The reforms, first proposed and issued for public comment in October 1994, carry out Secretary of Energy Hazel R. O'Leary's policy of "zero tolerance for reprisal."

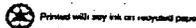
O'Leary initiated her "zero tolerance" policy after a 1993 meeting with a number of DOE federal and contractor employees who had raised concerns about certain practices in the department and allegedly were reprimanded for doing so. She said many of these whistleblowers put their careers on the line to protect their colleagues, neighbors and the American taxpayer, and should be protected.

The reforms adopted by O'Leary include measures to ensure that whistleblowers are not retaliated against by misuse of security clearance procedures; a limit on payment of contractor litigation costs in whistleblower cases, and establishment of an enhanced "employee concerns" program which would have the effect of strengthening DOE policies and programs to ensure that employee concerns are given full attention by DOE and DOE contractor managers and supervisors.

A copy of the proposed reforms, public comments, DOE analyses and conclusions is available by contacting the Office of Contractor Employee Protection at (202) 586-8289.

-DOE-

R-95-114



The Program would be open to receive all types of concerns, and enhance, not replace, existing statutory and regulatory procedures. Each concern would be reviewed to determine the appropriate resolution method, to include Alternate Dispute Resolution processes, investigation, or referral to an established system. Upon receipt, the DOE organization with facility ownership and/or program responsibility or an established panel of experts could be consulted. Collectively, the concern would be reviewed to determine the appropriate disposition. One or more of the following actions would be taken (1) the concern would be referred to an existing system; (2) an independent investigation would be conducted by the DOE Program/Facility owner organization; (3) informal resolution could be pursued, utilizing a form or combination of Alternative Dispute Resolution techniques; (4) the Employee Concerns Program staff could conduct an independent investigation or review of an investigation that had already been conducted; and/or (5) a panel of experts could conduct an independent review.

The concern originator would be made aware of the available formal avenues and the time requirements for submitting the concern (e.g., Equal Employment Opportunity Commission, Civil Rights Office, or collective bargaining procedures). Appendix A describes various DOE Federal employee statutory and regulatory concern/complaint procedures. The concern originator would be asked to sign a fact sheet that he or she has reviewed and understands his or her rights. If at any time, a conflict of interest exists by involving a particular individual in processing a concern, an independent alternate would be assigned.

In response to this proposal, the majority of individuals generally favored the Program as presented or with recommendations. Six commenters indicated that the goals of the Initiative could be achieved if programs that currently exist were to be improved or employees made aware of their existence. Two individuals opposed the program and one commenter opposed this Initiative as being flawed if it remains with the Department of Energy, but approved the concept. Additional specific comments are addressed below.

1. Comment: Most supporters suggested an emphasis on training and increasing an awareness of available programs for the resolution of concerns.

Analysis: The proposal reflects the fact that the Enhanced Employee Concerns Program is not intended to replace the existing programs, but rather to promote their availability and make use of their expertise, where programs exist to deal with certain type of concerns. The comments, therefore, support the intended focus of the program.

8. Comment: Several commenters raised issues unrelated to the implementation of an Enhanced Employee Concerns Program.

Analysis: Comments unrelated to this Program included such issues as hire whistleblowers, permit discovery under 10 C.F.R. Part 708 procedures, include Department of Energy employees under Part 708, and provide penalties against individuals "found" to have engaged in wrongful activity.

Conclusion: The Initiative will be implemented as proposed, but the issues have been referred to appropriate officials.

INITIATIVE II: ALLEGED MISUSE OF THE PERSONNEL SECURITY PROCESS

The October 17, 1994, proposal indicated that existing reforms, including the revision of the personnel security rule (10 C.F.R. Part 710), expressly prohibit the use of the security clearance process for improper purposes, and provide for federal hearing officers to hear cases where questions of eligibility for a clearance are raised. Allegations of personnel security reprisal based upon whistleblower activities, or discrimination based on EEO-type grounds, could be considered by the hearing officer in arriving at a recommendation. In addressing this issue, it was believed that these reforms will be very effective in dealing with concerns of perceived security process abuses.

Additional actions proposed included investigations into allegations by DOE Federal and contractor employees of reprisal and misuse of the personnel security process by the Office of Contractor Employee Protection, which currently investigates allegations of whistleblower reprisal by contractor management. Also, it was proposed that the Department's security managers would promulgate a "Zero Tolerance for Reprisals" policy and incorporate whistleblower protection awareness into the security training curriculum.

In response to the solicitation for comments regarding proposals for responding to allegations of misuse of personnel security processes, the following comments were received:

General Comments: Measures are needed to respond to acts of whistleblower reprisal involving personnel security processes. A "zero tolerance for reprisals" policy is supported. Investigation into reprisals should be performed by independent investigators. "Whistleblower" interests need consideration in determining policies and practices, and past abuses of personnel security procedures should be recognized.

Analysis: The present initiatives are intended to respond to past and present concerns for assuring greater protection for individuals engaged in protected whistleblowing activities. A

10. Comment: Protections are needed to safeguard against coercive investigatory and prosecutorial practices.

Analysis: Policies exist to protect individuals and to prevent such abuses. The Office of Safeguards and Security has announced that misconduct or violations of these policies will not be tolerated. That Office solicits information regarding possible abuses for purposes of prompt review and appropriate actions.

Conclusion: Protections from these abuses are in place and alleged violations will be reviewed by the Office of Safeguards and Security and/or the Office of General Counsel for appropriate action.

11. Comment: Legal issues may emerge if factors other than national security interests influence access authorization decisions.

Analysis: Independent reviews examining possible prohibited influences impacting upon access authorization procedures and practices will not conflict with existing criteria for making determinations regarding eligibility for access authorization.

Conclusion: Facts have not been presented which indicate that new factors other than national security interests will impact determinations of eligibility for access authorization. Should a factual basis for this concern be identified, appropriate legal reviews will be conducted.

12. Comment: "Make whole" remedies, including the expungement of records, should be provided to individuals who are reprised against.

Analysis: If reprisal actions are found, remedies available for correcting such actions should be applied appropriately. National security interests will continue to govern determinations of eligibility for access authorization. Individual remedies will be addressed on a case-by-case basis.

Conclusion: Should information be developed that additional remedies may be needed to assist individuals who are targets of reprisal, the Ad Hoc Working Group on Personnel Security Policy will be an appropriate forum for considering this topic and recommending/coordinating a response.

13. Comment: The need for access authorizations should be documented and justified.

Analysis: The Department has an existing policy that requires justification for all access authorizations. Existing practices are monitored through security surveys, evaluations and audits.

sets forth specific grounds for suspension and debarment, as well as a process through which a contractor can obtain aspects of "due process" before final agency action. Because the circumstances underlying a whistleblower action also may involve sufficient grounds for suspension or debarment, such independent proceedings could be instituted in appropriate situations. Similarly, the award fee system typically evaluates, among other things, management systems and environment, safety and health performance. Thus, we believe the processes supporting these other measures are sufficient, well-established, and capable of responding in appropriate circumstances. Moreover, the proposal's provision for requiring the contractor to absorb the costs of any adverse determination of reprisal serves as an additional deterrent to unlawful conduct towards employees.

Conclusion: Implement Initiative as proposed.

5. Comment: DOE should prohibit confidentiality provisions ("gag orders") in settlement agreements.

Analysis: The Department recognizes that there may be certain instances in which confidentiality provisions are appropriate, and others in which there is an overriding public interest in disclosing the terms of the settlement. Therefore, the Department agrees that it would consider the appropriateness of confidentiality provisions in settlement agreements on a case-by-case basis, whether such provisions are sought by employees or contractors.

Conclusion: Review each request for a confidentiality agreement on a case-specific basis.

6. Comment: DOE should clarify the impact of the Major Fraud Act on DOE proposed whistleblower provisions and policies.

Analysis: Section 8 of the Major Fraud Act of 1988 limits the allowability of costs incurred by Federal government contractors in certain proceedings, where the proceeding is brought by the federal or state government and alleges a violation of certain prescribed laws. Section 8 is an amendment to the Federal Property and Administrative Services Act.

Section 2 of the Major Fraud Act contains an amendment to Title 18 of the U.S. Code and creates a new criminal statute that described major fraud against the U.S. government in a procurement of property or services. This criminal statute also creates a private right of civil action for individuals who have been retaliated against in their terms of employment for assisting in a prosecution for major fraud under 18 U.S.C. § 1031.

Analysis: The Department agrees that there should be a specified deadline to complete the study. The contract with the National Academy provides that a report will be provided by the end of the year.

Conclusion: The Department anticipates that initial results will be provided by the National Academy of Public Administration by the end of the year.

2. Comment: Remedies should be sought through Congressional or judicial action.

Analysis: The Department will await the recommendations of the National Academy of Public Administration before making decisions whether additional legislative authority should be sought.

Conclusion: The Department will not seek additional legislative authority at this time.

3. Comment: Contractors found to have committed violations should be debarred from all federal contract work or denied legal fees.

Analysis: This concern is addressed in comments 1 and 4 under Initiative 3.

Conclusion: Implement Initiative as proposed.

4. Comment: Concern was expressed that there could be additional retaliation against "whistleblowers" who participated in this review.

Analysis: The Department currently implements the DOE Contractor Employee Protection Program, at 10 C.F.R. Part 708. This would provide protection to individuals alleging reprisal resulting from participation in such a review.

Conclusion: Implement Initiative as proposed.

5. Comment: Some commenters wanted old cases to be settled.

Analysis: The authority to settle old cases is unclear. The Department is seeking advice on the types of available remedies from the National Association of Public Administration. Action must await such advice.

Conclusion: Implement Initiative as proposed.

Appendix B

Alternate Dispute Resolution: Any process designed to settle a dispute without litigation or formal administrative adjudication, including, but not limited to, negotiations, conciliation, facilitation, mediation, ombudsperson programs, or any combination of the above. These processes are designed to enhance, not replace, statutory and regulatory procedures established to resolve disputes. Employees desiring to use Alternative Dispute Resolution should be cognizant of time requirements for filing formal complaints to avoid untimely submission.

Facilitation: A collaborative process whereby a neutral individual (i.e., facilitator) assists the parties in a dispute as a process expert, to include conducting meetings and coordinating decisions. The facilitator avoids involvement in negotiations and decision-making.

Negotiation: A process whereby the parties discuss their objectives and requirements for resolution via face-to-face meetings, correspondence, and/or telephone conversations for purposes of reaching a mutual agreement. Negotiation is a basic ingredient in several other forms of dispute resolution.

Conciliation: An informal process whereby a neutral third party (i.e., conciliator) assists in resolving a dispute by providing subject expertise, improving communications, reducing hostilities, interpreting issues, and actively participating in exploring potential solutions.

Mediation: A structured process whereby a trained neutral third party (i.e., mediator) assists the parties in reaching an agreement by facilitating discussions and exploring solutions. The mediator will meet with the parties collectively and privately for purposes of clarifying issues, improving communications and actively participating in discussions of settlement options. The mediator cannot reveal private conversations to either party without their authorization. Mediation may result in a signed agreement.

Fact-finding: The facts related to the dispute are explored by an independent investigator or technical expert for purposes of clarifying the issues and gathering the necessary information to be used in settlement negotiations, adjudications, technical reviews and other similar types of activities.

Ombudsperson: An independent and neutral third party with the flexibility to informally explore issues, report findings, facilitate discussions and assist in mutually agreeable settlements to a dispute.

Review Panels: Any combination of neutral parties designated to review concerns and recommend solutions.



NEWS

NEWS MEDIA CONTACT:
Joanna Stancil or Jayne Brady,
202/586-5806

FOR IMMEDIATE RELEASE
March 26, 1996

ENERGY DEPARTMENT ACCELERATES WHISTLEBLOWER REFORMS

The Department of Energy (DOE) is accelerating the implementation of whistleblower policy reforms, Secretary of Energy Hazel R. O'Leary announced today. O'Leary assigned Acting Under Secretary Thomas P. Grumbly to oversee the effort and requested that the National Academy of Public Administration (NAPA) pursue the second phase of a two-part study of pre-April 1992 whistleblower cases. This second phase will concentrate on specific recommendations for methods and standards to be used in the review of these cases. The cases originated before April 2, 1992, when DOE issued regulations providing for a review of contractor employee complaints.

"I am committed to a policy of zero tolerance for reprisals against our workers throughout the department's complex," said O'Leary. "As part of this policy, I want to see if there is a practical way to right past wrongs against some of our workers," added O'Leary. "Looking to the future, we have important environmental cleanup, national security and research missions that must be effectively and efficiently discharged. Maintaining a climate that allows for concerns to be raised without retaliation is critical to this task," she concluded.

The Department issued whistleblower initiatives last August after extensive public comment that include:

- an enhanced employee concerns program;
- measures to ensure that whistleblowers are not retaliated against by misuse of security clearance procedures;
- limitations on the payment of contractor litigation costs in whistleblower cases;
- enhanced use of alternative dispute resolution; and
- conduct a comprehensive implementation study by a highly-respected external, independent, organization relating to the review of pre-April 1992 cases.

R-96-038

-More-



"These whistleblower initiatives have not been implemented to my satisfaction and I want to get this effort back on track. I have asked Acting Under Secretary Tom Grumbly to accomplish this as soon as possible," said O'Leary.

Grumbly added, "Safety is one of my top priorities. Worker and public hazards as well as other concerns in the former weapons complex need to be raised without retaliation. I have asked Jeff Crater of my staff to assist with the implementation of whistleblower and employee concerns reforms."

Crater is experienced in dealing with these issues both within the department and as a congressional investigator with the former House Energy and Commerce Committee's Subcommittee on Oversight and Investigations.

The first phase of the NAPA report, released today, recommends establishing a process to review these cases, "expeditiously in a cost effective manner and provide finality to them." In June 1995, the department awarded a contract to NAPA, a congressionally chartered research organization that helps federal, state and local governments research and implement innovative strategies for institutional change, to conduct the review of whistleblower cases. Contact the U.S. Department of Energy's Public Inquiries Office at 202-586-5575 to obtain a copy of the NAPA report entitled, "Retaliation Complaint Study."

-DOE-

R-96-038

Attachment 1

In January 1998, the Office of Enforcement and Investigation (EH-Enforcement) initiated contact with Mr. David Lappa. EH-Enforcement initiated this contact after learning through media reports that Mr. Lappa had nuclear safety concerns related to activities at LLNL, where he was employed. On February 19, 1998, EH-Enforcement staff took detailed sworn testimony from Mr. Lappa regarding these concerns. A copy of the deposition was previously provided to the Commerce Committee.

The deposition focused on information acquired by Mr. Lappa when he participated in a LLNL Incident Analysis Committee formed to investigate safety related incidents at the Plutonium Facility at the LLNL site. Mr. Lappa testified that he had filed a complaint with the DOE in November 1997 charging that LLNL violated provisions of 10 CFR 708 (Contractor Employee Protection Rule) and retaliated against him. Mr. Lappa explained that his complaint ultimately got referred to the DOE Office of Inspector General for review.

EH-Enforcement focused on the nuclear safety issues. On July 28, 1998, after conducting a full field investigation into criticality safety infractions raised by Mr. Lappa at the Plutonium Facility, EH-10 issued a Preliminary Notice of Violation (PNOV) and imposed a civil penalty of \$153,750.00 (which was waived due to the statutory exemption). LLNL did not contest the PNOV.

On February 27, 1998, Mr. Lappa filed a discrimination complaint with the Department of Labor (DOL). In August or September 1998, EH-Enforcement learned from DOL that it reached a decision in Mr. Lappa's case that LLNL discriminated against him. DOL issued its decision on June 29, 1998. LLNL did not appeal the decision; it became a Final Order of the Secretary of Labor.

On March 16, 1999, EH-Enforcement formally requested a copy of DOL's investigative file in the Lappa case for evaluation. On October 4, 1999, EH-Enforcement received the file. EH-Enforcement reviewed the evidence contained in the documents provided by DOL including its investigation report and concluded that violations of 10 CFR 708 may have occurred. EH-Enforcement recommended that an Enforcement Conference be held with the contractor to give them an opportunity to present their views.

On January 5, 1999, David Michaels, Keith Christopher, Mary Jo Zacchero and Rebecca Smith, representatives of EH, met with Mary Ann Sullivan and Ben McCrea from the General Counsel's office. Ms. Sullivan, General Counsel, stated that she had due process concerns with the proposed enforcement action against LLNL. She held the opinion that DOE should not rely on the Final Order of the Secretary of Labor in this case because LLNL did not have adequate notice that DOE intended to rely on Final Orders of the Secretary of Labor as evidence of retaliation and had they Laboratory known this fact they might not have settled the case because she understood they had a good case. Ms.

Sullivan further stated her opinion that an Enforcement Conference did not constitute adequate due process

Mr. Christopher, Director of EH-Enforcement, advised Dr. Michaels that given the General Counsel's legal concerns about due process and that this case might be legally flawed, Dr. Michaels should consider the option of not pursuing this case but rather resolve the General Counsel's due process concerns for future cases. . Mr. Christopher further recommended to Dr. Michaels that we should consider issuance of an Enforcement Letter to LLNL and require them to respond to reflect the Department's concerns about retaliation.

To: Sharon Hurley/EH/DOE@EH
cc: Mary Jo Zacchero/EH/DOE@EH
Subject: Lappa Investigation

On January 5, 1999 I, along with David Michaels, Mary Joe Zacchero and Rebecca Smith (sitting in for Joe Fitzgerald) met with Mary Ann Sullivan and Ben McCrae from the General Counsel's Office. Sullivan stated that she was concerned with the proposed enforcement action to issue a Severity Level II PNOV and remitted fine to Lawrence Livermore Laboratory for retaliation against David Lappa for raising safety concerns. Sullivan stated that she did not feel DOE should rely on the Final Order of the Secretary of Labor determining that the laboratory had retaliated against the employee because the laboratory did not have adequate Notice that DOE would rely on the findings of the Department of Labor as evidence that retaliation occurred. As such she felt as General Counsel that issuance of a PNOV was inappropriate and lacked due process because the laboratory did not have an opportunity to make their case. I advised here that during the enforcement conference and in responding to any subsequent PNOV if one were issued the lab would have an opportunity to make their case. Sullivan stated that she felt this process was not adequate due process without DOE conducting another separate investigation of the case regardless of the DOL findings.

Sullivan stated that Laboratory was pressured by DOE to accept the DOL findings and to not appeal the finding and had that not been the case, the Laboratory would have appealed the DOL finding. She opined that from her discussions with the Laboratory's lawyers, they had a good case to present had they done so. She therefore felt it was inappropriate for us to now use the Final Order of the Secretary of Labor for a Price Anderson Action.

On this basis, Sullivan as General Counsel advised David Michaels not to issue an action in this case but to prospectively pursue other cases once the contractors were given notice that DOE could rely on evidence developed by DOL investigators in evaluating whether to pursue an enforcement action. While I disagree with this legal position, I have advised Dr. Michaels that he should defer to the advice given by DOE's General Counsel.

As a separate matter, I advised Sullivan that the recently re-issued DOE Whistleblower Rule which was issued as an interim final rule was no longer enforceable under Price Anderson because it had deleted the requirement prohibiting such retaliation. Ben McCrae agreed that the rule was not enforceable as written and that they would have to change it.

I recommended to Dr. Michaels that while we may be precluded from issuing an enforcement action based on the General Counsel's position we should, given the fact that you now have another employee raising safety concerns at this lab and fearing retaliation that we should at least issue an enforcement letter stating our concern and require them to provide a response demonstrating what management processes they have in place to ensure that employees will feel free to raise safety concerns.

For your files

To: David Michaels/EH/DOE@EH, Mary Jo Zacchero/EH/DOE@EH
cc: Sharon Hurley/EH/DOE@EH
Subject: Lappa

Attached is a draft for discussion on how to approach the Lappa issue in PAAA space. I think GC will continue to lay the issue at EH's feet for re-investigation. I think EH's position is clear. We have done the investigation we feel is necessary to reach preliminary conclusions on the merits; however we agree that given GC's due process concerns plus equity considerations in that one element of DOE forced them to settle so another element ought not take advantage of the legal significance of the DOL final decision and we should not focus on an enforcement action per se but focus on corrective actions through the enforcement letter as described without reaching a conclusion on the merits of the DOL findings. DOE should then also make clear to the complex how we will assess DOL findings in the future. Any decision to re-investigate (which is fruitless given the compromised nature of the case at this time) should be done outside of regulatory space and should be a matter of contract (It is appropriate to ask what the Field Office and Program office have done under the contract (although we know the answer) In the event of any re-investigation EH-10 would have to recuse itself. We have done our investigation, reached preliminary conclusions and could not objectively re-start this investigation all over again using the same person.

I have verified that NRC still relies on DOL findings for enforcement once they have been through appeal or become a final order.

NRC has also pointed out to me that DOL has articulated the position (of which I have a copy) that the Final Order of the Secretary of Labor is not subject to challenge in any administrative proceeding. This means no matter what a new DOE investigation might conclude, the Secretary's Order is the only one that counts. DOE can however make your its decision whether or not to proceed on the Secretary's Final Order which for the reasons stated in the draft letter we are recommending against.

I think the combination of the enforcement letter, having the lab director come in and meet with TJ so DOE can express his concerns on this topic, (without reaching new conclusions outside of DOL's position) might give us a path forward. The biggest barrier I see is whether DOE is willing to accept responsibility for pressuring them to settle in the first place.



Lappa.wpd

*Rec'd 1-11-00
by [unclear] from [unclear]*

Bob - *Emergency*

I understand that Mary Anne has asked you and Ben to meet with Dwight Cates (House staffer) on whistleblower issues on Wednesday. Attached are some documents that you might find useful in preparing for your meeting:

- A. *from KC contract* → My summary of our "policy" on reimbursement of contractor whistleblower claims, with a sample contract clause (proposed in 1/98), a listing of some (but not all) of the contracts and which have the clause and which do not, and two rulemakings on the subject. Mary Ann Masterson and Laura Fullerton
- B. Information on the pipefitters cases in Hanford and whether we are/have reimbursed contractor litigation costs. This was prepared by Anne Broker and Marc Johnston working with Richland counsel.
- C. Information on the Lappa case in California and whether we are/have reimbursed contractor litigation costs. This was prepared by Anne Broker working with Oakland counsel.

*Amey
Amy*

A

Reimbursement of Contractor Whistleblower Litigation Costs

- No DOE policy in effect with regard to reimbursement of contractor whistleblower litigation costs
- In January 1998, DOE proposed a contract clause to govern reimbursement of these costs. The main effect of the clause would be to prohibit reimbursement of these costs if there is an adverse determination (adverse to the contractor), unless the contractor eventually wins or if the contracting officer decides it is in the best interest of the government for the contractor to proceed with defending the claim rather than settling .
- Since that time, in the expectation that this would be finalized, the clause was inserted in numerous contracts, but not all. The clause is in DOE's contract with the University of California and our contract at Richland. For those contracts that do not have the clause, the allowability of litigation costs associated with defending whistleblower claims would be determined under the general principles for allowability of litigation costs. In particular, there would not be an outright prohibition of reimbursement of costs if there is an adverse determination.
- In May 1999, DOE proposed an alternate to the above clause. Rather than a contract clause, this would be a "cost principle" to govern EEO cases, union agreement violations, federal labor cases, and whistleblower cases. It would be less prescriptive and give contracting officers greater discretion to review the circumstances of each case in making a determination of allowability. It provides a presumption for reimbursing litigation costs prior to an adverse determination and requires a higher level of scrutiny for reimbursing litigation costs associated with an adverse determination.
- DOE has not issued a final rule. According to Mary Ann Masterson, there is no one championing movement on this rule.

Attachments



Department of Energy
Washington, DC 20585

April 28, 2000

The Honorable Tom Bliley, Chairman
Committee on Commerce
U. S. House of Representatives
Washington, D.C. 20515

Dear Chairman Bliley:

I am writing to respond to your letter of April 3, 2000 to Secretary Richardson in which you requested certain documents and information concerning the whistleblower concerns raised by Mr. David Lappa, a former employee of the Lawrence Livermore National Laboratory (LLNL).

First, I want to reaffirm the Department's commitment to open communication between management and employees and a zero tolerance policy for reprisals against those who raise safety concerns. Free and open expression of employee concerns is essential to safe and efficient accomplishment of the Department's missions.

Second, I want to correct the misconception that the Department is ignoring Mr. Lappa's concerns. As I explained in my February 24, 2000 letter to you, Mr. Lappa has chosen to have his concerns addressed in forums outside the Department. The proceedings at the Department of Labor (DOL) and now in the California state court have dictated the actions available to the Department.

Mr. Lappa's decision to use the DOL whistleblower process required the Department to stop its whistleblower process under 10 CFR Part 708, which would have entailed investigation and action by the DOE Office of the Inspector General. When the DOL decision was issued, the Oakland Operations Office (Oakland) met with Mr. Lappa and reviewed the DOL decision and LLNL's plan to comply with its terms and conditions. Oakland accepted the DOL decision as an equitable resolution of Mr. Lappa's concerns and concluded no contractual action was appropriate, provided that LLNL complied with the terms and conditions of the DOL decision and engaged in no retaliation against Mr. Lappa. In reaching this conclusion, Oakland took into account both the terms and conditions of the DOL decision and LLNL's decision to settle the proceeding promptly without invoking its right to an evidentiary hearing.

The Office of Enforcement within the Office of the Assistant Secretary for Environment, Safety and Health investigated the criticality safety issues raised by Mr. Lappa and issued a Notice of Violation to LLNL in March 1998. Consistent with its policy, the Enforcement Office did not investigate Mr. Lappa's whistleblower concerns at that time. Following the issuance of the DOL

decision, the Enforcement Office evaluated the evidence collected by DOL including witness statements, affidavits, reports of interviews and other relevant documents. EH then requested an opinion from the Office of the General Counsel as to whether a Notice of Violation relating to Mr. Lappa's whistleblower concerns could be based solely on the findings in the DOL proceeding. On January 5, 2000, I advised the Assistant Secretary for Environment, Safety and Health, Dr. David Michaels, that an enforcement action under the PAAA could not be based solely on the findings in a DOL Whistleblower proceeding without further investigation of the matter by the Enforcement Office to verify those findings and to determine whether additional information was necessary. I discussed the reasons for this position in my February 24, 2000 letter to you.

Dr. Michaels did not direct the Enforcement Office to undertake further investigation. He did, however, request that DOE contractors be put on notice that in the future the Department might rely solely on the findings in a DOL proceeding to issue a Notice of Violation relating to DOE whistleblower regulations in 10 CFR Part 708 and to impose civil penalties. The Office of the General Counsel and the Enforcement Office worked together to revise the Statement of Enforcement Policy set forth as an Appendix to 10 CFR Part 820 (Procedural Rules for DOE Nuclear Safety Requirements) to put DOE contractors on notice of this change in policy. These revisions were published in the Federal Register on March 22, 2000.

In addition, Dr. Michaels sent a memorandum to the Acting Deputy Administrator of Defense Programs, Brigadier General Thomas Gioconda, in which he requested "that the facts and circumstances of [the Lappa matter] be examined and assessed as part of the evaluation of LLNL's performance in the environment, safety, and health area for purposes of determining LLNL's performance rating and associated amount of fee." In response, General Gioconda committed Defense Programs and Oakland to jointly decide what contractual or other action should be taken following the conclusion of Mr. Lappa's case in state court. In the interim, General Gioconda directed Oakland to reinforce to LLNL and other contractors that DOE remains firmly committed to a zero tolerance policy with respect to acts of reprisal taken against whistleblowers.

Documents and Information Requests:

1. Please provide all records relating to Mr. Lappa or his whistleblower complaint. Please do not provide records included in DOE's prior responses.

Several documents listed below have been attached as relevant to Mr. Lappa and his whistleblower complaint. I have requested the relevant offices to see if there are any additional responsive documents. Any such documents will be sent to the Committee as they become available.

2. Based on Ms. Sullivan's February 24, 2000 letter to the Committee, it is unclear whether DOE believes LLNL engaged in acts of discrimination which resulted in DOL's June 1998 Order against LLNL. Does DOE believe LLNL engaged in acts of reprisal covered by

provisions of 10 CFR 708 or 10 CFR 820 which led to DOL's June 1998 Order? If so, why hasn't DOE initiated its own PAAA investigation.

As discussed above, Mr. Lappa has decided to have his whistleblower concerns addressed in forums other than the Department. Accordingly, the Department has not developed its own evidentiary basis on which to characterize the actions of LLNL considered in the DOL decision, as it would have had Mr. Lappa pursued the remedy DOE provides in 10 CFR Part 708. The Office of Enforcement did reach a preliminary evaluation that retaliation may have occurred based upon its review of the evidence compiled by DOL. As described previously, the Department cannot rely on the evidence developed by the DOL without pursuing further investigation to validate DOL's findings. EH has concluded that given the extent to which witnesses have and are currently being exposed to multiple investigatory and adjudicatory activities, further resolution through traditional investigatory tools available to EH and the development of new information is not realistic. Accordingly, the Department has not initiated further investigation under Part 820 because it accepts the DOL decision as an equitable resolution of Mr. Lappa's concerns considering that LLNL resolved the DOL proceeding promptly without invoking its right to an evidentiary hearing and contractual mechanisms are being used to determine performance ratings and fees following the outcome of the trial in state court.

3. According to Ms. Sullivan's February 24, 2000 response to the Committee, "DOE has decided that Mr. Lappa's subsequent claims of reprisal may provide a basis for contractual action. In particular, the Assistant Secretary for Environment, Safety and Health intends to ask the contracting officer to evaluate whether LLNL's handling of the Lappa matter warrants adjustment of LLNL's performance rating and fee determination."

a. Please provide an update on whether DOE has determined whether to adjust LLNL's FY 2000 performance rating and fee determination.

As discussed above, Defense Programs and Oakland will jointly decide what contractual or other action should be taken following the conclusion of Mr. Lappa's case in state court. In responding to Dr. Michaels, General Gioconda stated:

The individual's state court lawsuit is still pending. I believe that the review of whether LLNL reprised against the individual, and therefore whether any response by DOE under its contract with UC is warranted, should await the outcome of that proceeding. This will enable the Oakland Operations Office to take into consideration any evidence that comes to light in that proceeding. It will also avoid the risk of the Department prejudging issues that the individual has elected to have considered by the state court rather than through DOE's Part 708 process. At the conclusion of the state court proceeding, if there is a determination that LLNL reprised against the individual, the Oakland Operations Office will be in a position to use those findings in connection with a formal review of the LLNL employee concerns program and its implementation of integrated safety

management, which includes feedback from employees as an essential element. Defense Programs and the Oakland Operations Office will then jointly decide what contractual or other actions should be taken as a result of that review.

- b. What is meant by "LLNL's handling of the Lappa matter?" Please provide a description of LLNL's handling of the Lappa matter, and why these actions may warrant adjustment of LLNL's performance rating. Are these actions considered acts of discrimination pursuant to provisions of 10 CFR 708 or 10 CFR 820.

"LLNL's handling of the Lappa matter" means actions by LLNL relating to compliance with the DOL decision and treatment of Mr. Lappa subsequent to the DOL decision. As noted above, Mr. Lappa has chosen to present his case with respect to these matters in state court. His lawsuit is still pending. Oakland has reasonably concluded that it should await the resolution of that lawsuit to determine whether reprisal or discrimination occurred that might warrant some contractual response. Oakland has also reviewed the number of cases received by its whistleblower and employee concerns programs for LLNL since the inception of the Part 708 program and determined that the statistics for those cases did not reflect any systemic problems which would warrant an independent review.

- c. What allowable legal costs have LLNL and DOE incurred relating to Mr. Lappa's whistleblower complaint and FOIA requests?

LLNL has incurred outside counsel fees and costs related to the DOL claim in the amount of \$46,542. For the lawsuit in state court, LLNL has incurred outside counsel fees and costs in the amount of \$281,091 to date. The contractual considerations described in (d) below determine the allowability of these costs. DOE's costs related to the FOIA requests, lawsuit, and other issues are a cost of doing business incurred by program offices and support offices and are not broken down by project.

- d. According to a July 10, 1998 memorandum from Gary M. Stern to Mary Anne Sullivan, Mr. Stern discussed the issue of allowable costs pursuant to the new whistleblower provision in the UC contract. Please provide a copy of the whistleblower costs provision referred to in this memo. Additionally, please explain why DOE has continued to reimburse LLNL's legal costs. Please also provide any records contained in the contract file that relate to DOE's decision to reimburse LLNL for its legal costs related to Mr. Lappa's complaints.

Although the ultimate allowability of litigation costs incurred by UC cannot be determined until final resolution of the litigation, DOE is reimbursing UC for legal costs incurred in defending Mr. Lappa's civil suit pursuant to DOE's contract with UC. UC must file quarterly reports of its costs associated with the litigation which are reviewed by DOE in Oakland.

The provisions in the contract governing allowability of costs including whistleblower costs may be found in the following clauses in the DOE/UC contract. See Contract No. W-7405-ENG-48, available on the internet at <http://labs.ucop.edu/internet/comix>.

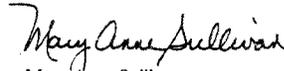
- i. Clause 3.2 - Allowable Costs (Management and Operating), at (d)(15), allows reasonable litigation and other expenses, including counsel fees, if incurred in accordance with Clause 4.1, Insurance-Litigation and Claims, and the DOE-approved Contractor Litigation Management Procedures.
- ii. Clause 4.1 - Insurance-Litigation and Claims, establishes procedures for managing litigation, specifically allows reimbursement for liabilities to third persons, including employees, if the liabilities were not directly caused by the willful misconduct or bad faith of the Contractor's "managerial personnel," which are defined to include the contractor's directors, officers, managers or other equivalent representatives who supervise and direct certain activities.
- iii. Clause 4.4 - Cost Prohibitions Related to Legal and Other Proceedings, provides prohibitions and limitations under the Major Fraud Act on reimbursing costs incurred by a contractor in connection with any criminal, civil or administrative proceeding commenced by a governmental agency that results in certain specified dispositions.
- iv. Clause 4.5 - Costs Associated with Discriminatory Employee Actions, provides that once an adverse determination is reached in an administrative action brought by an employee under 29 CFR Part 24, 10 CFR Part 708, or 41 CFR § 265, litigation costs, as well as costs associated with any interim relief granted, may not be paid from contract funds. For purposes of an action brought before the DOL, "adverse decision" means a recommended decision under 29 CFR § 24.6 by an Administrative Law Judge. A recommended decision by an ALJ under 29 CFR § 24.6 was not reached in Mr. Lappa's case since LLNL acted in accordance with DOE policy encouraging prompt resolution of whistleblower issues and did not seek an evidentiary hearing. This is the provision to which Mr. Stern was referring. I believe he was referring to the allowability of costs if LLNL had continued the DOL proceeding and received an adverse decision.

Nothing indicates that UC has not followed the requirements of DOE litigation management policy and the contract in terms of notice to DOE and accounting for litigation costs. Information currently available to DOE indicates that UC has managed this litigation in accordance with the requirements of the contract and the DOE litigation management policies and procedures. There is no allegation of willful misconduct or bad faith by the LLNL managerial personnel. The lawsuit was not commenced by a governmental entity, and thus the Major Fraud Act does not prohibit reimbursement of costs. The statutes and common law principles upon which Mr. Lappa bases his lawsuit do not come within the ambit of Contract Clause 4.5 - Costs Associated with Discriminatory Employee Actions (as described above, this clause applies only to adverse determinations made under 29 CFR Part 24, 10 CFR Part 708, or 41 CFR § 265). However, as

noted above, final resolution of the allowability of costs associated with the state court litigation, including any resulting liabilities, cannot be determined until that litigation is resolved.

I hope this answers your concerns.

Sincerely,



Mary Anne Sullivan
General Counsel

Attachments:

1. Memorandum of March 3, 2000, to Brigadier General Thomas Gioconda, Acting Deputy Administrator of Defense Programs, from David Michaels, Assistant Secretary for Environment, Safety, and Health
2. Memorandum of April 27, 2000 to David Michaels, Assistant Secretary for Environment, Safety, and Health from Brigadier General Thomas Gioconda, Acting Deputy Administrator of Defense Programs
3. Federal Register Notice amending Appendix to Procedural Rules for DOE Nuclear Activities, 10 CFR Part 820. 65 Fed. Reg. 15,218 (March 22, 2000) (Final rule; amendment of enforcement policy statement and confirmation of interim rule)
4. DOE/UC Contract (Supplemental Agreement to Contract No. W-7405-ENG-48), at pages 20-28, 48-50, 54-57 (available on the internet at <http://labs.ucon.edu:internet:comix>):
 - Clause 3.2 - Allowable Costs (Management and Operating), at (d)(15),
 - Clause 4.1 - Insurance - Litigation and Claims,
 - Clause 4.4 - Cost Prohibitions Related to Legal and Other Proceedings
 - Clause 4.5 - Costs Associated with Discriminatory Employee Actions

ATTACHMENT 1



Department of Energy
Washington, DC 20585

DME Chron

March 3, 2000

MEMORANDUM TO: Brigadier General Thomas Gioconda
Acting Assistant Secretary for Defense Programs

FROM: David Michaels, PhD, MPH
Assistant Secretary
Environment, Safety and Health *DAM*

SUBJECT: Whistleblower Case at Lawrence Livermore National Laboratory

This in regard to the Department's response to a claim of whistleblower retaliation from a former engineer of the Lawrence Livermore National Laboratory (LLNL) for raising nuclear safety issues to high level LLNL personnel. The United States Department of Labor (DOL) investigated this matter and in June 1998 issued a Notice of Determination. The Notice of Determination stated that evidence obtained during its investigation indicated that LLNL had discriminated against the engineer for his involvement in protected activities (i.e., his involvement in and his raising of nuclear safety concerns regarding an investigation of criticality infractions). On the basis of this initial investigation, DOL ordered LLNL to undertake several actions to remedy this violation. LLNL did not appeal the decision to an Administrative Law Judge, and when the complainant withdrew his appeal based on the settlement he reached with LLNL, it became a Final Order of the Secretary of Labor.

I am concerned that if employees in fact suffer retaliation for raising nuclear safety concerns, it will have a deterrent effect on the willingness of other workers to feel free to raise safety concerns to their management without fear of reprisal. The ability and willingness of workers to raise such concerns to management for proper resolution is of paramount importance in ensuring a safer work place. Any action that deters this free flow of information is a potentially significant safety issue.

Accordingly, I am requesting that the facts and circumstances of this situation be examined and assessed as part of the evaluation of LLNL's performance in the environment, safety and health area for purposes of determining LLNL's performance rating and associated amount of fee. My staff is available to provide additional information and assist with your review of this matter. In that regard, please contact David Stadler, 903-6457.

cc: J. Turner, Oakland Operations Office
K. Christopher, EH-10
D. Stadler, EH-2

ATTACHMENT 2

memorandum

DATE: April 27, 2000
REPLY TO: DP-17 (S. Agrawal, 3-6988)
ATTN OF:
SUBJECT: Whistleblower Case at Lawrence Livermore National Laboratory

TO: Assistant Secretary for Environment, Safety and Health

This is in response to your memorandum dated March 3, 2000, concerning the whistleblower case at the Lawrence Livermore National Laboratory (LLNL). I fully agree that we must foster an environment in which employees are encouraged to bring safety concerns forward without fear of recrimination or reprisal. An open, honest environment is critical to both employee morale and to the continuous improvement of safety in operations, and thus by extension, it is also critical to the successful execution of Defense Programs' mission.

The criticality safety issues with which the LLNL scientist was first concerned have been addressed. The concerns were first raised in 1997 and included a criticality incident which resulted in the forming of the Incident Analysis Committee on which the above LLNL scientist served as a consultant.

As you know, the individual involved in this case has filed a lawsuit against the University of California in State court alleging reprisal. The individual's state court lawsuit is still pending. I believe that the review of whether LLNL reprised against the individual, and therefore whether any response by DOE under its contract with UC is warranted, should await the outcome of that proceeding. This will enable the Oakland Operations Office to take into consideration any evidence that comes to light in that proceeding. It will also avoid the risk of the Department prejudging issues that the individual has elected to have considered by the state court rather than through DOE's Part 708 process. At the conclusion of the State court proceeding, if there is a determination that LLNL reprised against the individual, the Oakland Operations Office will be in a position to use those findings in connection with a formal review of the LLNL employee concerns program and its implementation of integrated safety management, which includes feedback from employees as an essential element. Defense Programs and the Oakland Operations Office will then jointly decide what contractual and/or other actions should be taken as a result of that review.

In the interim, the Manager of the Oakland Operations Office has committed to take immediate actions to reinforce to all of the Oakland Management and Operations Contractors the DOE's zero tolerance policy with respect to acts of reprisal taken against whistleblowers.

If you have any questions or would like to discuss this further, please call me or have your staff contact Dennis Miotla at (301) 903-5427.



THOMAS F. GIOCONDA
Brigadier General, USAF
Acting Deputy Administrator
for Defense Programs

cc:
Deputy Secretary
Manager, Oakland Operations Office
Director, Office of Science
General Counsel

ATTACHMENT 3

9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR chapter I as follows:

1. In subchapter C, a new part 74 is added to read as follows:

PART 74—PROHIBITION OF INTERSTATE MOVEMENT OF LAND TORTOISES

Sec.

74.1 General prohibition.

Authority: 21 U.S.C. 111–113, 114a, 115, 117, 120, 122–126, 134b, 134f; 7 CFR 2.22, 2.80, and 371.2(d).

§ 74.1 General prohibition.

The interstate movement of leopard tortoise (*Geochelone pardalis*), African spurred tortoise (*Geochelone sulcata*), and Bell's hingeback tortoise (*Kinixys belliana*) is prohibited.

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

2. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622; 19 U.S.C. 1306, 21 U.S.C. 102–105, 111, 114a, 134a, 134b, 134c, 134d, 134f, 136, and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.2(d).

3. In § 93.701, a new paragraph (c) is added to read as follows:

§ 93.701 Prohibitions.

(c) No person may import leopard tortoise (*Geochelone pardalis*), African spurred tortoise (*Geochelone sulcata*), or Bell's hingeback tortoise (*Kinixys belliana*) into the United States.

Done in Washington, DC, this 16th day of March 2000.

Bobby R. Acord,

Acting Administrator, Animal and Plant Health Inspection Service

[FR Doc. 00-7014 Filed 3-21-00; 8:45 am]

BILLING CODE 3410-34-U

DEPARTMENT OF ENERGY

10 CFR Part 820

Procedural Rules for DOE Nuclear Activities; General Statement of Enforcement Policy

AGENCY: Department of Energy.

ACTION: Final rule; amendment of enforcement policy statement and confirmation of interim rule.

SUMMARY: The Department of Energy (DOE) is amending its General Statement of Enforcement Policy, which is in an Appendix to the Procedural Rules for DOE Nuclear Activities, to state that DOE may use information collected by DOE and the Department of Labor (DOL) concerning whistleblower proceedings as a basis for enforcement actions and civil penalties under the Procedural Rules for DOE Nuclear Activities if the retaliation against DOE contractor employees relates to matters of nuclear safety in connection with a DOE nuclear activity. DOE also confirms the interim amendments to the enforcement policy statement published October 8, 1997.

DATES: This amended Policy and confirmation of the interim rule published October 8, 1997 as final takes effect on April 21, 2000.

FOR FURTHER INFORMATION CONTACT: Keith Christopher, U. S. Department of Energy, Office of Investigation and Enforcement, EH-10, 19901 Germantown Road, Germantown, MD 20874 (301) 903-0100. Ben McRae, U. S. Department of Energy, Office of General Counsel, GC-52, 1000 Independence Avenue, SW, Washington, DC 20585 (202) 586-6975.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Basis for Amendment of Enforcement Policy
- III. Procedural Requirements
 - A. Review Under Executive Order 12866
 - B. Review Under the Regulatory Flexibility Act
 - C. Review Under the Paperwork Reduction Act
 - D. Review Under the National Environmental Policy Act
 - E. Review Under Executive Order 13132
 - F. Review Under Executive Order 12988
 - G. Review Under the Unfunded Mandates Reform Act of 1995
 - H. Congressional Notification

I. Background

The Department of Energy (DOE) has adopted procedural rules in 10 CFR part 820 (Part 820) to provide for the enforcement of violations of DOE Nuclear Safety Requirements for which civil and criminal penalties can be imposed under the Price-Anderson Amendments Act of 1986 (Pub. L. 100-408, August 20, 1988) (PAAA), 56 FR 64290 (proposed Dec. 9, 1991), 58 FR 43680 (final Aug. 17, 1993). Appended to the rule is a General Statement of Enforcement Policy (Enforcement

Policy). The Enforcement Policy sets forth the general framework through which DOE would seek to enforce compliance with DOE's nuclear safety rules, regulations and orders by a DOE contractor, subcontractor, or a supplier (hereinafter referred to collectively as "contractor"). Following that promulgation, DOE amended the Enforcement Policy with an opportunity for comment. 62 FR 52479 (Oct. 6, 1997). No comments were received and the amendments are made final today.

DOE's whistleblower regulations, 10 CFR part 708 (Department of Energy Contractor Employee Protection Program) (Part 708), establish requirements prohibiting retaliation against DOE contractor employees who have undertaken certain whistleblower actions. DOE's Office of Hearings and Appeals (OHA) has responsibility for resolution of whistleblower complaints under Part 708. The regulations provide criteria and procedures to protect employees of DOE contractors who believe they have suffered retaliation for disclosing information concerning danger to public health or safety, substantial violations of law, fraud or gross mismanagement; for participating in congressional proceedings; or for refusing to participate in dangerous activities. If an act of retaliation has occurred, OHA may order reinstatement, transfer preference, back pay, reimbursements of costs and expenses, or other remedies necessary to abate the violation. 10 CFR part 708, 57 FR 7533 (final March 3, 1992), 61 FR 55230 (notice Oct. 25, 1996), 64 FR 12862 (interim final March 15, 1999), 64 FR 37396 (interim final rule and amendment July 12, 1999), 65 FR 6314 (final Feb. 9, 2000), 65 FR 9201 (correction Feb. 24, 2000).

In late 1992, Congress amended the Energy Reorganization Act, 42 U.S.C. 5801, *et seq.* (ERA), to prohibit any employer, including a DOE contractor indemnified under section 170.d of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, *et seq.* (AEA), from discriminating against any employee with respect to his or her compensation, terms, conditions or privileges of employment because the employee assisted or participated, or is about to assist or participate in any manner, in any action to carry out the purposes of the ERA or the AEA. 42 U.S.C. 5851 (ERA Sec. 211). The Department of Labor (DOL) has the responsibility under Sec. 211 to investigate employee complaints of discrimination and may, after an investigation and opportunity for hearing, order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her

former position with back pay, and award compensatory damages, including attorney fees. 29 CFR part 24, 59 FR 12506 (proposed March 16, 1994), 63 FR 6614 (final Feb. 9, 1998).

Before Part 820 was finalized and before § 211 of the ERA was enacted, DOE published a Notice of Clarification (Clarification) of proposed Part 820 to clarify the intended scope of the proposed definition of "DOE Nuclear Safety Requirements" as a basis for civil penalties, and to clarify the relationship between proposed Part 820 and Part 708. 57 FR 20796 (May 15, 1992). This Clarification established that the regulations prohibiting contractor retaliation in Part 708 could constitute DOE Nuclear Safety Requirements if the retaliation resulted from the employee's involvement in matters of nuclear safety in connection with a DOE nuclear activity. Such retaliation against DOE contractor employees would, therefore, be subject to the investigatory and adjudicatory procedures of Part 820, and could lead to the imposition of civil penalties under Part 820.

II. Basis for Amendment of Enforcement Policy

DOE's 1992 Clarification indicated that the provisions of the DOE whistleblower rule in Part 708 could constitute DOE Nuclear Safety Requirements. DOE imposed an affirmative duty on DOE contractors to protect the public, workers, and the environment in matters of nuclear safety relating to DOE nuclear activities by subjecting the contractors to enforcement for retaliation against contractor employees. In particular, if DOE found that a contractor retaliated in response to a worker raising or disclosing legitimate nuclear safety-related information or concerns, the Clarification stated that a violation of Part 820 could exist. 57 FR at 20797, 58 FR at 43681.

Any deterrent to the flow of that information can potentially constitute a violation of DOE Nuclear Safety Requirements that are imposed through the DOE whistleblower protection provisions. This is consistent with the NRC enforcement policy, which subjects licensees to possible civil penalties if they discriminate against employees raising safety issues or otherwise engaging in protected whistleblower activities under the ERA or the AEA. See, e.g., 10 CFR 50.7, 58 FR 52410 (Oct. 8, 1993), 66 FR 24551 (amended May 9, 1995), 61 FR 6765 (amended Feb. 22, 1996).

When DOE put its contractors on notice in 1992 that a violation of the whistleblower provisions of Part 708

could result in civil penalties, the DOL whistleblower proceedings were not an alternative to Part 708. Accordingly, the Clarification did not indicate that information collected by DOL in a whistleblower proceeding could be used as the basis for issuance of a Preliminary Notice of Violation (PNOV) by DOE. Based on experience with DOL proceedings since the Clarification, DOE believes that DOL proceedings serve the same function as a Part 708 proceeding in determining whether a contractor has retaliated against an employee.

DOE is therefore amending the General Statement of Enforcement Policy appended to Part 820 to provide that the Director of the Office of Investigation and Enforcement (Director) may use information that DOL collects in a § 211 proceeding as a basis for enforcement action under Part 820. Specifically, the Director may use this information as the basis for initiating enforcement action by issuing a PNOV. In determining whether to initiate action under Part 820 with respect to an alleged retaliation, the Director would review the report of the investigation, the adjudicative record, and any other relevant material associated with the proceeding to determine if an adequate basis exists to issue a PNOV.

The Director may also use DOL information to support the determination that a contractor has violated or is continuing to violate the nuclear safety requirements against contractor retaliation and to issue civil penalties or other appropriate remedy in a Final Notice of Violation (FNOV). 10 CFR 820.24-820.25.

The Director will have discretion to give appropriate weight to information collected in DOL and in OHA investigations and proceedings. In deciding whether additional investigation or information is needed, the Director will consider the extent to which the facts in the proceedings have been adjudicated as well as any information presented by the contractor.

DOE has a policy of encouraging its contractors to cooperate in resolving whistleblower complaints raised by contractor employees. Accordingly, in deciding whether to initiate an enforcement action, the Director will take into account the extent to which a contractor cooperated in a Part 708 or § 211 proceeding, and, in particular, whether the contractor resolved the matter promptly without the need for an adjudication proceeding.

In considering whether to initiate an enforcement action and, if so, what remedy is appropriate, the Director will also consider the egregiousness of the particular case including the level of

management involved in the alleged retaliation and the specificity of the acts of retaliation.

Normally, the Director will await the completion of the DOL or OHA investigation and related deliberative processes before deciding whether to take any enforcement action in order to avoid duplication of investigative effort. A Part 708 or Sec. 211 proceeding would be considered completed when there is either a final decision or a settlement of the retaliation complaint, or no additional administrative action is available. In egregious cases outlined in the Clarification and included in paragraph 7 of Section XIII, DOE may initiate an investigation and bring an enforcement action before the other proceedings are completed.

It should be noted, however, that any enforcement action in which the Director cites a violation of the whistleblower regulations is separate and distinct from violations arising from the substantive nuclear safety rules in 10 CFR part 830 (nuclear safety management), 10 CFR part 835 (occupational radiation protection), and 10 CFR 820.11 (information accuracy requirements). The Director may begin investigations of noncompliances of these nuclear safety rules at any time based on the underlying nuclear safety concerns raised by the employee regardless of the status of any related whistleblower retaliation proceedings.

III. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be "a significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 31735, Oct. 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule will not have a "significant economic impact on a substantial number of small entities." DOE is not required by the Administrative Procedures Act (5 U.S.C. 553) or any other law to propose this policy statement for public comment. Accordingly, the Regulatory Flexibility Act requirements do not apply to this

rulemaking, and no regulatory flexibility analysis has been prepared.

C. Review Under the Paperwork Reduction Act

No additional information or record keeping requirements are imposed by this policy statement. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act

The Department determined that this policy statement is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and does not require preparation of an environmental impact statement or an environmental assessment. This policy statement amendment clarifies that DOE may use information generated in certain whistleblower proceedings involving DOE contractor employees as the basis for enforcement under procedures applicable to DOE Nuclear Safety Requirements. This action is covered under the Categorical Exclusion found at paragraph A.5. of Appendix A to Subpart D, 10 CFR part 1021, which applies to rulemakings that do not change the environmental effect of the rule being amended.

E. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, Aug. 10, 1999) requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. "Policies that have federalism implications" is defined in the Executive Order to include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This amendment of DOE's enforcement policy would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," (61 FR 4729, February 7,

1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this policy statement meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each federal agency to prepare a written assessment of the effects of any federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year. The Act also requires a federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity to timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE's intergovernmental consultation process under the Unfunded Mandates Reform Act of 1995 is described in a statement of policy published by the Office of General Counsel on March 18, 1997 (62 FR 12820). The policy statement amendment published today does not

contain any federal mandate, so these requirements do not apply.

H. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of this policy statement amendment prior to its effective date. The report will state that it has been determined that the amendment is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects 10 CFR Part 820

Government contracts, Nuclear safety, Whistleblowing

Issued in Washington, DC, on March 14, 2000.

David Michaels,
Assistant Secretary for Environment, Safety
and Health

For the reason set forth in the preamble, Part 820 of Title 10 of the Code of Federal Regulations is amended as set forth below:

PART 820—PROCEDURAL RULES FOR DOE NUCLEAR ACTIVITIES

1. The authority citation for Part 820 continues to read as follows:

Authority: 42 U.S.C. 2201, 2282(e), 7191; 28 U.S.C. 2461 note.

2. Appendix A to Part 820 as amended on October 8, 1997 (62 FR 52479), is adopted as final without change.

3. Appendix A to Part 820 is amended by adding a new Section XIII to read as follows:

Appendix A to Part 820—General Statement of Enforcement Policy

XIII. Whistleblower Enforcement Policy

a. DOE contractors may not retaliate against any employee because the employee has disclosed information, participated in activities or refused to participate in activities listed in 10 CFR 708.5 (a)-(c) as provided by 10 CFR 708.43. DOE contractor employees may seek remedial relief for allegations of retaliation from the DOE Office of Hearings and Appeals (OHA) under 10 CFR part 708 (Part 708) or from the Department of Labor (DOL) under sec. 211 of the Energy Reorganization Act (sec. 211), implemented in 29 CFR part 24.

b. An act of retaliation by a DOE contractor, proscribed under 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a)-(c) concerning nuclear safety in connection with a DOE nuclear activity, may constitute a violation of a DOE Nuclear Safety Requirement under 10 CFR part 820 (Part 820). The retaliation may be subject to the investigatory and adjudicatory procedures of both Part 820 and Part 708. The same facts that support remedial relief to employees under Part 708 may be used by the Director of the Office of Investigation and

Enforcement (Director) to support issuance of a Preliminary Notice of Violation (PNOV), a Final Notice of Violation (FNOV), and assessment of civil penalties. 10 CFR 820.24-820.25.

c. When an employee files a complaint with DOL under sec. 211 and DOL collects information relating to allegations of DOE contractor retaliation against a contractor employee for actions taken concerning nuclear safety, the Director may use this information as a basis for initiating enforcement action by issuing a PNOV. 10 CFR 820.24. DOE may consider information collected in the DOL proceedings to determine whether the retaliation may be related to a contractor employee's action concerning a DOE nuclear activity.

d. The Director may also use DOL information to support the determination that a contractor has violated or is continuing to violate the nuclear safety requirements against contractor retaliation and to issue civil penalties or other appropriate remedy in a PNOV. 10 CFR 820.25.

e. The Director will have discretion to give appropriate weight to information collected in DOL and OHA investigations and proceedings. In deciding whether additional investigation or information is needed, the Director will consider the extent to which the facts in the proceedings have been adjudicated as well as any information presented by the contractor. In general, the Director may initiate an enforcement action without additional investigation or information.

f. Normally, the Director will await the completion of a Part 706 proceeding before OHA or a sec. 211 proceeding at DOL before deciding whether to take any action, including an investigation under Part 820 with respect to alleged retaliation. A Part 706 or sec. 211 proceeding would be considered completed when there is either a final decision or a settlement of the retaliation complaint, or no additional administrative action is available.

g. DOE encourages its contractors to cooperate in resolving whistleblower complaints raised by contractor employees in a prompt and equitable manner. Accordingly, in deciding whether to initiate an enforcement action, the Director will take into account the extent to which a contractor cooperated in a Part 706 or sec. 211 proceeding, and, in particular, whether the contractor resolved the matter promptly without the need for an adjudication hearing.

h. In considering whether to initiate an enforcement action and, if so, what remedy is appropriate, the Director will also consider the egregiousness of the particular case including the level of management involved in the alleged retaliation and the specificity of the acts of retaliation.

i. In egregious cases, the Director has the discretion to proceed with an enforcement action, including an investigation with respect to alleged retaliation irrespective of the completion status of the Part 706 or sec. 211 proceeding. Egregious cases would include: (1) Cases involving credible allegations for willful or intentional violations of DOE rules, regulations, orders or Federal statutes which, if proven, would

warrant criminal referrals to the U.S. Department of Justice for prosecutorial review; and (2) cases where an alleged retaliation suggests widespread, high-level managerial involvement and raises significant public health and safety concerns.

j. When the Director undertakes an investigation of an allegation of DOE contractor retaliation against an employee under Part 820, the Director will apprise persons interviewed and interested parties that the investigative activity is being taken pursuant to the nuclear safety procedures of Part 820 and not pursuant to the procedures of Part 706.

k. At any time, the Director may begin an investigation of a noncompliance of the substantive nuclear safety rules based on the underlying nuclear safety concerns raised by the employee regardless of the status of completion of any related whistleblower retaliation proceedings. The nuclear safety rules include: 10 CFR part 830 (nuclear safety management); 10 CFR part 835 (occupational radiation protection); and 10 CFR part 820.11 (information accuracy requirements).

[FR Doc. 00-6916 Filed 3-21-00; 8:45 am]
BILLING CODE 6450-01-P

FEDERAL ELECTION COMMISSION

11 CFR Part 108

[Notice 2000-4]

Filing Copies of Campaign Finance Reports and Statements With State Officers

AGENCY: Federal Election Commission.
ACTION: Final rules; transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is revising its regulations that govern filing of campaign finance reports with State officers and the duties of State officers concerning the reports. The revisions implement amendments to the Federal Election Campaign Act that exempt States meeting certain criteria from these requirements.

DATES: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 439(d). A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Rita A. Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-1650 or toll free (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act ("FECA" or the "Act"), 2 U.S.C. 431 et seq., at 2 U.S.C. 439(a) requires all persons who

file campaign finance reports and statements under the Act to file copies of these documents with the Secretary of State, or the officer charged by state law with maintaining state election campaign reports. In each State where contributions were received or expenditures made on behalf of a Federal candidate or candidates appearing on that State's ballot. Under 2 U.S.C. 439(b), these officers must receive and maintain the documents for two years after their date of receipt, and must make them available for public inspection and copying during regular business hours.

In 1995, Congress enacted 2 U.S.C. 439(c), which exempts from these receipt and maintenance requirements any State that the Commission determines to have in place a system that permits electronic access to and duplication of reports and statements that are filed with the Commission. Pub. L. 104-79, 109 Stat. 791, section 2. If the Commission does not make this determination, the State remains obligated to maintain copies of the statements and disclosure reports that have been filed with it. These new rules revise the Commission's regulations at 11 CFR Part 108 to reflect this statutory change.

In September 1997, the Commission published a Notice of Proposed Rulemaking ("NPRM") that proposed a number of revisions to the Commission's recordkeeping and reporting requirements, including those addressed in this document, and corresponding changes to the relevant disclosure forms. 62 FR 50708 (Sept. 26, 1997). The Commission received three written comments in response to the NPRM, two of which addressed the state filing issues: one from the Secretary of State of South Dakota, and one from David S. Addington, Esq. In addition, the Internal Revenue Service submitted a comment in which it said that the proposed rules were not inconsistent with their regulations or the Internal Revenue Code. On February 11, 1998, the Commission held a public hearing on the NPRM at which one witness testified but did not discuss waivers of state filing requirements. One further comment was submitted in response to the announcement of the hearing.

The Commission has decided to proceed separately with this portion of the rulemaking, both because these issues are more straightforward than those addressed in other parts of the NPRM, and because the Commission is in the process of granting waivers pursuant to section 439(c) to States that meet certain requirements.

ATTACHMENT 4

Contract Between

—●—○—●—
The United States of America
and
The Regents of the University of California

—●—○—●—
For Management of the
Lawrence Livermore National Laboratory

Supplemental Agreement to
Contract No. W-7405-ENG-48



Effective October 1, 1997

Modification No.: M320
 Supplemental Agreement to
 Contract No.: W-7405-ENG-48

terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

(h) Internal audit. The Contractor agrees to conduct an internal audit and examination, satisfactory to DOE, of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this contract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the Contracting Officer.

(i) Comptroller General.

(1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.

(2) This paragraph may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(3) Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

CLAUSE 3.2 - DEAR 970.5204-13 ALLOWABLE COSTS (MANAGEMENT AND OPERATING) (JUN 1997) (DEVIATION)

(a) Compensation for Contractor's Services. Payment for the allowable costs and the Contractor's indirect costs as hereinafter defined, and of the fees as described in Clause 5.3, Program Performance Fee, shall constitute full and complete compensation for the performance of the work under this contract.

(b) Allowable costs. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the Contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and that are determined to be allowable as set forth in paragraph (c).

(c) Determination of allowability. The determination of the allowability of cost shall be based on

(1) Allowability and reasonableness in accordance with FAR 31.201-2(d) and 31.201-3, provided, however, that the following standard shall be substituted for the first and second sentences of FAR 31.201-3(a): A cost is reasonable if, in its nature and amount, it reflects the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made;

(2) Standards promulgated by the Cost Accounting Standards Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances; and

(3) Recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) below except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) below shall not imply either that it is allowable or that it is unallowable.

(d) Examples of items of allowable cost. Subject to the other provisions of this clause, the following examples of items of cost of work done under this contract shall be allowable to the extent indicated:

(1) Bonds and insurance, including self-insurance, as provided in Clause 4.1, Insurance - Litigation and Claims.

(2) Cafeteria, net cost of operating plant-site cafeteria, dining rooms, and canteens, attributable to the performance of the contract.

(3) Communication costs, including telephone services, local and long-distance calls, telegrams, cablegrams, postage, and similar items.

(4) Consulting services (including legal and accounting), and related expenses, as approved by the Contracting Officer except as made unallowable by subparagraphs (e)(27) and (e)(34).

(5) Costs incurred or expenditures made by the Contractor, as directed, approved or ratified by the Contracting Officer and not unallowable under any other provisions of this contract.

(6) Establishment and maintenance of financial institution accounts in connection with the work hereunder including, but not limited to, service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters. If payments to employees are made by check, facilities and arrangements for cashing checks may be provided without expense to the employees, subject to the approval of the Contracting Officer.

(7) Indemnification of the Pension Benefit Guaranty Corporation, pursuant to the Employee Retirement Income Security Act of 1974, in accordance with FAR 31.205-6(j)(3)(iv).

(8) Litigation expenses (including reasonable counsel fees and the premium for bail bond) necessary to defend adequately an on-site uniformed guard against whom a civil or criminal action is brought based upon an act or acts of the guard undertaken within the course and scope of employment, subject to the approval or ratification, in writing, of the Contracting Officer.

(9) Indirect costs and other oversight costs only to the extent provided in paragraph (f) below.

(10) Losses and related expenses (including settlements made with the consent of the Contracting Officer) sustained by the Contractor in the performance of this contract and certified, in writing, by the Contracting Officer to be reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract. Such certification will not be unreasonably withheld.

(11) Materials, supplies, and equipment, including freight transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use, and disposition thereof, subject to approvals required under other provisions of this contract.

(12) Patents, purchased design, license fees, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the Contracting Officer, and preparation of invention disclosures, reports and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with the cost of DOE funded technology transfer in accordance with paragraph (c), Allowable Cost, of Clause 7.1, Technology

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Transfer Mission, and with Clause 7.7, Patent Rights - Nonprofit Management and Operating Contractors.

(13) Payments to educational institutions for tuition and fees or institutional allowances in connection with fellowship or other research, educational, or training programs.

(14) Personnel costs and related expenses incurred in accordance with the Personnel Appendix (Appendix A). Appendix A sets forth in detail personnel costs and related expenses allowable under this contract. The Contractor will advise the Contracting Officer of any proposed change to the Contractor's personnel policies which relate to this item of cost. Examples of personnel costs and related expenses included in Appendix A are as follows:

- (i) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards; employee counseling services, health or first-aid clinics; house or employee publications; and wellness/fitness centers;
- (ii) Legally required contributions to old-age and survivor's insurance, unemployment compensation plans, and workers compensation plans, (whether or not covered by insurance); voluntary or agreed-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);
- (iii) Recruitment of personnel (including help-wanted advertisement), including service of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the Contractor for employment interviews.
- (iv) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (Contractor) committees, provided, however, that the Contracting Officer's approval is required in each instance of total compensation to an individual employee in excess of the annual rate established in Appendix A when it is proposed that a total of 50 percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary, bonus, and incentive compensation payments;
- (v) Training of personnel (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the Contracting Officer on a case-by-case basis), including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work; and
- (vi) Travel (except foreign travel, which, unless delegated, requires specific approval by the Contracting Officer on a case-by-case basis); incidental subsistence and other allowances of Contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects, and the travel and subsistence of their dependents);

(15) Reasonable litigation and other legal expenses, including counsel fees, if incurred in accordance with Clause 4.1, Insurance - Litigation and Claims, and the DOE-approved Contractor Litigation Management Procedures (including cost guidelines) as such procedures may be revised from time to time, and if not otherwise made unallowable in this contract.

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(16) Rentals and leases of land, buildings, and equipment owned by third parties, allowances in lieu of rental, charges associated therewith, and costs of alteration, remodeling, and restorations, subject to approval by the Contracting Officer except as otherwise provided in this contract.

(17) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities to the extent approved by the Contracting Officer and allowable under paragraph (g) of Clause 6.12, Property.

(18) Stipends and payments made to reimburse travel or other expenses of faculty members and students who are not employed under this contract but are participating in research, educational or training activities under this contract to the extent such costs are incurred in connection with fellowship or other research, educational, or training programs approved by the Contracting Officer.

(19) Subcontracts and purchase orders, including procurements from Contractor-controlled sources, subject to approvals required by other provisions of this contract.

(20) Subscriptions to trade, business, technical and professional periodicals.

(21) Taxes, fees, and charges levied by public agencies which the Contractor is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(22) Technology Transfer costs to the extent provided under paragraph (c) of Clause 7.1, Technology Transfer Mission.

(23) Utility services, including electricity, gas, water and sewage.

(e) Examples of items of unallowable costs. The following examples of items of costs are unallowable under this contract to the extent indicated:

(1) Advertising and public relations costs designed to promote the Contractor or its products, including the costs of promotional items and memorabilia such as models, gifts, and souvenirs, and the cost of memberships in civic and community organizations; except those advertising and public relations costs:

(i) Approved, in advance, by the Contracting Officer as clearly in furtherance of work performed under the contract;

(ii) Specifically required by the contract;

(iii) That arise from requirements of the contract and that are exclusively for recruiting personnel, acquiring scarce items for contract performance, disposing of scrap or surplus materials, the transfer of Federally-owned or originated technology to state and local governments and to the private sector, or acquisition of contract-required supplies and services; or

(iv) Where the primary purpose of the activity is to facilitate contract performance in support of the DOE mission.

(2) Bad debts (including expenses of collection) and provisions for bad debts arising out of other business of the Contractor.

(3) Bidding expenses and cost of proposals except for such expenses and costs which are incurred pursuant to the provisions of the contract, including but not limited to Clause 2.5, Agreements to Perform Non-DOE Activities.

(4) Bonuses and similar compensation under any other name, which:

(i) Are not pursuant to an agreement between the Contractor and employee prior to the rendering of the services or an established plan consistently followed by the contract or,

(ii) Are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or

(iii) Provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(5) Central and branch office expenses of the Contractor, except as included in the payment in lieu of Contractor's indirect costs set forth in (b) above.

(6) Charges for late premium payment related to employee deferred compensation plan insurance.

(7) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the Contractor for the purpose of obtaining Government business.

(8) Contingency reserves.

(9) Contributions, donations, and gifts, including cash, property, or services, regardless of the recipient, except as otherwise provided in this contract or otherwise approved by the Contracting Officer.

(10) Costs of alcoholic beverages.

(11) Costs of bonds and insurance, notwithstanding any other provision of this contract, are unallowable to the extent they are incurred to protect and indemnify the Contractor and/or subcontractor against otherwise unallowable costs, unless such insurance or bond is required by law, the express terms of this contract, or is authorized, in writing, by the Contracting Officer. The cost of commercial insurance to protect the contractor against the costs of correcting its own defects in material or workmanship is an unallowable cost.

(12) Costs of gifts, except gifts do not include awards for performance or awards made in recognition of employee achievements pursuant to an established Contractor plan or policy.

(13) Costs incurred in connection with any criminal, civil, or administrative proceeding commenced by the federal Government or a state, local or foreign government, as provided in Clause 4.4, Cost Prohibitions Related to Legal and Other Proceedings.

(14) Costs of independent research and development excluding Laboratory Directed Research and Development, unless specifically provided for elsewhere in this contract.

(15) Costs of software maintenance made unallowable under subparagraph (e) (1) (iii) (G) of Clause 7.2, Rights in Data - Technology Transfer Activities.

- (16) Costs made unallowable by Clause 11.5, Printing.
- (17) Costs made unallowable by Clause 4.5, Costs Associated with Discriminatory Employee Actions.
- (18) Costs made unallowable by Clause 3.13, Legislative Lobbying Cost Prohibition.
- (19) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Service under the Internal Revenue Code of 1954, as amended, including the straight-line declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight-line method), or sum-of-the-years digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life.
- (20) Dividend provisions or payments and, in the case of sole proprietors, and partners, distributions of profit.
- (21) Entertainment, including costs of amusement, diversion, social activities, and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities; costs of membership in any social, dining, or country club, or organization. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle.
- (22) Facilities capital cost of money. (CAS 414 and CAS 417).
- (23) Fines and penalties, unless, with respect to civil fines and penalties only, the Contractor demonstrates to the Contracting Officer that—
- (i) Such a civil fine or penalty was incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer; or
 - (ii) Such a civil fine or penalty was imposed without regard to fault and could not have been avoided by the exercise of due care.
- (24) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the Contractor from others.
- (25) Insurance (including any provisions of a self-insurance reserve) on any person where the Contractor under the insurance policy is the beneficiary, directly or indirectly; insurance against loss of or damage to Government property as defined in Clause 6.12, Property, except as authorized by the Contracting Officer; and insurance covering any cost which is unallowable under any provision of this contract.
- (26) Interest, however represented (except (i) Interest incurred in compliance with other contract clauses including Clause 4.6, State and Local Taxes, or (ii) imputed interest costs relating to leases classified and accounted for as capital leases under generally accepted accounting principles (GAAP), provided that the decision to enter into a capital leasing arrangement has been specifically authorized and approved by DOE in accordance with applicable procedures and such interest costs are recorded in an appropriately specified DOE account established for such purpose), bond discounts and expenses, and costs of financing and refinancing operations.

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(27) Legal, accounting, and consulting services and related costs incurred in connection with the preparation and issuance of stock rights, organization, or reorganization; prosecution or defense of antitrust suits; prosecution of claims against the United States; contesting actions or proposed actions of the United States; and prosecution or defense of patent infringement litigation (unless initiated at the request of DOE, or except where incurred pursuant to the Contractor's performance of the Government-funded technology transfer mission and in accordance with Clause 4.1, Insurance-Litigation and Claims).

(28) Losses or expenses:

- (i) On, or arising from the sale, exchange, or abandonment of capital assets, including investments;
- (ii) On other contracts, including the Contractor's contributed portion under cost-sharing contracts;
- (iii) In connection with price reductions to and discount purchases by employees and others from any source;
- (iv) That are compensated for by insurance or otherwise or which would have been compensated by insurance required by law or by written direction of the Contracting Officer but which the Contractor failed to procure or maintain through its own fault or negligence;
- (v) That result directly from willful misconduct or bad faith on the part of any of the Contractor's managerial personnel;
- (vi) That represent liabilities to third persons, that are not allowable under Clause 4.1, Insurance-Litigation and Claims; or
- (vii) That represent liabilities to third persons for which the Contractor has expressly accepted responsibility under other terms of this contract.

(29) Maintenance, depreciation, and other costs incidental to the Contractor's idle or excess facilities (including machinery and equipment), other than reasonable standby facilities.

(30) Memberships in trade, business, and professional organizations, except as approved by the Contracting Officer.

(31) Premium Pay for wearing radiation-measuring devices for Laboratory and all-tier cost-type subcontract employees.

(32) Recreation costs, except for the costs of employees' participation in Contractor-sponsored sports teams or employee organizations designed to improve Contractor employee loyalty, team work, or physical fitness.

(33) Rental expenses for commercial automobile, unless approved by the Contracting Officer or authorized by Appendix A.

(34) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organization and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that the other contractor is reimbursed for the services of the individual.

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(35) Special construction industry "funds" financed by employer contributions for such purposes as methods and materials research, public and industry relations, market development, and disaster relief, except as specifically provided elsewhere in this contract.

(36) Storage of records pertaining to this contract after final payment by the Government to the Contractor under Clause 3.5(f), Payments and Advances, unless storage thereafter is required by the Contracting Officer.

(37) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including listing of securities on exchanges, taxes which are paid contrary to Clause 4.6, State and Local Taxes; federal taxes on net income and excess profits; special assessments on land which represent capital improvements; and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(38) Travel expenses of the officers, proprietors, executives, administrative heads, and other employees of the Contractor's central office or branch office organizations concerned with the general management, supervision, and conduct of the Contractor's business as a whole, except to the extent that particular travel is in connection with the contract and approved by the Contracting Officer.

(39) Travel costs of Contractor employees incurred for lodging, meals and incidental expenses which are not in accordance with Appendix A.

(f) (1) Indirect costs. DOE will pay the Contractor a fixed amount for indirect costs for each annual period, or portion thereof as set forth below:

<u>During the Period:</u>	<u>The Amount will be:</u>
10/01/97 - 9/30/98	\$4,400,000
10/01/98 - 9/30/99	\$4,400,000
10/01/99 - 9/30/00	\$4,400,000
10/01/00 - 9/30/01	\$4,400,000
10/01/01 - 9/30/02	\$4,400,000

The University utilizes an integrated system of accounts for the collection of all general and administrative costs associated with University government contracts, including this contract, calculated in accordance with OMB Circular A-21. The above amount is an allocation of the costs of such general and administrative attributable to this contract. This sum shall be paid to the Contractor in equal monthly installments and shall not be subject to adjustment except as provided in Clause 13.2, Termination.

(2) Laboratory Administration Office Costs. DOE will pay the Contractor the costs of the Laboratory Administration Office (LAO) within the University's Office of the President in the amounts not to exceed for the period as set forth below:

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<u>During the Period:</u>	<u>The Not to Exceed Amount will be:</u>
10/01/97 - 9/30/98	\$1,800,000
10/01/98 - 9/30/99	\$1,800,000
10/01/99 - 9/30/00	\$1,800,000
10/01/00 - 9/30/01	\$1,800,000
10/01/01 - 9/30/02	\$1,800,000

These costs shall be a direct charge to Laboratory overhead and shall be paid by the Laboratory to LAO in equal monthly installments of 1/12th the annual amount. All funds not required shall be refunded to the Laboratory and applied to reduce Laboratory overhead. The allowability of costs charged shall be determined in accordance with OMB Circular A-21 and shall be subject to an annual audit of costs.

CLAUSE 3.3 - DEAR 970.5204-75 PRE-EXISTING CONDITIONS ALTERNATE I
 (JUN 1997)

(a) Any liability, obligation, loss, damage, claim (including without limitation, a claim involving strict or absolute liability), action, suit, civil fine or penalty, cost, expense or disbursement, which may be incurred or imposed, or asserted by any party, and arising out of any condition, act or failure to act which occurred before the effective date of this Supplemental Agreement, in conjunction with the management and operation of Lawrence Livermore National Laboratory, shall be deemed incurred under Contract No. W-7405-ENG-48, Modification No. M205 dated November 20, 1992.

(b) The obligations of DOE under this provision are subject only to the availability of appropriated funds.

CLAUSE 3.4 - DEAR 970.5204-15 OBLIGATION OF FUNDS (APR 1994) (MODIFIED)

(a) Obligation of funds. The amount presently obligated by the Government with respect to this contract is \$21,035,406,503 through modification A318. Such amount may be increased unilaterally by DOE by written notice to the Contractor and may be increased or decreased by written agreement of the Parties (whether or not by formal modification of this contract). Estimated collections from others for work and services to be performed under this contract are not included in the amount presently obligated. Such collections, to the extent actually received by the Contractor, shall be processed and accounted for in accordance with applicable DOE Directives. Nothing in this paragraph (a) is to be construed as authorizing the Contractor to exceed limitations stated in financial plans established by DOE and furnished to the Contractor from time to time under this contract.

(b) Limitation on payment by the Government. Except as otherwise provided in this contract and except for costs which may be incurred by the Contractor pursuant to Clause 13.2, Termination, or costs of claims allowable under the contract occurring after completion or termination and not released by the Contractor at the time of financial settlement of the contract in accordance with Clause 3.5, Payments and Advances, payment by the Government under this contract on account of allowable costs shall not, in the aggregate, exceed the amount obligated with respect to this contract, less the total of the Contractor's program performance fee. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of (1)

4.0 LITIGATION AND CLAIMSCLAUSE 4.1 - DEAR 970.5204-31 INSURANCE-LITIGATION AND CLAIMS (JUN 1997)
(MODIFIED)

- (a) The Contractor may, with the prior written authorization of the Contracting Officer, and may, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The Contractor shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer. If the Contractor declines a Government request to initiate litigation, it shall assign its rights and interest in the matter to permit the Government to undertake the action.
- (b) The Contractor shall give the Contracting Officer immediate notice, in writing, of any legal proceeding, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract. Except as otherwise directed by the Contracting Officer, in writing, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action. The Contractor, with the prior written authorization of the Contracting Officer, shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.
- (c) (1) Except as provided in subparagraph (c)(2) below, the Contractor shall procure and maintain such bonds and insurance as required by law or approved, in writing, by the Contracting Officer.
- (2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.
- (3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.
- (d) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable at the discretion of the Contracting Officer.
- (e) Except as provided in paragraphs (g) and (h) below, or specifically disallowed elsewhere in this contract, the Contractor shall be reimbursed--
- (1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and
- (2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to Clause 3.4, Obligation of Funds.

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(f) The Government's liability under paragraph (e) above is subject to the availability of appropriated funds, provided, however that DOE will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies. Except to the extent released under Clause 3.5, Payment and Advances, the obligations of the Government under paragraph (e) above shall survive completion or termination of the contract.

(g) Notwithstanding any other provision of this contract, the Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities, including litigation costs, counsel fees, judgment and settlements)-

(1) Which are otherwise unallowable by law or the provisions of this contract.

(2) For which the Contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer.

(h) In addition to the cost reimbursement limitations contained in DEAR 970.3101-3, and notwithstanding any other provision of this contract, the Contractor's liabilities to third persons, including employees, but excluding costs incidental to worker's compensation actions, (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were directly caused by the willful misconduct or bad faith of the Contractor's managerial personnel.

(i) The burden of proof shall be upon the Contractor to establish that costs covered by paragraph (h) above are allowable and reasonable if, after an initial review of the facts, the Contracting Officer challenges a specific cost.

(j) (1) All litigation costs, including counsel fees, judgments and settlements shall be differentiated and accounted for by the Contractor so as to be separately identifiable. If the Contracting Officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation without the written approval of the Contracting Officer.

(2) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of liabilities referenced in subparagraph (g)(1) above is not allowable.

(k) The Contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the Contractor for any unallowable or unreimbursable costs incurred in connection with contract performance.

(l) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall-

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize DOE representatives to collaborate with in-house or DOE-approved outside counsel in settling or defending the claim or counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage, unless precluded by the terms of the insurance contract; and

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(3) Authorize the Government to settle the claim or to defend or represent the Contractor in or to take charge of any litigation, if required by DOE, if the liability is not insured or covered by bond. Where the Government undertakes the settlement or defense of such claim or litigation, any judgments, settlements, costs and expenses arising from such claim or litigation shall be allowable under the contract or shall be paid directly by the Government.

(4) In any action against more than one DOE contractor, DOE may require the Contractor to be represented by common counsel. Counsel for the Contractor may, at the Contractor's own expense, be associated with the DOE representatives in any such claim or litigation.

(m) The government warrants that in any settlement entered into on behalf of the Contractor pursuant to paragraph (l) of this clause, it shall obtain terms and conditions of settlement for the Contractor that are no less favorable than those applicable to the government under the settlement.

CLAUSE 4.2 - DEFENSE AND INDEMNIFICATION OF EMPLOYEES (SPECIAL)

(a) The Parties recognize that, under California law, the Contractor could be required to defend and indemnify its officers and employees from and against civil actions and other claims which arise out of the performance of work under this contract. Except for defense costs made unallowable by Clause 3.2, Allowable Costs (Management and Operating) subparagraph (e)(27) or the Major Fraud Act (41 U.S.C. §256(k)), the costs and expenses, including judgments, resulting from the defense and indemnification of employees from and against such civil actions and claims shall be allowable costs under this contract if incurred pursuant to the terms of Clause 4.1, Insurance-Litigation and Claims.

(b) Costs and expenses, including judgments, resulting from the defense and indemnification of employees from civil fraud actions filed in federal court by the Government will be unallowable where the employee pleads *nolo contendere* or the action results in a judgment or a conviction.

(c) Where in accordance with California law, the Contractor determines to defend an employee in a criminal action, DOE will consider in good faith, on a case-by-case basis, making the costs and expenses, including judgments, resulting from the defense and indemnification of employees allowable.

(d) The Contractor shall immediately furnish the Contracting Officer written notice of any such claim or civil action filed against any employee of the Contractor arising out of the work under this contract together with copies of all pleadings filed. The Contractor shall furnish to the Contracting Officer a written determination by the Contractor's counsel that the defense or indemnity of the employee is required by the provisions of the California Government Code, that the employee was acting within the course and scope of employment at the time of the acts or omissions which gave rise to the claim or civil action, and that the exclusion set forth under California law for fraud, corruption, or malice on the part of the employee does not apply. A copy of any letter asserting a reservation of rights under California law with respect to the defense or indemnification of such employee shall also be provided to the Contracting Officer. The costs associated with the settlement of any such claim or civil action shall not be treated as an allowable cost unless approved in writing by the Contracting Officer.

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(k) Inclusion in subcontracts. The Contractor shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in subparagraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under Section 170b. of the Act or NRC agreements of indemnification under Section 170c. or k. of the Act for the activities under the subcontract.

(l) Indemnity agreement. This indemnity agreement shall be applicable with respect to nuclear incidents occurring on or after October 26, 1988.

(m) Effect on other contract provisions. To the extent that the Contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of public liability by an order or orders limiting same, pursuant to Section 170e. of the Act, the provisions of any clause providing general authority indemnity shall not apply.

CLAUSE 4.4 - DEAR 970.5204-61 COST PROHIBITIONS RELATED TO LEGAL AND OTHER PROCEEDINGS (JUN 1997)

(a) (1) "Conviction," as used in this clause, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a conviction due to a plea of *nolo contendere*.

(2) "Costs" include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the Contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a proceeding which bears a direct relationship to the proceeding.

(3) "Fraud," as used herein, means-

(i) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents,

(ii) Acts which constitute a cause for debarment or suspension under FAR 9.406-(2)(a) and FAR 9.407-(2)(a), and

(iii) Acts which violate the False Claims Act, 31 U.S.C. §§3729-3731, or the Anti-kickback Act, 41 U.S.C. §51 and §54.

(4) "Penalty" does not include restitution, reimbursement, or compensatory damages.

(5) "Proceeding" includes an investigation.

(b) Except as otherwise described in this clause, costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. §3730, or costs incurred in connection with any criminal, civil or administrative proceeding commenced by the federal Government, or a state, local or foreign government, are not allowable if the proceeding relates to a violation of, or failure to comply with, a federal, state, local or foreign statute or regulation by the Contractor, and results in any of the following dispositions:

(1) In a criminal proceeding, a conviction.

- (2) In a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of Contractor liability.
- (3) In the case of any civil or administrative proceeding, the imposition of a monetary penalty.
- (4) A final decision by an appropriate federal official to debar or suspend the Contractor, to rescind or void a contract, or to terminate a contract for default by reason of a violation of or failure to comply with a law or regulation.
- (5) A disposition by consent or compromise, if the action could have resulted in any of the dispositions described in subparagraphs (b)(1), (2), (3) or (4) above.
- (6) Not covered by subparagraphs (b)(1) through (5) above, but where the underlying alleged Contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of subparagraphs (b)(1) through (5) above.
- (c) (1) If a proceeding referred to in paragraph (b) above is commenced by the federal Government and is resolved by consent or compromise pursuant to an agreement entered into by the Contractor and the federal Government, then the costs incurred by the Contractor in connection with such proceeding that are otherwise unallowable under paragraph (b) above may be allowed to the extent specifically provided in such agreement.
- (2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the Contractor in conjunction with such a proceeding that are not otherwise unallowable by regulation or by separate agreement with the United States, may be allowed if the Contracting Officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.
- (d) If a proceeding referred to in paragraph (b) above is commenced by a state, local or foreign government, the Contracting Officer may allow the costs incurred in such proceeding, provided the Procurement Executive determines that the costs were incurred as a result of compliance with a specific term or condition of the contract, or specific written direction of the Contracting Officer.
- (e) Costs incurred in connection with a proceeding described in paragraph (b) above commenced by the federal government or a state, local, or foreign government and which are not made unallowable by that paragraph, may be allowed by the Contracting Officer only to the extent that:
- (1) The total costs incurred are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;
 - (2) Payment of the costs incurred, as allowable and allocable contract costs, is not prohibited by any other provision(s) of this contract;
 - (3) The costs are not otherwise recovered from the federal Government or a third party, either directly as a result of the proceeding or otherwise; and
 - (4) The amount of costs allowed does not exceed 80 percent of the total costs incurred and otherwise allowable under the contract. Such amount that may be allowed (up to 80 percent limit) shall not exceed the percentage determined by the Contracting Officer to be appropriate, considering the complexity of procurement litigation, generally accepted principles governing the

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award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. The amount of reimbursement allowed for legal costs in connection with any proceeding described in subparagraph (c)(2) above shall be the amount determined to be reasonable by the Contracting Officer but shall not exceed 80 percent of otherwise allowable costs incurred. Agreements reached under paragraph (c) above shall be subject to this limitation. If, however, an agreement explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied.

(f) Contractor costs incurred in connection with the defense of suits brought by employees or former employees of the Contractor under 18 U.S.C. §1031(k), including the cost of all relief necessary to make such employee whole, where the Contractor was found liable or settled, are unallowable.

(g) Costs which may be unallowable under this clause, including directly associated costs, shall be differentiated and accounted for by the Contractor so as to be separately identifiable. During the pendency of any proceeding covered by paragraphs (b) and (f) above, the Contracting Officer shall generally withhold payment and not authorize the use of funds advanced under the contract for the payment of such costs. However, the Contracting Officer may, in appropriate circumstances, provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreements by the Contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

CLAUSE 4.5 - COSTS ASSOCIATED WITH DISCRIMINATORY EMPLOYEE ACTIONS (SPECIAL)

(a) Definitions.

(1) "Adverse determination" means:

(i) A recommended decision under 29 CFR Section 24.6 by an Administrative Law Judge that the Contractor has violated the employee protection provisions of the statutes for which the Secretary of Labor has been assigned responsibility;

(ii) An initial agency decision, under 10 CFR Section 708.10 that the Contractor has engaged in conduct prohibited by 10 CFR Section 708.5; or

(iii) A decision against the Contractor by the Secretary under Section 6006 of Public Law 103-355 of the Federal Acquisition Streamlining Act (41 U.S.C. §265).

(2) "Retaliatory or discriminatory act" means discrimination which will support a claim for relief under 29 CFR Part 24, 10 CFR Part 708, or 41 U.S.C. §265.

(3) "Employee action" means an administrative action brought by an employee of the Contractor under 29 CFR Part 24, 10 CFR Part 708, or 41 CFR Section 265.

(4) "Litigation costs" means attorney, consultant, and expert witness fees, support costs, and related expenses incurred in connection with the defense of an employee action as well as the use of Contractor employees and others to investigate the facts and circumstances of and to defend an employee action subject to this clause, but exclude the costs of settlement, judgment, or Secretarial Order.

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(b) Segregation of costs. All litigation costs incurred in the investigation and defense of an employee action under this clause shall be differentiated and accounted for by the Contractor so as to be separately identifiable.

(c) Allowability of litigation and other costs.

(1) Litigation costs, including the use of alternative dispute resolution, and settlement costs incurred in connection with an employee action under this clause are allowable if the employee action is resolved prior to an adverse determination provided such costs are otherwise allowable under Clause 4.1, Insurance-Litigation and Claims, and other relevant provisions of this contract.

(2) In actions in which an adverse determination is issued, litigation, settlement, and judgment costs, as well as the cost of complying with any Secretarial Order, are not allowable unless:

(i) The Contractor prevails in a proceeding subsequent to the adverse determination at which a final decision is rendered in the action; or

(ii) The Contracting Officer has, on the basis that it is in the best interest of the Government, approved the Contractor's request to proceed with defense of the action rather than entering into a settlement with the employee or accepting an adverse determination or other interim decision prior to a final decision.

(3) Subsequent to an adverse determination, litigation costs, as well as costs associated with any interim relief granted, may not be paid from contract funds; provided, however, the Contracting Officer may, in appropriate circumstances, provide for conditional payment from contract funds upon provision of adequate security, or other adequate assurance, and agreement by the Contractor to repay all litigation costs if they are subsequently determined to be unallowable.

(4) Litigation costs incurred to defend an appeal by the employee from an interim or final decision in the Contractor's favor are allowable provided they are otherwise allowable under Clause 4.1, Insurance-Litigation and Claims, and other relevant provisions of the contract.

CLAUSE 4.6 - DEAR 970.5204-23 STATE AND LOCAL TAXES (APR 1984) (DEVIATION)

(a) The Contractor agrees to notify the Contracting Officer of any state or local tax, fee, or charge levied or purported to be levied on or collected from the Contractor with respect to the contract work, any transaction thereunder, or property in the custody or control of the Contractor and constituting an allowable item of cost if due and payable, but which the Contractor has reason to believe, or the Contracting Officer has advised the Contractor, is or may be inapplicable or invalid; and the Contractor further agrees to refrain from paying any such tax, fee, or charge unless authorized, in writing, by the Contracting Officer. Any state or local tax, fee, or charge paid with the approval of the Contracting Officer or on the basis of advice from the Contracting Officer that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was, in fact, inapplicable or invalid.

(b) The Contractor may take such action as may be requested or approved by the Contracting Officer to cause any state or local tax, fee, or charge which would be an allowable cost to be paid under protest, and may take such action as may be requested or approved by the Contracting Officer to seek recovery of any payments made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the

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U.S. House of Representatives
 Committee on Commerce
 Room 2125, Rayburn House Office Building
 Washington, DC 20515-6115

April 3, 2000

The Honorable Bill Richardson
 Secretary
 Department of Energy
 1000 Independence Avenue, S.W.
 Washington, D.C. 20585

Dear Secretary Richardson:

I am in receipt of a February 24, 2000 letter from Ms. Mary Anne Sullivan, DOE's General Counsel, in response to my January 26, 2000 letter to you regarding acts of retaliation taken by the University of California (UC) against Mr. David Lappa at Lawrence Livermore National Laboratory (LLNL). With respect to this matter, I am disappointed that you and Ms. Sullivan continue to refuse to take the basic steps to ensure a workplace in which employee concerns about safety can be expressed without fear of reprisal. DOE's inaction over the past two years with respect to Mr. Lappa's situation demonstrates a lack of concern for ensuring a safe workplace, and sends a chillingly clear message to employees at LLNL and throughout the complex that whistleblowers are not wanted. Due to DOE's inattention to these matters, LLNL management continued in its retaliation against Mr. Lappa, which resulted in his recent resignation after 20 years of service. Furthermore, records obtained by the Committee indicate that at least one other employee at LLNL has recently raised safety concerns, and is in fear of reprisal.

As you know, in June 1998 the Department of Labor (DOL) found that LLNL retaliated against Mr. Lappa for raising criticality safety concerns at the Plutonium Facility, and ordered reinstatement of his position and salary, among other remedies. Because LLNL's retaliation against Mr. Lappa involves nuclear safety issues, the enforcement provisions of the Price Anderson Amendments Act (PAAA) (10 CFR 820) also apply. Based on documents obtained by the Committee, DOE's Office of Enforcement (EH-Enforcement) recently "reviewed the evidence contained in the documents provided by DOL including its investigation report" and recommended that DOE proceed with a PAAA enforcement action against LLNL. According to recent e-mail messages of Mr. Keith Christopher, Director of EH-Enforcement, EH-Enforcement conducted "the investigation we feel is necessary to reach preliminary conclusions on the merits" and recommended DOE issue "a Severity Level II [preliminary notice of violation] and remitted fine to Lawrence Livermore Laboratory for retaliation against David Lappa for raising safety concerns."

The Honorable Bill Richardson

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According to interviews recently conducted by Committee staff with Ms. Sullivan and Mr. Christopher and a review of documents provided to the Committee, when Ms. Sullivan learned of EH-Enforcement's proposed enforcement actions, she requested a meeting with Dr. David Michaels, Assistant Secretary for Environment, Safety, and Health (ES&H), and Mr. Christopher, to tell them not to issue an enforcement action in the Lappa case. At this January 5, 2000 meeting, Ms. Sullivan raised due process concerns regarding the use of DOL findings as evidence for a PAAA enforcement action in this case, or in any case, until the Department formally notifies its contractors that it intends to do so. Ms. Sullivan's new due process concerns contrast sharply with Dr. Michaels' written responses to follow-up questions that appear in the hearing record of the Oversight Subcommittee's June 29, 1999 hearing on the PAAA program. Dr. Michaels submitted written statements, with the concurrence of DOE's Office of General Counsel, that DOL's investigative findings could be used in determining whether to issue a PAAA enforcement action. Dr. Michaels wrote "DOE is awaiting information from the Department of Labor to determine whether there is a sufficient basis upon which to issue a Notice of Violation."

Nonetheless, in response to Ms. Sullivan's new due process concerns, ES&H decided not to proceed with an enforcement action. However, Mr. Christopher recommended that DOE seek remedy through other means, including DOE's contract with LLNL. According to a January 6, 2000 e-mail from Mr. Christopher, these minimal actions are necessary, because there is "another employee raising safety concerns at this lab and fearing retaliation." Your lead nuclear safety enforcement officer apparently believes DOE's ongoing inaction with respect to LLNL's acts of retaliation against Mr. Lappa may have already created a chilling effect at LLNL that has deterred at least one other LLNL employee from openly raising safety concerns.

In the past several weeks, the Committee has been contacted by several whistleblowers who have described acts of retaliation and discrimination, many of whom are employees at facilities operated by the UC system. As the Committee reviews these matters, I am certain that I will have additional questions for you. There seems to be a much larger problem than you and Ms. Sullivan are willing to recognize. DOE's lack of response to Mr. Lappa's situation -- responding only after repeated requests for action from this Committee -- indicate not only that DOE is unwilling to actively enforce your zero tolerance policy, but that your lack of attention to these matters may have already created a chilling effect at LLNL and throughout the DOE complex, making employees afraid to raise legitimate safety concerns.

For these reasons, and in order to continue our review of this matter, I am requesting that you provide, pursuant to Rules X and XI of the U.S. House of Representatives, the Committee with the following documents and information by April 17, 2000:

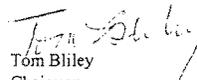
1. Please provide all records relating to Mr. Lappa or his whistleblower complaint. Please do not provide records included in DOE's prior responses.
2. Based on Ms. Sullivan's February 24, 2000 letter to the Committee, it is unclear whether DOE believes LLNL engaged in acts of discrimination which resulted in DOL's June 1998 Order against LLNL. Does DOE believe LLNL engaged in acts of reprisal covered by provisions of 10 CFR 708 or 10 CFR 820 which led to DOL's June 1998 Order? If so, why hasn't DOE initiated its own PAAA investigation?

The Honorable Bill Richardson
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3. According to Ms. Sullivan's February 24, 2000 response to the Committee, "DOE has decided that Mr. Lappa's subsequent claims of reprisal may provide a basis for contractual action. In particular, the Assistant Secretary for Environment, Safety and Health intends to ask the contracting officer to evaluate whether LLNL's handling of the Lappa matter warrants adjustment of LLNL's performance rating and fee determination."
 - a. Please provide an update on whether DOE has determined whether to adjust LLNL's FY 2000 performance rating and fee determination.
 - b. What is meant by "LLNL's handling of the Lappa matter?" Please provide a description of LLNL's handling of the Lappa matter, and why these actions may warrant adjustment of LLNL's performance rating. Are these actions considered acts of discrimination pursuant to provisions of 10 CFR 708 or 10 CFR 820?
 - c. What allowable legal costs have LLNL and DOE incurred relating to Mr. Lappa's whistleblower complaint and FOIA requests?
 - d. According to a July 10, 1998 memorandum from Gary M. Stern to Mary Anne Sullivan, Mr. Stern discussed the issue of allowable costs pursuant to the new whistleblower provision in the UC contract. Please provide a copy of the whistleblower costs provision referred to in this memo. Additionally, please explain why DOE has continued to reimburse LLNL's legal costs. Please also provide any records contained in the contract file that relate to DOE's decision to reimburse LLNL for its legal costs related to Mr. Lappa's complaints.

For purposes of responding to these requests, the terms "records" and "relating" should be interpreted in accordance with the Attachment to this letter, and should include records from all DOE headquarter, operations, field, site, or other offices. If you have any questions, please contact me, or have a member of your staff contact Dwight Cates of the Committee staff at (202) 226-2424.

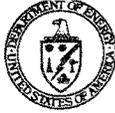
Sincerely,


Tom Bliley
Chairman

cc: The Honorable John D. Dingell, Ranking Member
The Honorable Fred Upton, Chairman, Subcommittee on Oversight and Investigations
The Honorable Ron Klink, Ranking Member, Subcommittee on Oversight and Investigations

ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.
2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.



Department of Energy
Washington, DC 20585

EH-10/10/00

March 3, 2000

MEMORANDUM TO: Brigadier General Thomas Gioconda
Acting Assistant Secretary for Defense Programs

FROM: David Michaels, PhD, MPH
Assistant Secretary
Environment, Safety and Health *DM*

SUBJECT: Whistleblower Case at Lawrence Livermore National Laboratory

This in regard to the Department's response to a claim of whistleblower retaliation from a former engineer of the Lawrence Livermore National Laboratory (LLNL) for raising nuclear safety issues to high level LLNL personnel. The United States Department of Labor (DOL) investigated this matter and in June 1998 issued a Notice of Determination. The Notice of Determination stated that evidence obtained during its investigation indicated that LLNL had discriminated against the engineer for his involvement in protected activities (i.e., his involvement in and his raising of nuclear safety concerns regarding an investigation of criticality infractions). On the basis of this initial investigation, DOL ordered LLNL to undertake several actions to remedy this violation. LLNL did not appeal the decision to an Administrative Law Judge, and when the complainant withdrew his appeal based on the settlement he reached with LLNL, it became a Final Order of the Secretary of Labor.

I am concerned that if employees in fact suffer retaliation for raising nuclear safety concerns, it will have a deterrent effect on the willingness of other workers to feel free to raise safety concerns to their management without fear of reprisal. The ability and willingness of workers to raise such concerns to management for proper resolution is of paramount importance in ensuring a safer work place. Any action that deters this free flow of information is a potentially significant safety issue.

Accordingly, I am requesting that the facts and circumstances of this situation be examined and assessed as part of the evaluation of LLNL's performance in the environment, safety and health area for purposes of determining LLNL's performance rating and associated amount of fee. My staff is available to provide additional information and assist with your review of this matter. In that regard, please contact David Stadler, 903-6457.

cc: J. Turner, Oakland Operations Office
K. Christopher, EH-10
D. Stadler, EH-2



Department of Energy

Washington, DC 20585

February 24, 2000

The Honorable Tom Bliley, Chairman
 Committee on Commerce
 U. S. House of Representatives
 Washington, D. C. 20515

Dear Chairman Bliley:

I am writing to respond to your letter to Secretary Richardson in which you requested an explanation of how DGE's actions with respect to Mr. Lappa, a whistleblower at Lawrence Livermore National Laboratory (LLNL) are consistent with the policy he announced on March 3, 1998, of "zero tolerance" of retaliation against whistleblowers.

First, it is important to note that DOE has investigated Mr. Lappa's claims. With respect to his nuclear safety concerns related to activities at LLNL, the DOE Enforcement Office took detailed sworn testimony from Mr. Lappa regarding these concerns on February 19, 1998. A copy of the deposition was previously provided to the Commerce Committee. On July 28, 1998, after conducting a full field investigation into criticality safety infractions raised by Mr. Lappa at the Plutonium Facility, the Enforcement Office issued a Preliminary Notice of Violation that indicated a civil penalty of \$153,750.00 would have been imposed but for the fact that section 234A of the Atomic Energy Act exempts LLNL from the imposition of civil penalties.

With respect to his whistleblower claims, Mr. Lappa filed a complaint with DOE in November 1997 charging that LLNL violated provisions of 10 C.F.R. Part 708 (Contractor Employee Protection Rule) and retaliated against him. This complaint was referred to the DOE Office of Inspector General for review. Prior to the completion of the investigation of this claim, however, Mr. Lappa decided to pursue his whistleblower claim with the Department of Labor (DOL) under section 211 of the Energy Reorganization Act. DOL investigated the complaint and found that LLNL had discriminated against Mr. Lappa in violation of section 211. On the basis of this initial investigation, DOL ordered LLNL to undertake several actions to remedy this violation. LLNL did not appeal the decision to an Administrative Law Judge and, when Mr. Lappa withdrew his appeal based on the settlement he reached with LLNL, it became a Final Order of the Secretary of Labor.

DOE has considered whether the Final Order of the Secretary of Labor provides a basis for action by DOE. For several reasons, DOE has decided that the Final Order does not provide the basis for the imposition of civil penalties on LLNL. First, as noted previously, section 234A of the Atomic Energy Act expressly exempts LLNL from the imposition of civil penalties. Second, section 234A of the Atomic Energy Act permits the imposition of civil penalties for violations of

regulations issued by other agencies only if DOE expressly incorporates those regulations by reference. DOE has not incorporated the DOL regulations. Third, when DOE put its contractors on notice that a violation of the whistleblower provisions of 10 C.F.R. Part 708 could result in civil penalties, it did not indicate that the factual findings from a DOL whistleblower proceeding would be used as the basis for issuance of a Preliminary Notice of Violation by DOE. This lack of notice is exacerbated by DOE's policy of encouraging its contractors to settle whistleblower claims. LLNL's decision not to contest the initial investigation by DOL was consistent with this policy.

DOE has decided that Mr. Lappa's subsequent claims of reprisal may provide a basis for contractual action. In particular, the Assistant Secretary for Environment, Safety and Health intends to ask the contracting officer to evaluate whether LLNL's handling of the Lappa matter warrants adjustment of LLNL's performance rating and fee determination.

Our review of the Lappa case has highlighted two areas in which action can be taken to enhance our "zero tolerance" policy. The first area is the possible use of the factual findings in a DOL whistleblower proceeding. We believe these DOL proceedings serve the same function as a 10 C.F.R. Part 708 proceeding in determining whether a contractor has retaliated against an employee. Accordingly, we intend to inform our contractors that the factual findings from future DOL proceedings can be used to support issuance of a Preliminary Notice of Violation by DOE.

The second area is reimbursement of litigation costs for whistleblower cases if there is an adverse determination against the contractor. On January 5, 1998 DOE published in the Federal Register a Notice of Proposed Rulemaking on "Costs Associated with Whistleblower Actions." This proposed regulation would authorize contracting officers to disallow litigation costs after a contractor has been found liable in a whistleblower case (i.e., an administrative action brought by an employee under 29 C.F.R. Part 24, 10 C.F.R. Part 708, or 41 C.F.R. Section 265). The regulation is also designed to encourage the use of alternative dispute resolution mechanisms to resolve cases before they get mired in administrative or judicial litigation. Although this regulation has not yet been finalized, since 1995 most DOE contracts have contained a negotiated provision similar to what would be required by the new regulation.

In March 24, 1999, DOE published a notice to reopen the comment period and propose an alternative approach that would add a new cost principle to the acquisition regulations that would address the allowability of costs relating to labor disputes generally, including whistleblower actions. The cost principle would be less prescriptive than the proposed contract clause and would give contracting officers greater discretion to review the facts of each case in determining allowability. The flexibility provided by the cost principle would permit contracting officers to disallow costs of settlements before adverse determinations when there is egregious conduct by the contractor. We intend to conclude the rulemaking on this issue in the near future.

I hope this answers your concerns.

Sincerely,



Mary Anne Sullivan
General Counsel



Department of Energy

Washington, DC 20585

February 10, 2000

Honorable Tom Bliley, Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in partial response to your January 26, 2000 letter concerning David Lappa's whistleblower complaint.

Item number 1 on page two of your letter requests that the Department produce the September 8, 1998, University of California Memorandum between Lawrence Livermore National Laboratory's General Counsel, Jan Tulk, and the Lawrence Livermore National Laboratory's Staff Relations Manager, Robert Perko. I enclose the document with the request that this document be treated as a confidential communication that should not be released to the public.

I am advised that the University of California has asserted, in state court litigation, the attorney/client privilege for this document, which also extends to DOE under the joint defense doctrine. This assertion of privilege is also being litigated in the United States District Court for the Northern District of California. Therefore, we request that the Committee take steps necessary to ensure that the confidentiality of this document will be maintained.

Sincerely,

A handwritten signature in cursive script that reads "Mary Anne Sullivan".

Mary Anne Sullivan
General Counsel

Human Resources

Mail Station: L-708
Ext: 2-9501

IN STRICT CONFIDENCE

Staff Relations

September 8, 1998

To: Jan Tulk
From: Robert Perko
Subject: David Lappa

Pursuant to your request, the following is a summary of the actions that the Laboratory has taken in response to the recommendations from the Department of Labor regarding David Lappa's complaint. I have included the exact wording of the Department of Labor remedies followed by the Laboratory's response to each action.

1. No drop in Mr. Lappa's ranking as long as his performance remains satisfactory. Future ranking and/or raise challenges will be handled in accordance with currently established policy and procedures at LLNL.

Lab response: Mr. Lappa's ranking has been maintained at the same level as the previous year. The current salary review has not taken place to date.

2. Immediate salary adjustment by \$125.00, retroactive to October 1, 1997, making his new salary \$6545.00 per month.

Lab response: Mr. Lappa's salary was adjusted pursuant to the above recommendation on August 1, 1998 with retroactive pay.

3. Expungement of all negative references in Mr. Lappa's personnel file dated from June 1, 1997 to the resolution of the complaint.

Lab response: There were no negative references in Mr. Lappa's personnel file. The file was delivered to Mr. Lappa on July 27, 1998 and he did not object to its content.

4. Expungement of Mr. Lappa's transfer appraisal dated February 1998.

Lab response: On July 27, 1998, Mr. Lappa was given the option of either expungement of the transfer appraisal or including it as an attachment to his FY98 annual performance appraisal. He chose the latter and signed the document on August 27, 1998.

Jan Tulk
September 8, 1998
Page 2

5. Continued good faith efforts to secure an assignment for Mr. Lappa to the Accelerated Strategic Computing Initiative. Assignment to be made when an opening occurs.

Lab response: Mr. Lappa began his new assignment in the Accelerated Strategic Computing Initiative on September 1, 1998.

6. Immediate provision of high-quality, professional career counseling and employment out placement services through Drake Beam Morin in accordance with the terms and conditions of the LLNL contract with that agency.

Lab response: Dorothy Freeman of the Laboratory Career Center met with Mr. Lappa and described the services available to him through the Drake Beam Morin contract. Mr. Lappa will be able to utilize these services at his convenience.

7. Placement assistance to Mr. Lappa by providing a letter of recommendation upon his request.

Lab response: On July 27, 1998, Jens Mahler offered to provide Mr. Lappa a letter of recommendation. Mr. Lappa stated he wasn't requesting it at this time.

8. Immediate provision of 1 month paid leave of absence for rest and recuperation.

Lab response: After several discussions (started on July 27, 1998) with Mr. Lappa, Satish Kulkarni (supervisor) and Jens Mahler, the provision for one month (174 hours) paid leave was provided as follows:

- Converted 140 hours of claims for vacation in FY98 to leave with pay and crediting Mr. Lappa's vacation account by that amount.
- Provided Mr. Lappa with an account number for an additional 34 hours to be used for leave with pay.

9. Immediate provision of \$1,500 to Mr. Lappa for counseling costs.

Lab response: The check was mailed to Mr. Lappa on July 31, 1998 and received by Mr. Lappa on August 1, 1998.

10. Immediate compensation of \$15,000 for compensatory damages.

Lab response: The check was sent to Mr. Lappa on July 31, 1998 and received by Mr. Lappa on August 1, 1998.

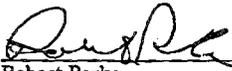
Jan Tulk
September 8, 1998
Page 3

11. Immediate compensation of \$16,000 for attorney fees and incidental expenses connected with this complaint.

Lab response: The check was sent to Lappa's attorney on July 31, 1998 and received by Lappa's attorney on August 3, 1998.

12. Posting in a place where notices are normally posted of notice to employees informing them of their rights under Appendix A to 29 CFR Part 24.

Lab response: Notice was sent to all 700 Laboratory bulletin board monitors for posting on August 4, 1998.


Robert Perko
Division Leader

RP:sh/kc

The Honorable Bill Richardson
Page 2

Furthermore, it seems DOE is going to great lengths to defend UC in a civil suit recently filed by Mr. Lappa in the California Superior Court, including reimbursing UC's legal expenses, and preventing Mr. Lappa's attorneys from deposing DOE personnel. DOE is also withholding several unclassified documents Mr. Lappa has requested through the Freedom of Information Act, in some cases claiming "joint defense" attorney-client privilege to protect certain documents from disclosure.

Last Friday, due what he has described as ongoing acts of retaliation, Mr. Lappa resigned from his position at LLNL. It seems that UC at LLNL has ignored your "zero tolerance" policy, with the aggressive approval of DOE. Furthermore, it seems DOE is actually working against Mr. Lappa by withholding requested documents and witnesses. More troubling, however, is DOE's failure to investigate Mr. Lappa's situation after a commitment from Dr. Michaels to review this matter at our June 1999 hearing. This is unacceptable.

For these reasons, and in order to continue our review of this matter, I am requesting that, pursuant to Rules X and XI of the U.S. House of Representatives, please provide the Committee with the following documents and information by February 9, 2000:

1. Please provide one copy of the September 8, 1998, UC memorandum between LLNL's General Counsel, Jan Tulk, and LLNL's Staff Relations Manager, Robert Perko.
2. Please provide all documents related to Mr. Lappa or his whistleblower complaint.
3. Please explain how DOE's refusal to investigate whistleblower retaliation taken against Mr. Lappa --or in any way admonish UC for its behavior-- is consistent with your March 3, 1998, "zero tolerance" policy.

If you have any questions please contact me, or have a member of your staff contact Dwight Cates of the Committee staff at (202) 226-2424.

Sincerely,



Tom Bliley
Chairman

cc: The Honorable John D. Dingell, Ranking Member
The Honorable Fred Upton, Chairman
Subcommittee on Oversight and Investigations
The Honorable Ron Klink, Ranking Member
Subcommittee on Oversight and Investigations

U.S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration

111 Third Avenue, Suite 715

Seattle, Washington 98101-3212

Reply to the Attention of: FVO/vc

May 6, 1999

*Rhennie L. Smith
President and General Manager
Fluor Daniel Northwest
B3-66
P.O. Box 1050
Hanford, WA 99352-1050*

RE: Fluor Daniel Northwest, Inc./Walli, Killen, Nicacio, O'Leary, and Stull/0-1960-99-008

Dear Mr. Smith:

This is to advise you that we have completed our investigation of the above-referenced complaint filed on February 25, 1999, by Messrs. Randall Walli, Clyde Killen, Pedro Nicacio, Shane O'Leary and James Stull against Fluor Daniel Northwest, Inc., under the employee protection provisions of the ERA, 42 U.S.C. §5851, as amended. The evidence supports a prima facie complaint and merit finding. Respondent has not shown by clear and convincing evidence that the same unfavorable personnel actions would have been taken against the complainants in the absence of their protected activities.

The workplace involved welding and other construction work conducted at Hanford, including areas known as 400, 200 East, 100 North, and 100 K (also known as "K Basins") where exposure to radioactive materials is possible. Fluor Daniel Northwest (FDNW) is a so-called "enterprise" subcontractor of Fluor Daniel Hanford, Inc. Fluor Daniel Hanford is the parent company to FDNW and is the Department of Energy's prime contractor for the Hanford site. The complainants, all pipefitters, were employed at all times material herein by respondent, FDNW. Respondent employs foremen and general foremen to direct the work of its pipefitters. Complainants were supervised by respondent's foremen and a general foreman. Those individuals directed the complainants' work and decided who was selected for layoffs. The complainants and respondent are thus covered under the provisions of the Energy Reorganization Act of 1974, as amended (ERA).

Complainants assert that their employment was terminated in the form of a reduction in force in retaliation for having been involved in activities protected under 42 U.S.C. Section 5851. Complainants Walli, Killen, Nicacio and Stull were laid off by respondent on October 2, 1998. Complainant O'Leary was laid off on November 25, 1998. It should be noted that this is not the first time these complainants have filed complaints with the Department of Labor alleging that respondent discriminated against them because of their protected activities. In 1997, the complainants filed a complaint with the U.S. Department of Labor because they were laid off by respondent. A chronology of activities, including those protected under the ERA, provides a brief background of the circumstances which are related to this current complaint.

- (1) On August 5, 1997, the complainants filed a discrimination complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor. The complainants alleged that Section 211 of the ERA had been violated when they were laid off on June 6, 1997, after voicing numerous safety and environmental concerns to respondent. That complaint was considered timely, and an investigation was conducted in accordance with 29 CFR Part 24. The complaint also included two other pipefitters.
- (2) On October 6, 1997, OSHA issued a finding stating that respondent had violated §5851 when it laid off five of the complainants. OSHA determined that complainant Nicacio and another pipefitter were not discriminated against. The finding identified specific actions respondent should take to remedy the violation, including reinstating the complainants to their former positions.
- (3) On October 10, 1997, respondent appealed OSHA's determination, and an appeal hearing was scheduled for February 27, 1998, before an Administrative Law Judge within the Department of Labor.
- (4) On February 23, 1998, respondent and complainants signed a settlement agreement that included reinstatement of all seven complainants. Respondent also agreed to pay the complainants \$42,000 each plus attorney's fees. The complainants were to report back to work on or about March 10, 1998.
- (5) On March 3, 1998, the seven complainants filed a complaint with their union. The complaint was not filed against respondent. The complaint claimed that fellow union members had violated the union's constitution and bylaws when they "made false statements" to the Department of Labor during the aforementioned investigation.
- (6) On March 4, 1998, respondent decided to lay off seven pipefitters in order to reinstate the complainants. Respondent developed a list with the names of pipefitters selected for layoff. This list also included the following statement: "This reduction of existing personnel does not reflect the employee's (sic) that we feel will better FDNW pipefitter work force, due to the federal mandate to reinstate 7 previously terminated employees." It was signed by twelve foremen and the general foreman.
- (7) Respondent claimed that the complainants had violated the settlement agreement because of their union complaint filed "against the Company witnesses in retaliation for our witnesses providing statements to the U.S. Department of Labor." On March 17, 1998, respondent filed a grievance against Local 598 for accepting complainants' charges and requested their charges be dropped.
- (8) On March 18, 1998, respondent's legal counsel spoke with OSHA regarding concerns that the complainants themselves had retaliated against "Company witnesses." OSHA advised respondent of the protections afforded under the Act for employees participating in a discrimination investigation. No further contact regarding this matter was made by respondent. No discrimination complaints were filed alleging that the complainants retaliated against witnesses.
- (9) On March 24, 1998, a Final Order Approving Settlement and Dismissing Complaint was issued by the Administrative Review Board of the U.S. Department of Labor.

(10) On April 2, 1998, respondent filed a petition in Federal District Court requesting that the "settlement payment be excused" because the complainants had violated it with the filing of their union complaint. Respondent's petition was denied in an Order dated June 22, 1998. 1

These accumulated facts formed the basis of the work environment to which the complainants were reinstated in March 1998. Six months later, four of them were laid off, and another was laid off the following month.

It is our determination that the complainants' allegations have made a prima facie showing in accordance with §29 CFR 24.5. The complainants were involved in protected activities as defined in §24.2 (b) (1), (2), (3), and (c)(1). It is undisputed that respondent had knowledge of their protected activities. The complainants have presented circumstances sufficient to raise the inference that their protected activities were likely a contributing factor in the unfavorable personnel action.

Complainants allege that, upon reinstatement, their working environment was hostile, intimidating and retaliatory. Evidence supports them. On March 4, 1998, respondent's foremen and general foreman signed a handwritten statement indicating that they resented the complainants' reinstatement. Respondent referred to the complainants' return as a "federal mandate." In fact, there was no "federal mandate" to reinstate the complainants. The complainants were brought back through a settlement agreement reached between them and respondent. There is nothing in the agreement that refers to any "federal mandate." It is doubtful that opinions of this type are normally written on a layoff list and signed by all of the foremen. Yet, by doing so, respondent helped to create a hostile work environment for the returning complainants. Respondent had knowledge that a hostile work environment existed after its general foreman signed his name to this statement. Respondent then allowed the same individuals who signed the statement to select the complainants for layoff.

Further evidence of hostility is exhibited by the foremen who directed the work of the complainants. Three foremen were heard making disparaging remarks and comments about the complainants. Jokes were made that the complainants had to pay taxes on their settlement payments. One foreman was heard saying, "...the complainants should have stayed laid off. I'll do anything in my power to get rid of them." Another foreman was so vocal in his hostility towards the complainants, they were warned by other employees to "watch their backs" around him. All of the complainants worked for these foremen after their reinstatement.

Shortly before the layoffs, on October 2, 1998, another foreman told his crew that a layoff was coming, but they would not be affected. By this time, complainant Stull had been assigned to this foreman's crew. In spite of the foreman's assurance, complainant Stull was laid off along with two other pipefitters. The foreman apologized about the layoffs and said the decision was not his, but was made by his supervisor, the general foreman. The foreman was overheard stating that he did not want to lay off complainant Stull, but "had to." After this group was laid off on October 2, they were replaced by 2 pipefitters and an apprentice on October 5. The replacement workers had been transferred from another area.

On October 2, complainants Walli and Killen were also laid off by a foreman who had made disparaging remarks about them. A third pipefitter was laid off with them. At this time, complainant Nicacio worked on a separate crew. Complainant Nicacio was the only pipefitter on his crew who was laid off on October 2. In November 1998, complainant Shane O'Leary was laid off with another pipefitter by a different foreman who was also disgruntled that the complainants were reinstated. Evidence indicates that pipefitters who were laid off with the complainants were vocal in their support of them.

The Act requires that if a prima facie showing is made, respondent must then demonstrate by clear and convincing evidence that the unfavorable actions would have occurred absent the protected conduct.

Respondent has not done so. Respondent has not shown by clear and convincing evidence that it would have laid off the complainants had they not been involved in protected activities. On the contrary, respondent requested that the complaint be dismissed for the following reasons:

- the allegations are not timely;
- other grievance procedures were not used such as filing complaints with the union, or with the Employee Concerns Program;
- the complainants failed to identify any alleged violations on their "Exit Interview Questionnaires;" and
- the complainants' themselves committed brazen acts of retaliation against employees...."

Respondent claims that many of the allegations are not timely. Since these particular complainants were involved in ongoing protected activities that date back to 1997, their allegations can be considered as part of a continuing violation. The Secretary of Labor has adopted a test to determine whether dated allegations can be included under the "continuing violation" theory. This three-step test includes (1) whether the alleged acts involve the same subject matter, (2) whether the alleged acts are recurring, and (3) the degree of permanence (*Webb v. Carolina Power & Light Company*, 1997 WL 530378, DOL Administrative Review Board, August 26, 1997). It is our opinion that complainants' allegations have met this test.

Respondent asserts that the complainants failed to file internal complaints or union complaints or note their concerns on the company's exit forms. The Act does not require an employee to use an employer's internal complaint procedure or file with a union before filing a discrimination complaint with the Department of Labor.

Respondent further claims that the complainants themselves "committed brazen acts of retaliation against employees..." and violated 29 CFR Part 24.9 when they filed union charges on March 3, 1998. Facts indicate that the union charge was not filed against respondent. Complainants' union charges claimed that three employees, including a shop steward, made false statements to the Department of Labor during its 1997 investigation. It alleged that the three employees violated the union's constitution and bylaws with their statements. Although respondent states the complainants retaliated against witnesses, no complaints were filed and no investigation was conducted to support respondent's claim.

Upon learning of the complainants' union charges, respondent took actions of its own. On March 17, 1998, respondent requested that Local 598 withdraw the charge in part because the complainants had "instigated" a "federal agency investigation."

On April 2, 1998, respondent petitioned a federal district court to void its settlement agreement with the complainants. This was filed after the DOL Administrative Review Board approved the settlement agreement and dismissed the 1997 complaint. Respondent based its petition, in part, on the complainants' "whistleblower claim and the Department of Labor's investigation of it." The court denied respondent's petition because the complainants' union charge did not involve respondent, and the complainants were "not seeking anything from" the respondent.

Respondent provided scant evidence to explain why it laid off the complainants. Respondent indicated that "project completion and a proper manpower match" were the reasons the complainants were laid off. Respondent refused to allow its witnesses to be interviewed in this present investigation, which further hampered its ability to provide clear and convincing evidence.

Respondent states that the general foreman and crew foreman select who will be laid off after receiving directions from upper management to discharge a specific number of workers. Seniority is not a consideration for retaining employees; however, criteria such as skill, productivity, and qualification of the

employee will be applied. Respondent merely stated the basis for layoff decisions are part of the Hanford Site Stabilization Agreement (HSSA) without further explanation and without permitting the foremen who made the layoff decisions to testify. Respondent did not say how skill, productivity and qualifications are applied to an individual employee when making layoff decisions.

After the five complainants were laid off, respondent replaced them. Respondent hired five pipefitters and one apprentice after it laid off the complainants. Facts indicate that respondent contacted Local 598 on January 5 and 6, and February 2, 1999, to recruit more pipefitters. Respondent advised Local 598 that the duration of the work was "unknown." Four pipefitters were assigned to work for a foreman who had been opposed to the complainants' reinstatement.

In the absence of evidence to support respondent's denial of discrimination, we are left with a finding for the complainants. The following actions are required to remedy the violations:

1. Reinstatement of the complainants to the positions they held prior to the layoff actions.
2. Immediate and continuing cessation of harassment and intimidation and all acts of reprisal against complainants, or anyone of them, or anyone who acknowledges their support of the complainants for instituting or causing to be instituted any proceeding under or related to 42 U.S.C. Section 5851, as amended.
3. Award of back pay in the amount the complainants would have earned from the effective date of their layoffs to the present. This amount includes consideration of interim earnings and expenses incurred since the layoffs took place.

Complainant	Back pay	Interest	Total
Killen, Clyde	\$36,987.40	\$ 396.94	\$37,384.34
Nicacio, Pedro	\$20,922.79	\$ 219.18	\$21,141.97
O'Leary, Shane	\$24,835.21	\$ 341.41	\$25,176.62
Stull, James	\$23,912.40	\$ 168.12	\$24,080.52
Walli, Randall	\$31,787.40	\$ 292.94	\$32,080.34

4. Pay compensatory damages to each complainant in the amount of \$2,000.00.
5. Payment of complainants' attorney's fees in the amount of \$12,500.
6. Comply with the employee protection provisions of the Energy Reorganization Act of 1974 by implementing training and/or formal discipline for respondent's agents and representatives, including its superintendents, assistant superintendents, general pipefitter foreman and each pipefitter foreman. Advise OSHA in writing of the steps taken to ensure that respondent's agents and representatives are aware of the rights of employees to be free from harassment, intimidation, and other forms of discrimination should employees raise safety, health or environmental concerns. Provide OSHA with this notification within six months from receipt of this notice.
7. Post the attached "Notice to Employees" poster at all Hanford Site Areas where respondent employs pipefitters including, but not limited to, the following Areas: 700, 1100, 3000, 300,

400 (FFTF), 200 West, 200 East, 100 B and C, 100 F, 100 KW and KE (K-Basins), 100 North, and 100 H. Copies of these Notices are to be posted in all places where notices for employees are customarily posted and maintained for a period of at least 60 consecutive days from the date posted. The Notice is to be signed by a responsible official for respondent with the date of actual posting included.

8. Ensure that the federal notice entitled, "Your Rights Under the ERA" is displayed in locations where respondent's employees can readily see it. Under §24.2 (d) (1), this Notice is to be prominently posted by any employer subject to the provisions of the Energy Reorganization Act of 1974. A copy of said notice is attached.

9. Expunge the complainants' individual employment records of any reference to the exercise of their rights under 42 U.S.C. Section 5851, as amended.

10. Provide a neutral job reference for each complainant to include dates of employment, job title, and final wage rate to all potential employers.

If you wish to appeal this finding you may file, within five (5) calendar days of receipt of this notice, with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or overnight/next day delivery service, a request for a hearing on the complaint. Copies of the request for a hearing shall be served on the employer and this office on the same day the hearing is requested by facsimile (fax), telegram, hand delivery, or overnight/next day delivery service. A copy of this letter, along with a copy of the complaint, has been sent to the Chief Administrative Law Judge. Any request for hearing should be sent to:

*Beverly Queen, Chief Docket Clerk
Office of Administrative Law Judges
U.S. Department of Labor
800 K. Street, N.W., Suite 400
Washington, D.C. 20001-8002
Fax No. 202-565-5325*

Unless a request for an appeal is received by the Administrative Law Judge within the five day period, this notice of determination will become the Final Order of the Secretary of Labor. A copy of this letter has also been sent to the Chief Administrative Law Judge with the complaint. If you decide to request a hearing, it is necessary for you to send copies of the request to all affected parties and to the Regional Administrator at the address noted in the above letterhead. After copies of your request are received, appropriate preparations can be made. If you have any questions, please do not hesitate to call me at 206-553-5930.

It should be made clear to all parties that the U.S. Department of Labor does not represent any of the parties in a hearing. The hearing is an adversarial proceeding in which the parties will be allowed an opportunity to present their evidence for the record. The Administrative Law Judge who conducts the hearing will issue a recommended decision to the Secretary based on the evidence, testimony, and arguments presented by the parties at the hearing. The Final Order of the Secretary will then be issued after consideration of the Administrative Law Judge's recommended decision and the record developed at the hearing and will either provide for appropriate relief or dismiss the complaint.

Sincerely,

/s/ Richard S. Terrill

Richard S. Terrill
Regional Administrator

Enclosures: Two Notices (*Your Rights Under the ERA* and Notice to Employees)

cc: Chief Administrative Law Judge
John D. Wagoner, Manager, DOE Hanford
Tom Carpenter, Esq.
Charles MacLeod, Chief Counsel
Richard Fein, Office of Employee Concerns
Russell Wise, Allegations Coordinator
James Lieberman, Director, Office of Enforcement
Randall Walli
Clyde Killen
Pete Nicacio
Shane O'Leary
James Stull

ORIGINAL
FILED

MAY 09 2000

RICHARD W. WIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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DAVID A. LAPPA,)	
)	C-99-04196 MEJ
Plaintiff(s),)	
)	ORDER RE: PLAINTIFF'S
vs.)	MOTION FOR SUMMARY JUDGMENT
)	AND DEFENDANT'S CROSS-MOTION
RICHARDSON, et al.,)	FOR SUMMARY JUDGMENT
Defendant(s))	

Plaintiff, David A. Lappa, a former employee of Lawrence Livermore National Laboratory ("LLNL"), filed an action under the Freedom of Information Act ("FOIA") seeking the production of documents in the possession of Defendants, Bill Richardson, Secretary, United States Department of Energy, and the United States of America. Pending before the Court is Plaintiff's motion for summary judgment filed on October 27, 1999, and Defendants' cross-motion for summary judgment filed on November 18, 1999.

FACTUAL BACKGROUND

On December 17, 1998, Plaintiff served a Freedom of Information Act request on the Oakland Office of the Department of Energy ("DOE"). Plaintiff contends that some personnel-related documents were eventually provided by the DOE, and the request was closed. On March 24, 1999, Plaintiff revised his initial FOIA request and specifically requested the following:

1 (1) Information, documents, notes and any memoranda related to
 2 the incidents and investigations into criticality safety infractions in
 3 LLNL's B332 during 1997 (Doug Eddy and Henry Rio), including
 specifically the notes of Henry Rio in connection with his service on the
 Incident Analysis Committee during July through September 1997.

4 (2) Information, documents, notes and any memoranda related to
 David Lappa's contacts with the DOE-OIG, beginning in
 5 August/September 1997 (Rolando Delacruz) and resuming in December
 1997 (Ray Rayner and Al Walter).

6 (3) Information, documents, notes and any memoranda related to
 David Lappa's December 1997 complaint filed under 10 C.F.R. 708 with
 DOE Oakland (Mark Barnes).

7 (4) Information, documents, notes and any memoranda related to
 David Lappa's contacts with the Defense Nuclear Safety Board,
 8 beginning in December 1997 (Woody Cunningham, Richard Azzarro,
 and Richard Shapira);

9 (5) Information, documents, notes and any memoranda related to
 10 any DOE disciplinary or corrective actions taken in connection with the
 June 1998 Department of Labor's finding of reprisals against David
 Lappa by the University of California.

11 (Compl. Exhibit EE).

12 On May 18, 1999, the Department of Energy responded to items 2, 3, and 5 of Plaintiff's
 13 March 24, 1999, request.¹ (Compl. Exhibit FF). With respect to item 2, the DOE in Oakland
 14 indicates that they located two documents which were forwarded to the Department of Energy's
 15 Office of the Inspector General ("DOE-OIG") for their determination of whether said documents
 16 should be released. With respect to item 3, the DOE indicates that some personal notes,
 17 electronic mail, and draft documents were withheld pursuant to Exemption 5 of FOIA. On May
 18 19, 1999, the DOE-OIG informed Plaintiff that it had been assigned Plaintiff's request with
 19 respect to two documents located by the DOE and that it would provide a response upon
 20 completion of its review of said documents. (Compl. Exhibit GG). On June 14, 1999, Plaintiff
 21 filed an appeal with respect to items 1 and 3 of his March 24, 1999, request, which the DOE
 22 FOIA office in Washington D.C., granted in part and denied in part. On August 19, 1999, the
 23 DOE Oakland Office issued a new determination letter denying Plaintiff's request as to: (1) a
 24 copy of a memorandum between the Lawrence Livermore National Laboratory (LLNL) Staff
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26 ¹ While the response letter does not indicate that it is responding to item 1 of Plaintiff's March 24, 1999,
 27 request, it is apparent from Plaintiff's June 14, 1999, appeal that at some point the DOE denied Plaintiff's request as
 to item 1 of his March 24, 1999, request.

1 Relations Division Leader, Robert Perko, and LLNL's Attorney, Jan Tulk and (2) two notebooks
2 belonging to Douglas Eddy and Henry Rio, employees of the DOE. (Compl. Exhibit JJ).

3 On July 19, 1999, Plaintiff served a second FOIA request on the DOE. (Compl. Exhibit
4 KK). On July 27, 1999, Plaintiff's counsel received a letter indicating that the DOE had received
5 the second request. *Id.* According to Plaintiff, no response has been received as to his second
6 request beyond the letter acknowledging receipt of the request.

7 Also in July of 1999, Plaintiff made a request to DOE General Counsel Marc Johnston
8 that Sharon Hurley, Henry Rio, Richard Trevillian, and other DOE employees be made available
9 to testify for depositions. (Compl. Exhibit LL). Plaintiff contends that the request was denied on
10 the basis that the materials requested were all public, the testimony would be duplicitous, and the
11 relevance and materiality of the testimony, was questionable. However, Plaintiff admits that the
12 DOE agreed to make Henry Rio available on limited terms.

13 On September 13, 1999, Plaintiff filed a Complaint seeking declaratory and injunctive
14 relief. On October 27, 1999, Plaintiff filed the instant motion for summary judgment. On
15 November 18, 1999, Defendants filed an opposition to Plaintiff's motion for summary judgment
16 and a cross-motion for summary judgment. On November 29, 1999, Plaintiff filed a reply brief
17 and an opposition to Defendants' cross-motion for summary judgment. On December 7, 1999,
18 Defendants filed a supplemental memorandum in support of their cross-motion for summary
19 judgment. The supplemental memorandum was filed without leave of Court and is stricken
20 pursuant to Federal Rule of Civil Procedure 12(f). On December 9, 1999, the Court heard oral
21 argument from the parties on Plaintiff's motion for summary judgment and Defendants' cross-
22 motion for summary judgment. On December 22, 1999, the Court granted Plaintiff's request for
23 the Court to consider a recent article in conjunction with Plaintiff's summary judgment motion.
24 On May 8, 2000, the Court granted Plaintiff's request ex parte request for the Court to consider
25 additional documents attached as Exhibit A to said request.

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DISCUSSION

I. Exhaustion of Available Administrative Remedies

A plaintiff must exhaust his or her available administrative remedies prior to seeking judicial review in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision. Stebbins v. Nationwide Mut. Ins. Co., 757 F.2d 364, 366 (D.C.Cir.1985); United States v. United States District Court, 717 F.2d 478, 480 (9th Cir.1983) (Upon exhaustion of administrative remedies, person not satisfied with agency's response to document request may institute civil suit in district court for judicial review). FOIA sets out an administrative appeal process. 5 U.S.C. § 552(a)(6)(A)(i), (ii). The complainant must comply with administrative procedures in making his or her request, and have the request improperly refused before a court action can be brought under the FOIA. See 5 U.S.C. § 552(a)(1), (2) & (3), and 5 U.S.C. § 552(a)(4)(B). Consequently, if a plaintiff files a court action before properly exhausting his or her administrative remedies, a court lacks jurisdiction over those issues that have not been exhausted. United States v. Steele 799 F.2d 461, 465 (9th Cir. 1986).

However, if the administrative agency fails to respond to the FOIA request within the twenty working days or fails to extend the time limit by written notice of unusual circumstances, the exhaustion requirement is deemed waived. See 5 U.S.C. § 552(a)(6)(A)(i), 5 U.S.C. § 552(a)(6)(B)(i) and 5 U.S.C. § 552(a)(6)(C).² As provided in section 552(a)(6)(C), "[a]ny person making a request to any agency for records ... shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions" "Thus, a requester who has not received a timely notice of the agency's decision, as required by 5 U.S.C. § 552(a)(6)(A)(i), may proceed immediately in court to enforce a FOIA request without exhausting any administrative remedies." Pollock v. Department of Justice, 49 F.3d 115, 119 (4th Cir.1995) (internal citations omitted) (plaintiff

² 5 U.S.C. § 552(a)(6)(A)(i) was amended in 1996 to provide an agency twenty days to respond to a FOIA request, rather than ten days as previously provided.

1 entitled to file suit one year after making request without appealing to agency head or seeking
2 further explanation as to why his request had not been processed).

3 However, if an agency responds to a FOIA request before the requester files suit, the
4 twenty-day constructive exhaustion provision in 5 U.S.C. § 552(a)(6)(C) no longer applies;
5 actual exhaustion of administrative remedies is required. Oglesby v. Department of Army, 920
6 F.2d 57, 61 (D.C.Cir.1990). An agency's response is sufficient for purposes of requiring an
7 administrative appeal if it includes: the agency's determination of whether or not to comply with
8 the request; the reasons for its decision; and notice of the right of the requester to appeal to the
9 head of the agency if the initial agency decision is adverse. 5 U.S.C. § 552(a)(6)(A)(i)

10 A. Plaintiff's Initial FOIA Request

11 Plaintiff's initial FOIA request was made to the DOE on December 17, 1998. (Compl.
12 Exhibit Z). On March 24, 1999, Plaintiff revised his request by letter. (Compl. Exhibit EE).
13 The DOE responded in part to Plaintiff's revised request on May 18, 1999. (Compl. Exhibit FF).
14 The DOE granted in part and denied in part Plaintiff's request as to items 2, 3, and 5 of his
15 revised request. Id. The letter specifically states that Plaintiff may appeal any denial of his
16 request. Id.

17 On June 14, 1999, Plaintiff appealed the DOE's denial of Plaintiff's items number (1) and
18 (3) of Plaintiff's revised request under Exemption 5 of FOIA. (Compl. Exhibit HH). On July 14,
19 1999, Plaintiff's appeal was granted in part and the matter was remanded to the DOE Oakland
20 office for a further determination and explanation for the Office's denial of Plaintiff's requests
21 under Exemption 5 of FOIA. (Compl. Exhibit II). On August 19, 1999, the DOE issued a new
22 determination letter in accordance with the remand by the DOE Office of Hearings and Appeals
23 ("DOE-OHA"). (Compl. Exhibit JJ). Defendant's new determination letter denied Plaintiff's
24 request as to the following documents pursuant to §552(b)(5): (1) a September 8, 1998,
25 memorandum from R. Perko, a Laboratory Staff Relations manager to J. Tulk, Laboratory
26 Counsel and (2) notebooks maintained by Douglas Eddy and Henry Rio, DOE Oakland
27 employees. Id. The letter specifically states that any denial should be appealed within thirty
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1 days of the receipt of the denial. Id.

2 Plaintiff received a new determination letter on August 19, 1999, from the Oakland
3 Office of the DOE. Plaintiff was afforded the opportunity to appeal the new determination letter
4 to the DOE within thirty days. Plaintiff did not file an appeal. Instead, Plaintiff filed this lawsuit
5 on September 13, 1999.

6 One of the main purposes that the administrative appeals process serves is to allow the
7 agency to reflect on its own decision. McKart v. United States, 395 U.S. 185, 194-95 (1969),
8 cited in United States v. Steele, 799 F.2d 461, 465 (9th Cir. 1986). Here, the agency was not
9 afforded that opportunity. It would undermine the exhaustion requirement if this Court were to
10 find that Plaintiff had exhausted his administrative remedies. On Plaintiff's first appeal, the
11 DOE-OHA remanded the denial of Plaintiff's requests for further determination by the DOE
12 Oakland Office.³ The DOE Oakland Office then issued a new determination letter, the proper
13 course of action was for Plaintiff to seek review of the new determination letter on appeal at the
14 DOE. See United States v. Agunbiade, 1995 WL 351058, *4, No. CR-610(s)-02, (E.D.N.Y. 1995)
15 (holding that while defendant appealed the adverse determination rendered by the agency, that
16 failure to appeal the determination of the agency on remand was a failure to exhaust available
17 administrative remedies). The DOE has been denied the opportunity to reflect and review the
18 DOE Oakland Office's decision and reasoning set forth in its determination letter of August 19,
19 1999.

20 Moreover, the Court finds that exhaustion of Plaintiff's administrative remedies would
21 not be futile. Again, one of the purposes behind the exhaustion doctrine is the opportunity for
22 the agency to exercise its discretion and knowledge and to make a record for the district court to
23 review. McKart v. United States, 395 U.S. 185, 194-95, (1969); Strauman v. Watt, 656 F.2d

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25 ³ The language of the Hearings and Appeal letter indicates that Plaintiff's motion for appeal is granted in so
26 much as the DOE must issue a new determination letter (Compl. Exhibit II). The letter also states that Plaintiff can
27 seek judicial review of the Hearings and Appeals Office decision. While Plaintiff may have sought judicial review after
28 the decision by the Office of Hearings and Appeals remanding the matter to the Oakland Office of the DOE for further
29 explanation. Once the new determination letter was issued by the Oakland Office of the DOE, Plaintiff must appeal the
30 new determination letter.

1 1321, 1326 (9th Cir. 1981)(citations omitted). Here, the DOE has not had an opportunity for its
2 DOE-OHA Office to review the new determination letter on appeal and utilize its expertise and
3 judgment in reviewing said letter. Moreover, the DOE-OHA has not had the opportunity to
4 create a record for the District Court to review. While the DOE-OHA may deny Plaintiff's
5 appeal of the new determination letter, this in and of itself, does not compel this Court to find
6 that exhaustion would be futile. See United States v. Steele, 799 F.2d 461, 466 (9th Cir. 1986)
7 (concluding that exhaustion of administrative remedies would not be futile despite Plaintiffs'
8 argument that the government had clearly stated that it would not release the requested
9 information). Here, there is an even greater indication than in Steele that the DOE-OHA should
10 have the opportunity to review and reflect the new determination letter by the DOE Oakland
11 Office. Counsel for Defendants have taken a different position in oral argument and in briefing
12 than the position reflected in the new determination letter issued by the Oakland Office of the
13 DOE. Specifically, Defendants now claim that the Rio and Eddy notebooks are not "agency"
14 records within the meaning of FOIA. Consequently, the agency should have the opportunity to
15 review and reflect on the new determination letter issued by the DOE Oakland Office and the
16 opportunity to exercise its administrative review of the DOE Oakland Office's determination.
17 Thus, exhaustion of Plaintiff's available administrative remedies would not be futile.

18 Accordingly, the Court finds that it does not have subject matter jurisdiction over
19 Plaintiff's revised first FOIA requests number (1) and (3) because Plaintiff has neither actually,
20 nor constructively exhausted his available administrative remedies. Therefore, the Court
21 DISMISSES without prejudice Plaintiff's complaint seeking judicial review of items (1) and (3)
22 of his revised first FOIA request for failure to exhaust his available administrative remedies.

23 **B. Plaintiff's Second FOIA Request and Item 2 of Plaintiff's March 24, 1999**
24 **Request**

25 Item 2 of Plaintiff's March 24, 1999, request was forwarded by the Oakland Office of the
26 DOE to the DOE-OIG in Washington D.C. Plaintiff has not received a determination as to
27 whether the DOE-OIG either grants or denies his request for those documents forwarded to said
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1 office. Accordingly, Defendant has not responded to Plaintiff's FOIA request within the
 2 statutorily imposed time limit of twenty days. Consequently, Plaintiff has constructively
 3 exhausted his administrative remedies with respect to Item 2 of Plaintiff's March 24, 1999,
 4 request.

5 On July 19, 1999, Plaintiff filed a second FOIA request. (Exhibit KK). No response has
 6 been received to Plaintiff's second request, yet Defendants contend that the response is
 7 forthcoming. However, more than twenty days have passed since Plaintiff filed his second FOIA
 8 request with the DOE on July 19, 1999 and no unusual circumstances for the delay in responding
 9 have been demonstrated. Because the DOE has not responded to Plaintiff's July 19, 1999,
 10 request within the statutory time limit proscribed by 5 U.S.C. § (a)(6)(A)(i), Plaintiff has
 11 constructively exhausted his July 19, 1999 FOIA request submitted to the DOE.

12 II. Summary Judgment Standard

13 "Summary judgment may be granted only when the moving party demonstrates that
 14 'there is no genuine issue as to any material fact and that the moving party is entitled to a
 15 judgment as a matter of law.' Fed.R.Civ.P. 56(c); see also, Celotex Corp. v. Catron, 477 U.S.
 16 317, 322 (1986). In a FOIA case, a defendant agency is entitled to summary judgment if viewing
 17 all facts in favor of plaintiff, the agency can:

18 demonstrate that it has conducted a search reasonably calculated to uncover all
 19 relevant documents. Further, the issue to be resolved is not whether there
 20 might exist any other documents possibly responsive to the request, but rather
 21 whether the search for those documents was adequate. The adequacy of the
 search, in turn, is judged by a standard of reasonableness and depends, not
 surprisingly, upon the facts of each search the agency may rely upon reasonable
 detailed, nonconclusory affidavits submitted in good faith.

22 Zemansky v. United States E.P.A., 767 F.2d 569, 571 (9th Cir. 1985)(internal quotation
 23 marks and citations omitted).

24 A. FOIA Documents at the Office of the Inspector General

25 Two documents in item 2 of Plaintiff's March 24, 1999, revised request were forwarded
 26 to the DOE Office of the Inspector General. Plaintiff's second request was propounded directly
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1 on the Washington, D.C. Office of the DOE.

2 Plaintiff contends that the records of the DOE-OIG have been effectively withheld from
3 Plaintiff. Plaintiff submitted his first request to the Oakland office of the DOE in December of
4 1998 and his second request to the DOE in Washington, D.C. in July of 1999. In response, the
5 Oakland Office of the DOE referred two documents identified as possibly responsive to item 2 of
6 Plaintiff's March 24, 1999, request to the DOE-OIG. To date, there has been no determination
7 letter with respect to these two documents that were referred to the DOE-OIG. Moreover, there
8 has been no response by the DOE to Plaintiff's July 19, 1999, request. Plaintiff contends that the
9 DOE's delay in responding to his requests constitutes a *de facto* denial of Plaintiff's requests.

10 Defendants argue that Oakland was required to forward the request to the DOE Office of
11 the Inspector General and that the request remains in process. Defendants argue that Plaintiff's
12 requests have not been denied by the DOE and the requests have not been appealed
13 administratively. Defendants' further contend that Plaintiff's motion is premature and not ripe
14 for disposition by this Court.

15 The Court finds that there has been no response to Plaintiff's requests that remain
16 pending at the DOE-OIG in Washington D.C. The explanation that the documents were
17 forwarded is not a response within the statutory guidelines. 5 U.S.C. § 552(a)(6)(A)(i) requires
18 the agency to set forth the agency's determination of whether or not to comply with the request,
19 the reasons for its decision; and notice of the right of the requester to appeal to the head of the
20 agency if the initial agency decision is adverse. The Department of Energy has not presented
21 evidence to this Court that it has provided Plaintiff with a response in accordance with the
22 statutory guidelines. As of the date Defendants filed their opposition to Plaintiff's motion for
23 summary judgment, Defendants have had nearly four months to conduct an adequate search for
24 the documents contained in Plaintiff's second FOIA request and arguably almost a year since
25 Plaintiff's March 24, 1999, FOIA request. Accordingly, as indicated above Plaintiff has
26 constructively exhausted his available administrative remedies and Plaintiff's request for judicial
27 review of the DOE's actions are ripe for adjudication.

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1 Here, the Court finds that the Department of Energy has improperly denied Plaintiff's
2 FOIA request as to his July 19, 1999 request and as to item 2 of his March 24, 1999, request.
3 Plaintiff made his FOIA requests and has waited almost ten months for a response from the
4 Department of Energy. Defendants do not dispute that the DOE-OIG has made no determination
5 as to the two documents identified and forwarded to the DOE-OIG with respect to Plaintiff's
6 March 24, 1999, request. Nor do Defendants dispute that there has been no determination letter
7 denying or granting the entirety of Plaintiff's second request of July 19, 1999, propounded on the
8 DOE in Washington, D.C. Defendants argue that the requests are in process.

9 While Defendant's counsel argues that on-going negotiations between Plaintiff's counsel
10 and Defendant's counsel have justified the delay in responding to Plaintiff's FOIA requests, the
11 Court finds no evidence of these continuing negotiations in the record.⁴ The declaration of
12 Richard Vergas sheds no light on any on-going negotiations between the parties other than the
13 August 4, 1999, and on August 10, 1999, letters referenced in footnote 4. The statutory response
14 period to a FOIA request is currently twenty days. 5 U.S.C. § 552(a)(6)(A)(i). More than twenty
15 days have passed since Plaintiff's FOIA requests and Defendants have not provided a sufficient
16 response as required by statute. Moreover, Defendants have proffered no evidence that they have
17 conducted any search for Plaintiff's second FOIA requests, nor have Defendants submitted any
18 evidence, in the form of affidavits or otherwise, indicating why they have not made a
19 determination as to the two documents forwarded to the DOE-OIG for a determination.⁵

20 Additionally, Defendants have submitted no evidence explaining why the agency has
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22 ⁴ The only evidence submitted by Defendants are (1) an August 4, 1999, letter sent to Plaintiff's counsel
23 indicating that Plaintiff had not addressed the criteria entitling Plaintiff to a waiver of fees for his July 19, 1999, request
24 and that his request would not be processed unless Plaintiff contacted the DOE by August 18, 1999, and (2) an August
25 10, 1999, letter in which Plaintiff's counsel responded to the DOE's August 4, 1999, letter. (Def.'s Oppos. Exhibit B)
The fact that the parties were discussing who was going to pay for the FOIA requests does not excuse the Defendants
from providing Plaintiff with a response to his FOIA requests as to whether or not Defendants were going to deny or
grant his requests. Moreover, the Court notes that the DOE still has not responded to Plaintiff's requests.

26 ⁵ The only case that Defendants cite to Stebbins v. Nationwide Mutual Insurance Co., 757 F.2d 364 (D.D.C.
27 1985), is simply not on point with respect to Defendants' argument that their failure to respond to Plaintiff's requests to
28 date does not constitute a *de facto* denial of Plaintiff's requests.

1 been unable to respond to Plaintiff's requests as set forth in 5 U.S.C. § 552(a)(6)(A)(C). There
2 has been no evidence of a backlog of FOIA requests preventing the agency from conducting a
3 reasonable search. Moreover, with respect to the two documents forwarded to the DOE-OIG, the
4 documents have been identified and thus, the agency needs only to make a determination as to
5 whether the documents are exempt. Consequently, the Court finds that Defendants have not
6 responded to Plaintiff's FOIA requests as proscribed by 5 U.S.C. § 552.

7 Accordingly, the Court grants Plaintiff's motion for summary judgment and denies
8 Defendant's motion for summary judgment with respect to those FOIA requests which the DOE
9 forwarded to the DOE-OIG and Plaintiff's July 19, 1999, request. The Court finds that
10 Defendants failure to respond to Plaintiff's requests violates 5 U.S.C. § 552. The statute does not
11 indicate what remedy the court should impose on the Defendants for failure to respond to
12 Plaintiff's FOIA requests. See How the Electronic Freedom of Information Act Amendments of
13 1996 Update Public Access For the Information Age, Michael E. Tankersley, 50 Admin. L. Rev.
14 421, 457 (1998). However, the Court finds that the appropriate remedy in this action is to order
15 Defendant to respond to Plaintiff's requests. Accordingly, Defendants shall fully respond to
16 Plaintiff's July 19, 1999, FOIA request and item two of Plaintiff's March 24, 1999, FOIA request
17 by May 16, 2000. Defendant shall produce by May 22, 2000, any documents responsive to
18 Plaintiff's requests which do not fall within the FOIA exemptions.

19 **B. Testimony of Federal Employees on Behalf of Plaintiff**

20 **1. Background**

21 On June 30, 1999, Plaintiff requested that the DOE allow DOE employees, Henry Rio,
22 Douglas Eddy and Sharon Hurley be available for deposition testimony as well as for testimony
23 at Plaintiff's state court trial. (Compl. Exhibit LL). On July 29, 1999, Marc Johnston, Deputy
24 Counsel for the DOE, requested that Plaintiff submit an affidavit explaining in detail the
25 testimony Plaintiff seeks from the three DOE employees pursuant to 16 C.F.R. § 202.23(b).
26 (Compl. Exhibit NN). On August 2, 1999, Plaintiff provided the DOE with clarification of the
27 testimony Plaintiff seeks from the DOE witnesses. (Compl. Exhibit MM). On August 11, 1999

1 Mr. Johnston, Deputy General Counsel to the DOE, sent a letter to Plaintiff denying Plaintiff's
 2 request for the testimony of DOE witnesses in conjunction with Plaintiff's state law suit. (Compl.
 3 Exhibit NN). The letter states in pertinent part:

4 after reviewing the additional materials, we still do not see why you need
 5 these DOE employees to testify in the lawsuit. The Department of Labor
 6 issued a finding in response to your client's charges against the
 7 laboratory. Furthermore, I understand that almost all of the materials
 8 generated by the DOE during its review of the matter are public and have
 9 been provided or are available to you. Considering only those factors, it
 10 appears that any testimony you could elicit from the DOE employees
 11 would only duplicate that which you already have. Furthermore, the
 12 relevance and materiality of such testimony to your case, in our view,
 13 appears to be questionable.

14 (Compl. Exhibit NN). On August 20, 1999, Plaintiff submitted a request to the DOE seeking
 15 testimony of DOE witnesses: Henry Rio, Douglas Eddy, Sharon Hurley, Richard Trevillian,
 16 Rolando Delacruz, Chuck Lewis, Al Walter, Ray Rayner, and Mark Barnes. (Compl. Exhibit PP).
 17 On August 24, 1999, Marc Johnston, Deputy Counsel for the DOE, denied Plaintiff's request
 18 relying on the reasoning set forth in his August 11, 1999, letter.

19 Plaintiff seeks the testimony of DOE employees. The parties do not dispute that no DOE
 20 employees, except Henry Rio, were made available to Plaintiff for depositions and that Marc
 21 Johnston, a high level official at the DOE denied Plaintiff's request for the deposition testimony
 22 of other DOE employees. The parties also do not dispute that Plaintiff provided to DOE's high
 23 level official's office a copy of the First Amended Complaint, a chronology of events, a summary
 24 of testimony desired, the names of employees to be deposed, the estimated time for the
 25 depositions, the reasons and necessity for the depositions, Bill Richardson's "zero" tolerance
 26 memorandum, letters from the University of California's attorney regarding no more "classified"
 27 documents, and responded verbally to DOE's questions. The parties further agree that some
 28 DOE employees have knowledge of facts pertaining to the July 15, 1997, criticality incident and
 Incident Analysis Committee investigation.⁶ The parties also agree that the DOE did not deny
 witnesses' testimony to Plaintiff because matters might be "classified." Defendants dispute that

⁶ Defendants deny that all of the requested DOE witnesses have knowledge.

1 the DOE did not consider all material facts regarding the necessity for DOE employees'
2 testimony because they were not informed of Plaintiffs' litigation strategy.

3 2. Standard of Review

4 Under the Administrative Procedure Act ("APA"), judicial review is limited to
5 determining if agency decisions were "arbitrary, capricious, an abuse of discretion, or otherwise
6 not in accordance with law." 5 U.S.C. § 706. See also, Exxon Shipping Co. v. United States
7 Dept. of Interior, 34 F.3d 774 (1994). Plaintiff, who is alleging an irregularity, carries the burden
8 of proof. Schweiker v. McClure, 456 U.S. 188 (1982). In applying the "arbitrary and
9 capricious" standard, a court must undergo an in-depth review of the agency's actions in
10 determining whether the actions were based on reasoned decision making, however, the Court
11 should not substitute its own judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401
12 U.S. 402, 415-16 (1971). The "arbitrary and capricious" standard should be applied within the
13 "nature and context of the challenged action," ITT World Communications, Inc. v. FCC, 699
14 F.2d 1219, 1245 (D.C.Cir.1983), rev'd on other grounds, 466 U.S. 463 (1984), and no agency
15 action "should be set aside if the action is rational, based on relevant factors, and within the
16 agency's statutory authority." Overton Park, 401 U.S. at 416.

17 3. Discussion

18 Plaintiff argues that the information he seeks from the employees is relevant and the fact
19 that the DOL found in favor of Plaintiff does not address the conduct of individual defendants at
20 issue in Plaintiff's state law suit or the matter of punitive damages. Plaintiff contends that the
21 witnesses can corroborate Plaintiff's testimony and that the DOE has a key role in Plaintiff's
22 state law case. Plaintiff further argues that all materials, particularly the DOE employees' witness
23 testimony, are not known, nor are they public and that said testimonies are not duplicative.
24 Plaintiff contends that DOE employees met and discussed Plaintiff's disclosures and whistle
25 blower concerns, and that DOE employees have extensive interaction with the University of
26 California, including the Defendants' in Plaintiff's state court suit. Plaintiff contends they
27 investigated the matters which Plaintiff has raised in his lawsuit. Plaintiff additionally argues

1 that the DOE opposed his complaints filed with the DOE and the DOL. Plaintiff alleges that the
2 whistle blower anti-retaliation statutes directly place the nature of governmental officials'
3 deliberations about Plaintiff and safety issues Plaintiff raised at issue.

4 Defendants contend that Plaintiff has failed to provide the required justification for the
5 testimony sought, and thus, the Court should not compel the testimony of the requested DOE
6 employees. Defendants indicate that when Plaintiff's first request was submitted for the
7 deposition of three DOE employees Plaintiff's stated justification for their testimony was that
8 they were "involved in aspects of the IAC investigation." Defendants contend that Marc
9 Johnston, DOE Deputy General Counsel, contacted Plaintiff and requested that Plaintiff submit
10 an affidavit or statement pursuant to 10 C.F.R. § 202.23(b) setting forth in explicit detail the
11 testimony sought. Plaintiff's second request included ten DOE employees, with depositions
12 expected to range up to four hours each. Plaintiff's justification for his request was that the
13 DOE, by virtue of its relationship with the University of California, could not refuse testimony in
14 the state court against the University. Plaintiff also argued that because DOE employee Henry
15 Rio, at the request of the University of California, had submitted a declaration to the Department
16 of Labor in connection with the administrative proceedings involving plaintiff's whistle blower
17 allegations, the DOE was estopped from refusing to permit Rio from testifying at a deposition.

18 DOE Deputy General Counsel Johnston found plaintiff's justification insufficient and
19 informed Plaintiff that the testimony of the DOE employees would be duplicitous of the
20 information that he already received and that the information was already public. Defendants
21 contend that in the interest of fairness they informed Plaintiff that he would be permitted to elicit
22 testimony at deposition from Rio concerning the subject matter of the affidavit provided by Rio
23 in the Department of Labor proceeding.

24 Plaintiff has filed a collateral action under the APA which provides this Court with the
25 jurisdiction to determine whether the DOE Agency's decision to prohibit the testimony of DOE
26 employees was arbitrary and capricious in Plaintiff's action pending before the state court in
27 violation of the APA. The standard of review for summary judgment on review of any agency's

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1 decision, as set forth in 5 U.S.C.A. § 706 requires a finding that the agency's action was arbitrary,
2 capricious, abuse of discretion, not in accordance with the law, or unsupported by substantial
3 evidence on the record taken as whole. Environment Now! v. Espy, 877 F.Supp. 1397 (E.D. Cal.
4 1994).

5 Arbitrary and capricious review cannot be conducted under the APA in a vacuum, another
6 statute must identify the substantive factors in order to determine whether the agency's decision
7 based on those factors was arbitrary and capricious. Oregon Natural Resources v. Thomas 92
8 F.3d 792 (C.A. 9 OR. 1996). The arbitrary and capricious standard by its very nature requires the
9 Court to presume the agency's decision to be valid if rational basis for the agency's decision is
10 presented. Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275 (C.A.D.C. 1981).

11 Here, Plaintiff argues that based on the totality of the information before the agency, that
12 the agency's decision was arbitrary and capricious. Defendant argues that "[i]n choosing to
13 reject plaintiff's request to depose federal employees (with the qualified exception of Mr. Rio),
14 the DOE Office of General Counsel determined that the testimony of those employees would not
15 be of sufficient relevance to Mr. Lappa's discrimination case against the University to justify the
16 cost and disruption to the DOE of making so many employees available for deposition," pursuant
17 to 10 C.F.R. § 262. The problem with Defendant's argument is that Defendant produces no
18 evidence to demonstrate that the DOE's determination was not arbitrary and capricious, other
19 than the letters authored by Deputy General Counsel Marc Johnston. For example, Defendants
20 do not provide an affidavit or declaration from the General Counsel Marc Johnston setting forth
21 the basis behind the agency's decision. While the letter indicates that "after reviewing the
22 additional materials, we still do not see why you need these DOE employees to testify in the
23 lawsuit." The Court cannot determine from the letter whether or not a review of all of the
24 materials submitted by Plaintiff were considered in deciding to deny Plaintiff's application. The
25 Court finds that Defendants have provided no evidence of the reasoning behind their decision to
26 deny Plaintiff's request for testimony of DOE employees.

27 Plaintiff seeks the testimony of DOE employees, some of whom have undisputed

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1 knowledge about safety issues raised in Plaintiff's state court action. Attached as Exhibit S to
2 Plaintiff's complaint is the report issued by the Department of Labor. Marc Johnston indicates in
3 his letter that one of the factors that he denied Plaintiff's request for the testimony of DOE
4 employees, is that their testimonies would be duplicitous of the report by the Department of
5 Labor. The Court has reviewed the report and cannot reasonably conclude that testimonies of
6 DOE employees who worked closely with the Plaintiff and the LLNL would necessarily be
7 duplicitous of the report issued by the Department Labor.

8 The next factor that the Department of Energy relies on is that the information sought is
9 duplicative of other public information. The question arises is what other public information? It
10 appears from the affidavit of Henry Rio (Def. Motion Exhibit B) that many of the DOE
11 employees that Plaintiff seeks testimony from were involved in meetings and/or investigations
12 regarding the safety concerns at LLNL. The DOE does not identify what other public
13 information would be duplicitous or would provide information regarding the statements made at
14 these hearings or during the course of their investigations. Hence, this "explanation" by the DOE
15 is conclusory and vague.

16 The final factor that Defendants rely on is that the relevance and the materiality of the
17 testimonies by the requested DOE employees are questionable. Other than this bold assertion in
18 the August 11, 1999, letter by Marc Johnston, Defendants provide no evidence of the reasoning
19 behind this conclusion. It is clear based on the description of events provided by Plaintiff, that
20 members of the committee as well as the investigatory team may have relevant information to
21 Plaintiff's state court action. Additionally, Exhibit I of Plaintiff's declaration in support of his
22 motion for summary judgment is the "zero tolerance" memorandum by Bill Richardson,
23 Secretary of the DOE. The memorandum specifically states "[t]here must be open
24 communication between management and employees and a zero tolerance policy for reprisals
25 against those who raise safety concerns." Here, Plaintiff's state court action raises safety
26 concerns that impact the Department of Energy and the issue of reprisal against Plaintiff for
27 raising said safety concerns. Defendants have not provided any evidence contrary to the

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1 conclusion that the DOE employees that Plaintiff seeks to depose have knowledge of facts and
2 events critical to his state law action which involves an alleged reprisal against Plaintiff for
3 raising safety concerns. Moreover, the Court finds it incredulous that Defendants assert that they
4 are entitled to the joint-defense privilege with respect to a memorandum issued in conjunction
5 with the LLNL's compliance with the Department of Labor's finding that Plaintiff was retaliated
6 against for whistle-blowing, and now, in the same briefing, contend that the testimony of DOE
7 employees, some of which have undisputed knowledge concerning Plaintiff's whistle-blower
8 allegations, would be irrelevant and immaterial. Defendants themselves contend that the nature
9 of the relationship between LLNL and the DOE is a close one, even allowing the DOE to make
10 legal decisions for the LLNL. (Def.'s Oppos. p. 7-8).⁷

11 Moreover, Plaintiff argues that the DOE refused to listen to facts that relate to his strategy
12 in his state court action and therefore, did not consider all material facts before refusing to
13 disallow Plaintiff's request for testimony. (Plaintiff's Motion, Nielson Decl. at pp. 4-5).
14 Defendants do not dispute that they did not consider Plaintiff's strategic reasons. While this
15 Court is not willing to hold that an agency must inquire into a requester's legal strategy in a state
16 court action when reviewing a request for agency testimony, this Court does find that when the
17 requester presents such facts as a justification, that the agency should consider said facts in
18 evaluating whether or not to permit employee testimony.

19 Based on the analysis above, the Court finds that Defendants acted arbitrary and
20 capriciously in denying the testimony of those DOE employees set forth in Plaintiff's August 20,

21

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24 ⁷ This same point is expressed in Plaintiff's recent submissions to the Court, a letter by the Director of
25 Enforcement and Investigation of the Department of Energy, R. Keith Christopher, requests information from the DOE
26 regarding the Plaintiff's discrimination case and emphasizes that the LLNL is subject to civil enforcement by the DOE;
27 a letter from Tom Bitley, Chairman of the Committee on Commerce of the U.S. House of Representatives, noting that
28 the University of California is subject to enforcement by the DOE and requesting that a DOE investigation be conducted
into the matter based on the zero tolerance policy of the DOE. The letter also discusses, the DOE's reimbursement of
the University of California's legal costs in Plaintiff's state court action and the DOE's claim of joint defense privilege
(Plaintiff's May 8, 2000, Ex Parte submissions, Exhibit A).

28

1 1999, request.⁸

2 Accordingly, it is HEREBY ORDERED that Defendants denial of Plaintiff's request for
3 the testimony of Henry Rio, Douglas Eddy, Sharon Hurley, Richard Trevillian, Richard Haddock,
4 Chuck Lewis, Al Walter, and Mark Barnes, was arbitrary and capricious. Plaintiff's motion for
5 summary judgment is granted with respect to said employees.

6 Consequently, Defendants shall make Henry Rio, Douglas Eddy, Sharon Hurley, Richard
7 Trevillian, Richard Haddock, Chuck Lewis, Al Walter, Ray Rayner, and Mark Barnes available
8 for deposition testimony for the number of hours set forth in Plaintiff's request.

9 CONCLUSION

10 In accordance with the above, it is HEREBY ORDERED that:

11 1. The Court DISMISSES without prejudice Plaintiff's complaint seeking judicial review
12 of items (1) and (3) of his March 24, 1999, revised first FOIA request for failure to exhaust his
13 available administrative remedies, said request is identified as items number 1 and 2 of Plaintiff's
14 first cause of action;

15 2. Plaintiff's motion for summary judgment is GRANTED and Defendants' cross-motion
16 for summary judgment is DENIED with respect to items number 3 and 4 of Plaintiff's first cause
17 of action. Defendants shall fully respond to Plaintiff's July 19, 1999, FOIA request and item two
18 of Plaintiff's March 24, 1999, FOIA request by May 16, 2000. Defendants shall produce by May
19 22, 2000, any documents responsive to Plaintiff's requests which do not fall within the FOIA
20 exemptions; and

21 3. Plaintiff's motion for summary judgement is GRANTED and Defendants' cross-
22 motion for summary judgment is DENIED with respect to his third cause of action, identified as
23 item number 5 in Plaintiff's motion for summary judgment. Defendants shall make available the
24 following DOE employees for deposition testimony for the time specified next to each name:

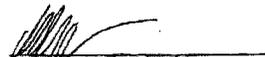
25 _____
26 ⁸ The Court makes no ruling with respect to any non-DOE employees which Plaintiff may have requested
27 testimony from. Moreover, the Court makes no ruling with respect to unspecified employees which Plaintiff has
requested testimony from. Any such request for additional and/or unspecified employees would be premature at this
28 juncture because there is no determination by the Defendants in this action with respect to said employees.

1 Henry Rio (4 hours), Doug Eddy (4 hours), Sharon Hurley (4 hours), Richard Trevillian (2.5
2 hours), Richard Haddock (1 hour); Chuck Lewis (1 hour), Al Walter (1 hour), Ray Rayner
3 (1 hour), and Mark Barnes (1 hour).

4
5 Additionally, the Court ORDERS that the parties to submit case management statements
6 pursuant to Civil Local Rule 16 by June 15, 2000. A case management conference shall be held
7 on July 13, 2000, at 10:00 a.m. before the Honorable Maria-Elena James.

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10 IT IS SO ORDERED.

11
12 DATED: May 9, 2000


MARIA-ELENA JAMES
United States Magistrate Judge

100 Seal
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DOL/OALJ REPORTER

Gutierrez v. Regents of the University of California, 1998-CAA-19 (ALJ June 9, 1999)

U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office & Courthouse - Room 507
Post Office Square
Boston, MA 02109

Date: June 9, 1999
Case No. 1998-ERA-19
File No. 6-0030-98-803

IN THE MATTER OF:

Joe Gutierrez,
Complainant

**Regents of the
University of California,** Respondent

APPEARANCES:

Carol Oppenheimer, Esq.
For the Complainant

Ellen Cain Castille, Esq.
For the Respondent

Before: DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. Part 24 and Part 18. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (hereinafter "the NRC") and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The following abbreviations shall be used herein: ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Complainant's Exhibit and EX for a Respondent's Exhibit.

[Page 2]

On November 21, 1997, Joe Gutierrez (Complainant herein) filed a complaint of retaliation against Los Alamos National Laboratory (LANL or the Laboratory). LANL is run by the Regents of the University of

California for the Department of Energy (DOE). The Complainant, an internal assessor employed by LANL, alleged that LANL added negative comments to his performance assessment and that he received an inadequate pay increase in 1997. (ALJ EX 1) The complaint was referred to the Office of Administrative Law Judges under cover of letter dated February 27, 1998. (ALJ EX 4) A hearing was held before the undersigned from January 4, 1999, through January 8, 1999, in Santa Fe, New Mexico. (ALJ EX 17) All parties were present, had the opportunity to present evidence and to be heard on the merits.

Post-Hearing Exhibits

ALJ EX 21 ¹	Letter from this Office to S.R. Skaggs, Ph.D., regarding his January 5, 1999 letter	01/19/99
CX 39	Letter from Complainant's counsel dated January 13, 1999, regarding the deposition of Dennis Derkacs	01/21/99
EX T	Letter from Respondent's counsel dated January 25, 1999, regarding the taking of the deposition of Dennis Derkacs	01/25/99
EX U	Notice of Deposition of Dennis Derkacs	01/29/99
EX V	Letter from Respondent's counsel dated March 4, 1999, with	03/08/99
<hr/>		
[Page 3]		
EX W	February 8, 1999, deposition of Dennis Derkacs attached	03/08/99
CX 40	Complainant's Post-Hearing Brief	03/24/99
EX X	Respondent's Post-Hearing Brief	03/25/99
EX Y	Respondent's Post-Hearing Brief Regarding Damages	04/09/99

The record was closed on April 9, 1999, as no further documents were filed.

The following are the uncontested facts (ALJ EX 18):

- 1) Los Alamos National Laboratory (LANL) is operated by the University of California for the Department of Energy (DOE).
- 2) Complainant is an employee of the University of California at the Los Alamos National Laboratory.
- 3) At all applicable times, Complainant was and continues to the present to be employed as an internal assessor in LANL's Office of Audits and Assessments (AA) specifically in group AA-2.
- 4) Complainant identifies protected activity as various disclosures he made to DOE, LANL management, the media, the Federal court, and to New Mexico's congressional delegation between

1996 and 1997 and to an affidavit he provided to Citizens Concerned for Nuclear Safety (CCNS) in 1996.

5) Complainant received a 2.75% raise for FY '98.

6) Katherine Brittin became Director of Audits and Assessments in October 1994. James Loud became Group Leader of Audits and Assessments Group 2 in March 1997. Laboratory policies identified in Complainant's and Respondent's exhibits below are true and accurate policies of the Los Alamos National Laboratory.

I. Summary of the Evidence

A. Background

Joe **Gutierrez** is employed by LANL as an assessor in the independent internal assessment (AA-2) group. (TR 53) This position entails the evaluating, independent of line management, of the actual performance of programs, organizations and processes of the facility, as well as worker behavior and other personnel behavior that impacts on those programs and organizations. (TR 53) Complainant has been employed at LANL since May of 1989, and he has been an assessor since October of 1992. (TR 54) From 1989 through 1992, Complainant's position was that of standards coordinator under the Engineering Division. (TR 54-55)

[Page 4]

Katherine Brittin, the Director of the Audits and Assessments Office at LANL (TR 882), explained that the purpose of AA-2 is to provide management with independent and objective evaluations of the status of the environmental, safety, health, security and quality assurance programs within the Laboratory. (TR 825)

Dennis Derkacs was the group leader of AA-2 through February of 1997. (EX W at 4-5) His duties included supervising the employees in the group, making assignments and managing the Internal Assessment Program. (EX W at 5-6) James Loud took over the role of group leader of AA-2 in March of 1997. (TR 974)

There are three team leaders in the AA-2 group: James Griffin, Nathaniel King and John Frostenson. (TR 519-521, 575-577, 714) The duties of a team leader include scheduling the assessment, making the announcements, setting the overall objectives, selecting the assessors, conducting team meetings, interacting with the assessed organizations and preparing a readable report that can be used by management. (TR 520, 576-577, 716-718) After the field work is done, each team member comes with a write-up of what they have found, and they go through a "murder board."² (TR 581, 529-530) After the "murder board", the team leaders take the documentation and prepare the assessment report itself. (TR 581) The report is next reviewed by the group leader, and then it is forwarded to the Director of Audits and Assessments. (TR 531) Editors are used to maintain proper format, grammar and sentence structure. (TR 532, 722)

According to Mr. Griffin, Mr. King and Mr. Frostenson, there is an expectation that assessments are to remain internal documents to the Laboratory. (TR 544, 587, 723-724) They explained that, although assessments are not marked "internal use only" or "confidential", it is expected that they will be kept as internal documents. (TR 544-545, 587-590, 723-724) Neither Mr. King nor Mr. Griffin are aware of any written policy explaining that assessments are for internal use only. (TR 608-609, 570) It is also Ms.

Brittin's expectation that assessment reports are for internal distribution only.³ (TR 828-836)

Mr. Griffin, Mr. Frostenson and Ms. Brittin explained that there may be safety, logistical or security reasons why the group may not be able to enter a particular facility during an assessment. (TR 524-526, 720, 827) Mr. Griffin stated that if the group is denied access to a certain area, they will have the group leader speak with the group leader of the facility to be evaluated. (TR 526) If that does not resolve the problem, they "elevate it" to the division directors. (TR 526-527, 737) Ms. Brittin stated that she never had an issue pertaining to access that could not be resolved. (TR 828)

[Page 5]

Mr. King, Mr. Frostenson and Mr. Loud indicated that if there were imminent safety issues uncovered, they should immediately be brought to the attention of members of the assessed organization. (TR 606, 718, 1165-1166) This way, the members of the assessed organization can begin addressing those issues before the assessment report comes out. (TR 606)

According to Complainant, a process was established whereby he would "co-manage the assessment." (TR 1129) Complainant stated that he co-managed the assessments in relation to the quality assurance topic as it related to the assessment. (TR 1129) He further explained that he assisted Mr. Griffin in the planning and scheduling. (TR 1130) He, along with Mr. Griffin, would introduce the quality assurance topic and address the quality assurance aspects of the assessment. (TR 1130) He would also make a special out-brief specifically just for the topic of quality assurance. (TR 1130) Complainant stated that Mr. Griffin gave him full authority to deal with the QA part of the assessment. (TR 1120)

However, Mr. Derkacs stated that he never appointed anybody, including Complainant, an assessment co-team leader for an independent assessment. (EX W at 11-13) He stated that no one else would have the authority to appoint a co-team leader while he was the group leader. (EX W at 13) However, Mr. Derkacs did explain that QA audit leader would be a fair term to use for Complainant, in connection with the RAB Audit Logs, but that was not the same thing as a team leader at LANL. (EX W at 24) Complainant had significant responsibilities because of his subject matter expertise in the area of quality assurance. (EX W at 22)

Complainant pointed out that the RAB Audit Logs, which provide evidence and documents the certification to the ISO 9000 quality requirements, indicate that he was the lead auditor on June 3, 1996, June 27, 1996, September 14, 1996 and October 7, 1996. (TR 184-185; CX 17) The logs were signed by Mr. Derkacs, who was Complainant's group leader at the relevant times. (TR 184-185) The logs also indicate that Complainant was a lead auditor on July 16, 1997, and it was signed by Mr. Loud, who was Complainant's group leader at that time. (TR 185) Complainant explained that the term "lead auditor" used in the RAB Audit Logs is equivalent to a team lead assessor in AA-2 parlance, and that the AA-2 logs should list him as a team leader for some of the assessments for which he is listed as a lead auditor in the RAB Audit Logs. (TR 348-349; CX 17)

Mr. Derkacs explained that the RAB Audit logs were to document Complainant's participation in audits and assessments so that he could be certified a QA audit leader. (EX W at 15; CX 17) He further explained that Complainant had a leadership role for QA, but he was not a team leader. (EX W at 19) According to Mr. Derkacs, for AA-2 purposes, Complainant was the subject matter expert for quality assurance. (EX W at 19) For the purpose of the RAB certification, Complainant had the total responsibility for the QA. (EX W at 19-20) Mr. Derkacs explained that by signing the RAB Audit Logs, he was saying that, for purposes of that organization, Complainant was fulfilling a role that was similar enough to what they were looking for. (EX W at 35)

[Page 6]

B. BUS Assessment

Complainant received the Business Operations Division (BUS) assessment to lead in mid-1994. (TR 267; EX W at 7) He was assigned as the team leader to assess the status of the safeguards of the security program, the quality assurance program and the environmental program as applied to the division's operations. (TR 74) Complainant explained that for the two years preceding 1996, "the Laboratory had experienced what many considered an epidemic of events that were accidents."⁴ (TR 75)

According to Complainant, the duties of a team leader are to coordinate the planning of an assessment, collect information, provide guidance to the team, coordinate the team in its interface with their respective organizations, and then prepare a report. (TR 268-269) He further explained that it is the team leader's responsibility to get to the point of drafting the report, next it would be subject to peer review, and from there "it was pretty much the editor who was responsible for the editing and getting that report edited" to the point where the group leader can send it out as a draft to the assessed organization. (TR 270-271)

Complainant stated that his report was ready to go out as a draft in the early part of 1995, but it was held back by Mr. Derkacs, who at the time was the group leader of AA-2.⁵ (TR 270; EX W at 4-5) According to Complainant, Mr. Derkacs, informed the group that no reports would be going out without a person in authority reviewing it. (TR 270)

Complainant wanted to get the BUS assessment out because of the epidemic of accidents, and because he did not see any action from management to address the issue. (TR 1142) He stated that a closing conference would not have served the same purpose as the issuance of the final report. (TR 1142) He explained that the out-brief is to give the assessed individuals, and line management, a "heads-up." (TR 1143) He further explained that "soft issues", those relating to human behavior, large expenditures and coordination among a number of divisions, would require a detailed information that could only be provided by a final report that has verified data. (TR 1143)

Complainant's primary concern was in relation to applying "a configuration management/as-built program to activities, to maintenance and construction in particular." (TR 81) He explained that "configuration" means that the routing of any process or the installation of a structural element be known and depicted on drawings appropriately as it exists in the field. (TR 82) The "as-built" refers to the drawings and documents that relate to that work being kept updated to reflect the configuration as it actually exists. (TR 82) Complainant explained that because no configuration/as-built program was in effect, individuals were cutting through walls and floors and encountering electrical wires. (TR 82) He further explained that the need for as-built configuration design is not limited to the business office. (TR 1143-1144)

[Page 7]

Ms. Brittin was contacted by Carol Smith, the customer⁶ of the assessment, who stated that she was annoyed because it had been a long time since the assessment was done and no report had been produced. (TR 822, 840-841) Ms. Brittin contacted Mr. Derkacs to find out about the report. (TR 841) Mr. Derkacs provided a copy of the report dated January 10, 1996, which Ms. Brittin did not think was well written. (TR 842-844; EX H-19) She also found no obvious health and safety issues in the report. (TR 851, 916;

EX H-19) Ms. Brittin read through the report, tried to express her concerns, and sent it back to Mr. Derkacs. (TR 844) According to Ms. Brittin, Complainant had the principal responsibility for the report because he was the team leader. (TR 845) Drafts of the report were sent back and forth between Ms. Brittin and Mr. Derkacs. (TR 845)

Ms. Brittin was also contacted by James F. Jackson, the Deputy Director of the Laboratory, who wanted to find out if there was a report that was being held up. (TR 838) She informed him that when she got something she felt she could sign, the report would be released. (TR 838)

Complainant explained that he would receive comments from Mr. Derkacs or Ms. Brittin, and he would address them, and Mr. Derkacs and himself would address the resolution of the comments. (TR 276; CX 36; CX 37) Mr. Derkacs would then pass on the comments to Ms. Brittin, or Complainant would annotate it for Mr. Derkacs. (TR 276; CX 36; CX 37)

According to Complainant, on January 31, 1996, Mr. Derkacs called him into his office to discuss Complainant's salary increase notification. (TR 73) Complainant testified that Mr. Derkacs told him that he would be receiving only a 2.0 percent salary increase, and that the determination was predicated perhaps on the delay in getting out the BUS assessment.² (TR 74) Complainant responded to Mr. Derkacs in a memo dated March 22, 1996. (TR 75-76; CX 2) The memo stated, in relevant parts, as follows:

I responded by stating that I did not accept the reason given since the issues and constraints that delayed the report were out of my control and the fact that I was not the only assessor experiencing these constraints. Please see attachment 1 for more detail on the constraints that have caused the delay in the issuance of the BUS Assessment. I elaborated on the fact that the underlying reason the report has been delayed is because of the extent of editing that has occurred from the many reviews of the report. In essence you and the Director of Audits and Assessments have continued to edit your own editing. Most importantly, I called to your attention the fact that what has been overlooked is the substance and significance of the topics the report tries to communicate. The perspective I gave you related to the several accidents that the Laboratory operations has experienced in the last two years. What has been overlooked is the fact that my reports have consistently pointed out the many deficiencies in the management of the Laboratories' "work process" and implementation of the "Quality Assurance Program". I pointed out the fact that the Laboratory may be vulnerable since the report has highlighted management ineptness that is a contributing factor to the occurrence of the accidents and management has not demonstrated the necessary aggressiveness in correcting these noted shortcomings.

[Page 8]

You in turn responded by stating that we should not disclose to the public the information revealed by the assessments since this information can be considered privileged and confidential. I pointed out that Secretary O'Leary has announced that the Laboratory no longer operates under the veil of secrecy. Besides there are professional ethics, moral and legal issues that may impact us if we knowingly suppress potentially damaging and life threatening information.

(CX 2) According to Complainant, Mr. Derkacs was "very nervous" that he would go to the public with his concerns. (TR 77) Complainant sent a copy of the memo to Katherine Brittin, and to Mr. Jackson. (TR 79) Ms. Brittin did not respond to Complainant's memo. (TR 86, 837)

Ms. Brittin received Complainant's March 22, 1996 memo to Mr. Derkacs. (TR 917) She indicated that the memo did reference health and safety issues. (TR 917-919) However, Ms. Brittin noted that

Complainant did not tie the health and safety issues to the findings he had in his report. (TR 920) Ms. Brittin did not discuss the health and safety issues with Complainant, although she did discuss them with Mr. Derkacs. (TR 920-921) Ms. Brittin explained that it is her job "to advise management about the state of the environmental, safety and health programs", and it is "management's job to ensure protection." (TR 922)

Ms. Brittin stated that if Complainant had major concerns about health and safety issues, she would expect him to raise them immediately with the Business Operations Division. (TR 863) She also reiterated that if Complainant had significant health and safety problems, he should have raised them with her. (TR 917)

On April 18, 1996, Ms. Brittin sent memos to Complainant and Mr. Derkacs indicating that she was disappointed in the way the report had gone because it did not appear that they were addressing her comments.⁸ (TR 277-278, 845-848; EX Q, EX R) Ms. Brittin explained that she was not trying to change the contents of the report, but she was concerned that Complainant had not expressed his thoughts very well. (TR 848-849)

Mr. Frostenson stated that he was asked by Mr. Derkacs in June of 1996 to help in the rewrite of the BUS assessment report. (TR 770) Mr. Frostenson was to try and answer Ms. Brittin's comments. (TR 771) Ms. Brittin's concerns were that the findings be "stated clearly and supported." (TR 773)

According to Mr. Frostenson, when he spoke with Complainant about the BUS assessment, Complainant told him that he did not want anything to do with it and he did not

[Page 9]

care if it ever got out. (TR 772) Mr. Frostenson stated that he did not change the factual content of the report, but that he reorganized the material in the report so that it was understandable. (TR 773-774) He believed he included all of Complainant's findings and observations, and that he did not water down Complainant's findings. (TR 774) Mr. Frostenson did not recall any particular significant safety concerns in the report. (TR 777)

At the point Mr. Frostenson thought that the report would be acceptable to Ms. Brittin, he asked Complainant to go through the report with him. (TR 775) According to Mr. Frostenson, Complainant was reluctant to assist. (TR 775-776) Complainant explained that, through the editing process, the substance of the report changes because "either there's not enough explanation to capture the true reality of the finding that we're trying to portray or in the course of a two-year period you have so much iteration in the writing that after a while it doesn't become my finding." (TR 279; TR 87)⁹

Mr. Frostenson stated that the rewrite took approximately a week and a half. (TR 777) Complainant was not called into any meetings with Mr. Frostenson and Ms. Brittin when Mr. Frostenson was rewriting the BUS assessment. (TR 799, 850) The BUS assessment report was finally distributed on July 9, 1996. (TR 277, 776, 850; EX H; CX 4)

In early 1996, Complainant spoke with Herman Le Doux, the Deputy Area Manager for the Los Alamos Area Office of the Department of Energy, about his safety concerns. (TR 83; TR 464) Complainant did so because he did not feel that he was going to get a response to his March 22, 1996 memo.¹⁰ (TR 83) According to Mr. Le Doux, Complainant was concerned about his inability to get a report, dealing with an addition at the TA-55 plutonium facility, out of Audits and Assessments. (TR 464-465) Specifically,

Complainant was concerned with the potential for a leak between concrete placements. (TR 465) Mr. Le Doux explained that the concerns revolved around quality assurance with the concrete. (TR 475) Mr. Le Doux did not recall discussing the BUS assessment with Complainant. (TR 466)

Mr. Le Doux committed to Complainant that he would get in touch with Mr. Jackson, and inform him of his conversation with Complainant. (TR 84,469) According to Mr. Le Doux, he did so inform Mr. Jackson, "[w]ithin a day or so." (TR 469) Specifically, he told Mr. Jackson that he met with Complainant, that Complainant had some concerns about his inability to get his report through Audits and Assessments, and that Complainant had some concerns about concrete placement. (TR 470) According to Mr. Le Doux, Mr. Jackson committed to looking into it, although he never heard back from Mr. Jackson. (TR 470) However, after following up on a conversation, Mr. Jackson indicated to Mr. Le Doux that LANL had followed up on Complainant's concerns. (TR 470) Mr. Le Doux did not provide anything in writing to Complainant, although he did tell Complainant that he had spoken with Mr. Jackson.¹¹ (TR 471)

C. Statement of Joe Gutierrez

Complainant received LANL's whistleblower policy in July of 1996. (TR 96; CX 5; EX C-24) He considered whether it was time to "blow the whistle" given that there did not "appear to be a mechanism in the Laboratory that [was] working." (TR 96) Complainant was also concerned about how effective the policy was going to be. (TR 97)

[Page 10]

Siegfried S. Hecker, the Laboratory Director, issued a memo dated July 15, 1996. (CX 6) The memo stated, in relevant part, as follows:

The purpose of this memorandum is to reiterate and clarify the message that I presented to you this morning in our LLC meeting. As a result of the serious safety incident last week, I am instituting "Safety First Days" at the Laboratory. The features of "Safety First Days" were outlined in the viewgraph hardcopies that were distributed to you this morning. In this memorandum I want to focus specifically on two of the key elements: temporary suspension of work pending internal safety reviews and obtaining a clear and formal commitment to safety from all workers at this site.

By 8:00 a.m. Tuesday, July 16, 1996, all work at the Laboratory will be temporarily suspended. We are not shutting down our facilities but rather pausing so we can step back and reexamine the way we all approach our work. During this suspension, all on-site workers (University of California employees and all subcontractor employees) will review the safety of their current operations with their supervisors. This review will include work planning, hazards analysis, safety procedures, and training. The key questions are: Are necessary policies and procedures in place for the safe performance of current operations? Are workers properly trained to carry out these procedures? Are workers actually following procedures they are trained to use? Please note that this temporary suspension is not intended to determine the adequacy of procedures for current operations but rather to ensure that procedures exist and are being followed.

(CX 6)

On July 15, 1996, Complainant, as well as all other individuals at LANL, were asked to sign an Employee Safety Commitment ("ESC") form. (TR 100) On July 17, 1996, Complainant sent a memo to Mr. Frostenson setting forth his concerns with the ESC. (TR 100; CX 7) Complainant would not sign the ESC without annotating it, because in his opinion, it required that he take responsibility not only for

himself, but also for his associates and line management. (TR 101) Complainant felt "uncomfortable" with signing the ESC as it did not address the responsibilities of management to ensuring workplace safety. (TR 101) Complainant referenced the configuration/as-built problem and the fact that there was no QA program in place. (TR 101-102) According to Complainant, Mr. Frostenson made a comment that if he did not sign the ESC, he would be fired. (TR 286)

Mr. Derkacs responded to Complainant's memo in a memo of his own dated July 22, 1996. (TR 103; CX 8) He indicated that Complainant's questions deserved review,

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and he would forward those questions to Ms. Brittin. (TR 104) Complainant has not heard from Ms. Brittin with regards to the ESC. (TR 104)

On July 29, 1996, LANL issued a news release entitled "LABORATORY ANNOUNCES COMPLIANCE WITH CLEAN AIR ACT". (CX 9) The news release announced that LANL had notified the DOE that it could demonstrate compliance with radioactive air emissions requirements of the Clean Air Act. (CX 9) Complainant first saw the news release on July 30, 1996. (TR 105) Based upon his knowledge of the configuration program and the overall quality assurance program at the Laboratory, Complainant found the claims being made by LANL to be deceptive. (TR 105-106) He felt "very concerned" and he also felt that there was a "compelling need to make things right in the public eye and for the public's benefit." (TR 106) Complainant felt that he "needed to blow the whistle." (TR 106)

The "last straw" that made Complainant decide to blow the whistle was an article that appeared which described the incident involving a graduate student who received an electrical shock while working at the Laboratory. (TR 106) According to Complainant, management indicated that they were starting to question the effectiveness of the audit and assessment function because they relied on them to provide information about problems. (TR 106-107) Complainant explained that from his past experience in the nuclear industry, "that told [him] that somebody was looking for a scapegoat and that scapegoat was the audit and assessment function." (TR 107) As the concerns related to the quality assurance program, Complainant felt that "it pointed the finger right back at [him] because [he] was the one individual in the Audit and Assessment Group that focused on assessing and evaluating the effectiveness of the quality assurance program across the Laboratory." (TR 107)

After accumulating information, Complainant decided he was on firm footing to blow the whistle. (TR 107-108) Complainant drafted a statement dated October 7, 1996, which set forth his concerns. (TR 108; CX 27) He tried to convey that many, if not all, of the problems could be attributed to the fact that an effective quality assurance program had not been implemented. (TR 122) Another related observation in the statement is that LANL had been informed in many ways about the potential problems that come about by not having a fully implemented effective quality assurance program. (TR 122) Complainant explained that quality assurance is applicable to the Clean Air Act activities. (TR 122) Complainant stated that there was a culture, behavior and attitude of individuals at LANL whereby they were not willing to embrace the QA requirements. (TR 124)

One of the Complainant's specific concerns he mentioned was that clerical people were doing the QA function at TA-21, the facility that processes Tritium¹². (TR 127) Furthermore, two technicians compiling air emissions data were not using the same methodology to calculate the emissions, and there was disagreement as to what was the correct methodology. (TR 130) Complainant also

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indicated that records for the emissions calculations for a complete year could not be located. (TR 131) Complainant had written an assessment for TA-21, dated March 28, 1995, which included a critique of the tritium air monitoring system. (TR 132; EX G) He also noted that there was a potential structural weakness with the plutonium facility, and that there was a potential for gas and/or liquid leakage. (TR 128-129)

According to Complainant, his concerns affected public health and safety because, through his assessments, he found problems with the configuration of the radionuclide monitoring system. (TR 1148) He explained that the "individuals responsible for those areas were unaware of the requirements of quality assurance as applied to those particular monitoring instruments and how to ensure that procedures were in place and prior to the use of monitoring equipment." (TR 1148) Complainant agreed that if there were a power outage because somebody bore through the wall, it could affect the monitoring of radionuclides that could escape to the public. (TR 1149)

After completing his statement, Complainant had it notarized, and then he delivered it to Citizens Concerned for Nuclear Safety (CCNS)¹³, and he mailed it to Senator Jeff Bingaman and Congressman Bill Richardson. (TR 139) He explained that, although the statement indicated that he was giving information to CCNS, the press and the New Mexico congressional delegation, he did not give a copy of the statement to the press. (TR 383) Complainant drew a distinction between the statement itself, which he did not provide to the press, and the information contained within it, which he expected the press would inquire into. (TR 383)

On August 27, 1996, Complainant received his performance assessment for the review period covering the time period of June 1, 1995, to May 31, 1996.¹⁴ (TR 113-114; CX 16)

Also on August 27, 1996, Complainant signed a document entitled UC/DOE National Laboratories Code of Ethical Conduct for Los Alamos National Laboratory Audits and Assessments Office. (CX 16) The document was first presented to Complainant at the time of his performance assessment. (TR 308) Complainant signed the document, indicating that he would abide by the Code Of Ethical Conduct, "with the exception of items 2,3 and 4." (CX 16) Those items state as follows:

2. Exhibit loyalty in all matters pertaining to the affairs of the University of California, the Los Alamos National Laboratory, and the Audits and Assessments Office, and will not knowingly be a party to any illegal or improper activity.
3. Maintain independence in attitude and appearance on all matters which come under review, and refrain from entering into any activity which may be in conflict with the interest of the University of California, the Los Alamos National Laboratory, or the Audits and Assessments Office, or which would impair or be presumed to impair their professional judgment in carrying out objectively their duties and responsibilities.

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4. Be responsible for ensuring due care to prevent improper disclosure of in-strict confidence or privileged information acquired in the course of their duties, and shall not use such information for personal gain, nor in a manner which would be contrary to law or detrimental to the welfare of the University of California, the Los Alamos National Laboratory, or the Audits and Assessments Office.

(CX 15) Complainant took issue with items two, three and four, because he believed the first commitment of the Laboratory and the University of California is to ensure public safety. (TR 310) He found the statements calling for loyalty in all matters to the University of California, LANL and the Audits and Assessments Office to be "very confining and limiting." (TR 311)

Complainant asked to speak with Congressman Richardson and Senator Bingaman after he sent them copies of his October 8, 1996 statement, but he did not receive a response. (TR 288) However, he also indicated that at some point, he did have an opportunity to speak with them about his concerns. (TR 289) Complainant did not personally give a copy of the statement to the Laboratory, and no one in line management ever discussed the statement with him. (TR 290-291)

Complainant considered Congressman Richardson and Senator Bingaman to be proper authorities to contact regarding his concerns, pursuant to the policy set out in the Administrative Manual.¹² (TR 367-368; EX C-21) Complainant explained that he did go to DOE about his concerns, but that "basically nothing happened." (TR 368-369) He further explained that he was told that the DOE did not have the personnel to deal with his concerns, and that the DOE "would get to it when they got to it." (TR 369) Complainant was also concerned with the fact that DOE was a party in the CCNS suit. (TR 369) Complainant had similar concerns about going to the EPA. (TR 369)

Complainant explained that it would be his expectation that if he released a document stamped confidential, he would be called in to discuss the policy violation, and if the situation warranted, he could be fired. (TR 370-371) Complainant indicated that none of that happened. (TR 371)

According to Complainant, he never provided a copy of his October 7, 1996 statement to anyone other than Congressman Richardson, Senator Bingaman and CCNS. (TR 375) He explained that his intent was to "surface the concern [he] had to the public", and it was his expectation that by giving it to CCNS, he could get his concerns to the court. (TR 375-376) He also explained that he had raised his concerns on numerous occasions, but he was confronted by a "stone wall." (TR 376-377) Complainant felt that he had done all he could do. (TR 377)

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James Coughlan, the LANL Program Director at CCNS, stated that Complainant contacted him sometime after July 30, 1996, and he met with Complainant "up to a half a dozen times." (TR 401) Mr. Coughlan explained that the substance of the meetings with Complainant "pertained to quality assurance programs at Los Alamos" in general, and specifically to "quality assurance programs relative to Clean Air Act compliance." (TR 402) He was informed by Complainant that "essentially because quality assurance is an integral part of Clean Air Act compliance and that those quality assurance programs were inadequate, that essentially the Laboratory was not in compliance with the Clean Air Act even after it claimed it was." (TR 402)

According to Mr. Coughlan, in April of 1996, Judge Mechem ruled that LANL was not in compliance with the Clean Air Act, and he directed the parties to negotiate. (TR 402) A settlement conference took place on October 28, 1996, before Judge DeGiacomo. (TR 404) At that time, CCNS submitted a document to Judge DeGiacomo, at his request, outlining their position. (TR 404) One of the attachments to that document was Complainant's October 7, 1996 statement. (TR 405; CX 27) Mr. Coughlan stated that he personally had no way of checking Complainant's accuracy before submitting Complainant's statement to Judge DeGiacomo. (TR 418) However, he did believe Complainant's statement was corroborated by the court ruling. (TR 421-422) Mr. Coughlan stated that, as far as he knew, nobody from CCNS distributed

Complainant's statement. (TR 414)

With regards to Complainant's October 7, 1996 statement, Mr. Frostenson stated that, in his experience, QA assessors are not demoralized or reluctant to write up the true severity of their findings. (TR 780; CX 27; EX N) He also stated that neither himself, nor anybody on his team, has ever been reluctant to write up the true severity of their findings or downplayed the seriousness of operational deficiencies. (TR 780)

Ms. Brittin saw Complainant's statement, after it was faxed to her office from the Public Affairs Office, which had received it from a reporter. (TR 870) Ms. Brittin gave the statement a cursory reading, as she had personal matters to attend to, and she never discussed it with Complainant. (TR 871) However, she stated that she did briefly discuss it with Mr. Loud. (TR 871-872)

Ms. Brittin noted that in Complainant's statement, he claimed that he had written an assessment for TA 21 which included a critique of the tritium air monitoring system, that sat on the Director's desk for over a year. (TR 906; EX N; CX 27) Ms. Brittin indicated that the final assessment report for the assessment Complainant referred to went out on March 29, 1995, five months after she arrived at LANL. (TR 906-907; EX G)

Ms. Brittin stated that she did not have a concern with Complainant going to CCNS or being involved with the Clean Air Act lawsuit. (TR 961) She added that she would have a concern if Complainant was "using our material if it's connected with a lawsuit." (TR 962)

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D. Santa Fe New Mexican Article

On October 28, 1996, Complainant sent an e-mail to Mr. Derkacs in response to concerns from line management at TA-21 regarding the validity and value of assessments provided by Complainant's assessment of the Tritium Science and Fabrication Facility (TSFF). (TR 361-362; CX 32; EX G) According to Complainant, during the stand down, line management found approximately one hundred and forty-four deficiencies. (TR 362) In the e-mail, Complainant explained that the reason those deficiencies were not detected by his assessment team was because "specifically we were not allowed to go into that room."¹⁶ (TR 362) Complainant further explained that "when we did walk through that room we were told not to write up anything related to what we saw in that room." (TR 362) Complainant also noted that the QA people assigned to TSFF do not have the requisite training as required by LANL quality management and the Code of Federal Regulations. (TR 363)

Complainant was contacted by Keith Easthouse, of the *Santa Fe New Mexican*, a day or two before October 28, 1996. (TR 141) Complainant granted an interview because he had a "nagging concern" that the public was not being given adequate notice of the status of the problems of which he was aware. (TR 141) Complainant did not notify the Public Affairs Office, as required by AM 707, before he spoke with Mr. Easthouse.¹⁷ (TR 238; EX C-16) Nor did he seek authorization to release information from his assessments to Mr. Easthouse. (TR 240)

On October 28, 1996, the *Santa Fe New Mexican* published an article entitled "Inspection system takes big cuts when lab works on safety". (CX 10; EX E) Complainant was quoted as stating that "[t]he internal audits and assessments process is not independent, nor is it functioning." (CX 10; EX E) Complainant explained that under a new approach, the Audits and Assessments Office would be limited to "administrative" evaluations. (CX 10; EX E) He also explained that it appeared inspectors would be limited

to reviewing the evaluations of facilities provided by the managers of the facilities, a situation Complainant likened to the fox guarding the henhouse. (CX 10; EX E) The article also referenced Complainant's statement that he submitted to CCNS. (CX 10; EX E)

Although the article refers to Complainant as a "lab inspector", Complainant stated that he did inform the reporter that his official title was an assessor. (TR 222) He also stated that information relating to a June Laboratory meeting was not provided by him. (TR 223) Complainant explained that his allegations of defects in a concrete wall came from the assessment of the TA-55 plutonium facility. (TR 226) He also explained that his statement, that assessors¹⁸ were not allowed in certain areas, related to the TA-21 facility. (TR 228) Complainant explained that he addressed his concerns regarding access to Mr. Derkacs and Mr. Griffin, who was the team leader for that assessment. (TR 230) He did not take his concerns to Ms. Brittin, as the approach "has always been to follow the chain of command and to approach by administrative policies and address it through your immediate supervisor." (TR 231-232, 881)

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Complainant explained that he used information from the Gas Generation Matrix assessment in his statement to the newspaper that the WIPP¹² data was unreliable. (TR 1135-1136; CX 34) According to Complainant, the software that was being utilized for processing the data in the computer was found to be unreliable and ineffective. (TR 1132) He also indicated that the calibration records were not traceable to specifications or devices, and that the procedures for calibrating the pressure transducers in the install position were not available. (TR 1132; CX 34) Complainant explained that he based his statement on the results of "four or five experiments" in which he participated, wherein the experiment was assessed relative to the quality assurance program that was being applied. (TR 1136)

According to Complainant, after the article came out in the *Santa Fe New Mexican*, nobody in management made any reference to it. (TR 143; 242) The first time that anyone talked to Complainant about the newspaper article was when he reviewed his performance assessment in August of 1997. (TR 143-144)

Mr. Griffin read the article in the *Santa Fe New Mexican* when it first came out, and he stated that he was "angry" because he felt like his "whole group had been betrayed because we were under the impression that what we wrote in our reports and what we advised top management was proprietary information at least, to be shared only with the Lab management and within program managers at the Laboratory." (TR 534; CX 10; EX E) However, Mr. Griffin never spoke with Complainant about the article. (TR 565) Mr. Griffin felt that the article was "inaccurate" and it "reflected on our capability to determine what was important and whether it was the kind of information that should be allowed into the general domain." (TR 534) Mr. Griffin explained that there was an expectation of confidentiality. (TR 535)

Mr. Griffin felt the allegation, that inspection teams were not allowed access into certain areas because the Laboratory was trying to hide things, was not true. (TR 536) He explained that access has been denied only for operational and security reasons. (TR 536) Mr. Griffin also stated that there were some statements made by line managers that he felt were inaccurate because they gave the impression that Audits and Assessments were merely a watchdog group. (TR 537) He felt that this "degraded the effectiveness of our organization." (TR 537)

Mr. King read the article, and he was concerned that the statements being made were inaccurate. (TR 592; CX 10; EX E) Mr. King explained that "there was my feeling that there was no substance to the allegations of the statements being made", and he did not "remember seeing substantive documentation to

support them." (TR 593) Mr. King stated that, even if every statement in the article were true, he would have a similar reaction because he felt it was "something that the management needs to address not the newspaper." (TR 593) Mr. King stated that "[w]e're servants...we're not enforcers." (TR 593) He explained that "we discover information and we present it to

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the Laboratory for them to determine how best to handle that information." (TR 593-594)

At some point, Ms. Brittin did see the article in the *Santa Fe New Mexican*. (TR 872; EX E; CX 10) She was concerned that similar assessment materials were in the paper, that the assessments were considered for internal use only, and that assessors were giving press interviews which did not appear to have been through official LANL channels. (TR 873) She was also concerned that Complainant was quoted as saying that the internal audit and assessments process was not independent or functioning. (TR 873) Ms. Brittin explained that if the assessed organizations do not think the assessors can be objective and fair and give them a balanced perspective, then they will not rely on the reports. (TR 874)

E. Santa Fe Reporter Article

Complainant was next quoted in an article from the *Santa Fe Reporter* entitled "The Truth About the Stacks", which appeared in the January 15-21, 1997 edition. (TR 144; CX 11; EX D) Complainant explained that the article tried to "characterize the facets of the true status of the air emissions program as it is at the Laboratory." (TR 145) It was noted in the article that Complainant found that two technicians compiling air emissions data at TA-21 were not using the same methodology to calculate emissions, and that records for the emissions calculations for a complete year could not be located. (CX 11; EX D) It was also noted that Complainant found a defect in the concrete walls of the plutonium processing facility, and that gases could escape the building without being recorded by the air monitoring system. (CX 11; EX D) Complainant was quoted as follows:

The Lab is accustomed to doing what it wants without being held accountable. It suppresses information. It fabricates information. And it destroys information (using) using (sic) half truths, lies and slick marketing.

(CX 11; EX D) Complainant made this statement at a press conference held to announce that a settlement had been reached in the Clean Air Act case. (TR 145) Complainant explained that, attending the press conference, were representatives of CCNS, LANL, DOE and perhaps the University of California. (TR 148-149) He specifically stated that Denny Ericson, the Division Director for the Environmental Safety and Health Division at the Laboratory was present. (TR 148) According to Complainant, Mr. Ericson did not make any remarks to him regarding his participation in the press conference. (TR 150)

In the article, Complainant referred to "shabby" practices. (TR 151) He elaborated on this by explaining that the quality assurance programs "are in a state of disarray", that there is a fair amount of turnover in people, that individuals are dissatisfied, and programs as a whole are ineffective. (TR 152)

Complainant explained that his remarks in the article came from both an interview and the January, 1997 press conference announcing the settlement in the Clean Air Act case. (TR 243-244) He further explained that he specifically mentioned to the reporter that it was

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the QA aspect of the Clean Air Act in which he was considered an expert, although the article simply refers to him as an expert on the Clean Air Act regulations. (TR 247) Complainant stated that he did not release any of his assessments to anyone, including the reporter who wrote the article in the *Santa Fe Reporter*. (TR 254) Complainant does believe he commented to the reporter on the 1995 assessment of the plutonium processing facility. (TR 255-256) Complainant indicated that references in the article to "pervasive evidence of QA non-compliance" and "disdain for QA requirements" probably came from his October 7, 1996 statement, rather than from a discussion with the reporter.²⁰ (TR 256-257) Complainant did not give the reporter any documented proof, although he made the statements from his own knowledge of information. (TR 258)

After the article came out, Complainant had no discussions about it with Mr. Hecker, Ms. Brittin or Mr. Derkacs. (TR 259-260) Complainant did speak with Mr. Jackson about his concerns in a meeting in June or July of 1997, although they did not speak specifically about the article in the *Santa Fe Reporter*. (TR 260) Complainant stated that he did not receive any oral or written counseling after the article came out, although there were some "snide remarks" in passing from Mr. Derkacs. (TR 261) Complainant noted that the articles from the *Santa Fe New Mexican* and the *Santa Fe Reporter* had been circulated throughout the Laboratory, so he had a "suspicion" that Mr. Loud was aware of their contents. (TR 293)

In an article from the *Albuquerque Journal North* dated January 15, 1997, Complainant was quoted as follows:

They were doing some monitoring but it was a very cursory kind of monitoring, and there were no processes in place to verify the quality of the data.

(CX 12) He stated that nobody spoke with him about his quote in the article until August of 1997. (TR 153)

Mr. King read the article in the *Santa Fe Reporter*, and he stated that he was "concerned over the fact that there had been a number of evaluations done by the Laboratory about the stack emissions and at no point had we exceeded the limits established by the EPA." (TR 595-596; CX 11; EX D) Mr. King did not speak to Complainant about the articles in the *Santa Fe Reporter* or the *Santa Fe New Mexican*. (TR 612-613)

Mr. Frostenson read the article in the *Santa Fe Reporter*. (TR 726; EX D; CX 11) He was "surprised" about the article, because Complainant was quoted in the article, and he made a number of statements with which Mr. Frostenson did not agree. (TR 728-729) Specifically, Mr. Frostenson stated that he does not believe that Complainant is an air quality expert, nor has he been used as a subject matter expert in the Clean Air Act. (TR 729) He also stated that he does not believe that LANL suppresses information. (TR 729) Mr. Frostenson believed that the assessors' credibility would be impaired because the

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statements were not factual. (TR 731) He explained that the assessors' relationship with the assessed organization would be jeopardized if the press is given information prior to their having an opportunity to correct any problems. (TR 731)

Ms. Brittin saw the article in the *Sante Fe Reporter*. (TR 882; EX D; CX 11) She was concerned that one of the assessors was being quoted in the article, that there were some inaccuracies and that it would have an effect on the ability of assessors to do their job. (TR 882) She did not speak to Complainant about the article because she was out of the Laboratory a lot of the time on personal matters from September of 1996

through May of 1997. (TR 883) Ms. Brittin stated that Complainant is not considered, in the AA office, to be an expert in the Clean Air Act. (TR 883) She also stated that she has not experienced disdain for QA programs from the director on down the line. (TR 884) It has not been Ms. Brittin's experience that LANL does what it wants without being held accountable. (TR 885) According to Ms. Brittin, Complainant has never come to her with such complaints. (TR 885-886)

Mr. Loud recalled seeing the article in the *Santa Fe Reporter*. (TR 979; EX D; CX 11) He was "surprised" and "saddened to some degree" because he believed it would have a detrimental impact on the group. (TR 980) He explained that by detrimental impact, he meant that it might cause an adversarial relationship between the assessors and customers. (TR 980-981) He also explained that he was surprised because he did not "realize that there was an issue brewing that would result in public disclosure." (TR 980)

F. Objections to Complainant's Participation

At some point after the article in the *Santa Fe Reporter* came out, Mr. Griffin stated that he heard from Dennis Carathers²⁴, the Facility Manager at Facility Management Unit 70, and Shirley O'Rourke, the QA advisor associated with the WIPP Projects at CMR. (TR 538) According to Mr. Griffin, in August or September of 1996, Mr. Carathers remarked that this kind of airing of the Laboratory's laundry in public was unacceptable and he did not want any AA member to participate in reviewing his facilities again.²² (TR 539) Furthermore, Mr. Carathers stated that, in particular, he did not want Complainant. (TR 539) Mr. Griffin also explained that, in a meeting in December of 1996, Mr. Carathers stated that he did not want Complainant performing an assessment. (TR 539) Although, Mr. Carathers initially stated that the AA group could not be trusted, he later limited this to Complainant. (TR 539) According to Mr. Griffin, Complainant could not be trusted because there were statements in the article that related to the TA-21, the tritium facilities, which may or may not have been true. (TR 540) Mr. Griffin explained that it was Mr. Carathers' belief that "he should be given the opportunity to work out the solutions to the problems without having input from the public." (TR 540)

Mr. Griffin removed Complainant from the assessment of Mr. Carathers' organization. (TR 542) He also advised Mr. Derkacs that he would be unable to use Complainant

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in projects associated with WIPP, or at least projects with which Bobby Villarreal and Shirley O'Rourke were associated, because "they did not trust and did not want to have him gathering information that could possibly be released to the public at a later date."²³ (TR 542)

On February 10, 1997, Mr. Griffin sent an e-mail to Mr. Derkacs. (EX L-6) According to Mr. Griffin, John Ruminer of ESA-DD requested that Complainant not be used on the team for the ESA Hydro build-up assessment because Mr. Carathers of ESA-FM objected to Complainant being on the team. (TR 554; EX L-6) On February 12, 1997, Ms. Brittin received an e-mail from Mr. Derkacs wherein Mr. Derkacs asked Ms. Brittin to talk to the ESH Division in order to get a quality assurance person, other than Complainant, for an assessment. (TR 887; EX L-6) Ms. Brittin stated that not too many such requests are made. (TR 888) Mr. Griffin explained that he had to hire someone inside the Laboratory to take Complainant's place because he was acceding to customer complaints. (TR 567) Mr. Griffin did not think that the replacement was as qualified as Complainant because she did not have the qualifications of working with nuclear materials that Complainant had. (TR 568) Mr. Griffin stated that he never spoke with Complainant about the complaints made by Mr. Carathers or Ms. O'Rourke. (TR 566-567)

Mr. King stated that, after the articles came out, several line organizations expressed concerns over the fact that the information was given to the media, and they did not wish Complainant to be involved in assessments of their organizations. (TR 597) He explained that giving the information to the media "violates the confidentiality that we have tried to establish so strongly." (TR 597) According to Mr. King, Bobby Villarreal and Shirley O'Rourke both "were concerned over the fact that they had very sensitive programs and they did not wish to have what they were doing be the substance of a newspaper article." (TR 597-598) Mr. King further noted that there was a LANSCE organization that had concerns of a similar nature. (TR 598) He explained that neither organization wanted Complainant to return to their organizations because they were concerned that he was not going to maintain confidentiality. (TR 598-599) Mr. King explained that he was concerned about the complaints he received because it would impact the activities he planned for Complainant, and "it brought a problem of credibility to the rest of the people coming out to do assessments." (TR 599)

Mr. King explained that he acceded to the requests to keep Complainant of the assessment teams, and he brought in other qualified individuals to the team. (TR 600-601)

Mr. Villarreal is a team leader and project manager at LANL, as well as being the project leader on many projects. (TR 640) He is also the project manager for three WIPP programs. (TR 640) Mr. Villarreal read the article in the *Santa Fe New Mexican*, and he was upset with it. (TR 646-647; CX 10; EX E) He explained that "whenever things get into the paper on the information involving WIPP, a little knowledge can be a dangerous thing." (TR 647) He further explained that "we have to spend a great deal of time trying to respond to a lot of questions that people raise because they have very little

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information." (TR 647) Mr. Villarreal noted a particular statement in the article, that WIPP could be producing data that is not fully compliant, as disturbing. (TR 647)

After the article came out, Mr. Villarreal called the AA-2 office to confirm the source of the information. (TR 652) Following that, he instructed Shirley O'Rourke, the quality assurance manager, to request that Complainant not be part of the next requested assessment because he did not want "this kind of information leaking out to the press under an internal audit that we have requested." (TR 653) Mr. Villarreal indicated that he was not trying to improperly manipulate an audit team by making this request. (TR 653) Rather, his primary concern was for his sponsor and customer. (TR 653)

Mr. Villarreal indicated that he judged Complainant without talking to him about why he made the statements attributed to him in the *Santa Fe New Mexican* article. (TR 664) He explained that the statements in the article were dangerous because it would become a problem for his sponsor, the Carlsbad Area Office of the DOE. (TR 665) The article was also a concern because Mr. Villarreal would have to take time to respond. (TR 666)

Mr. Villarreal had an expectation of confidentiality with the assessors, but this was not in writing. (TR 668) He agreed that there were not any details regarding the WIPP project in the article, but he added that "a little knowledge can be taken the wrong way." (668-689) Mr. Villarreal explained that the article, in stating LANL used inadequate quality assurance, made "an encompassing and negative statement about the quality assurance procedures" being used. (TR 671)

Shirley O'Rourke is the Transportation Program Manager at LANL. (TR 675) She recently returned to this position after spending six years in quality assurance working for the Source-Term Test Program

(STTP), which is a WIPP program. (TR 675) Ms. O'Rourke read the article in the *Santa Fe New Mexican*. (TR 682; EX E; CX 10) She noted that she was not happy with a paragraph which stated that LANL used inadequate quality assurance procedures related to an experiment for the WIPP program, and that the results of the experiment could not be certified or relied on. (TR 683) Specifically, Ms. O'Rourke stated that to the best of her knowledge, there is no question about the results of the experiment. (TR 683) According to Ms. O'Rourke, there were numerous audits, and at no time did anyone ever question the data, the experimental processes or the methodology. (TR 683) Ms. O'Rourke was not pleased by the article because it was bad publicity and it was not accurate. (TR 684) She also stated that the impact of the article "casts a doubt on the value and on the validity and of the results and of the work that's being done." (TR 684)

Ms. O'Rourke discussed the article with Mr. Villarreal, and then she called Mr. Griffin, who was the team leader for the most recent assessment. (TR 687) She told Mr. Griffin that she did not want Complainant involved in assessments on any projects with which she was affiliated. (TR 687) She explained that she did not feel that Complainant could be trusted because he was passing on confidential information, and because the data he was giving to the newspaper was inaccurate. (TR 687)

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Ms. O'Rourke explained that her concerns with regards to the article revolved around the fact that it was "a condemnation of all of the projects of the [WIPP]" and that it was "not specific about what they're talking about." (TR 711) She added that the "way the experiments are put together the results and the data, there's no question about the results or the data." (TR 711)

Ms. O'Rourke indicated that she was satisfied with Complainant's level of competency and his expertise when he did assessments. (TR 692) She stated that she never spoke with Complainant about the statements in the newspaper article, and that she did not know what he based his statements on. (TR 693-694)

According to Mr. Frostenson, Margie Gavett from CST-7 asked that Complainant not be used on an assessment that was being planned. (TR 731-732) Ms. Gavett did not want Complainant because she did not want to read about her problems in the newspaper. (TR 732) Mr. Frostenson indicated that he found another qualified quality assurance person to take Complainant's place. (TR 733) He stated that he informed Mr. Derkacs of Ms. Gavett's complaint. (TR 734) Mr. Frostenson stated that he never spoke with Complainant about Ms. Gavett's request that Complainant not be part of the assessment team. (TR 812) He also stated that he did not try to get access for Complainant. (TR 814)

Ms. Brittin indicated that she is concerned when she gets feedback from assessed organizations relating to the quality of the assessors work. (TR 962) Ms. Brittin agreed that she was concerned enough about the feedback from the assessed organizations to allow work to be taken away from Complainant without his knowledge. (TR 963-964) However, Ms. Brittin later stated that work was not taken away from Complainant, rather, resources were aligned to better serve the interests of the customers. (TR 969-970)

Mr. Loud, when he came on as group leader in March of 1997, scheduled meetings with all the employees. (TR 982) According to Mr. Loud, all three team leaders stated that they had negative customer feedback pertaining to Complainant's participation in certain assessments. (TR 984) He also believed that all three team leaders stated that they had customers who "requested or demanded" that Complainant not be used on their assessments. (TR 984) Mr. Loud recalled being told that Complainant was not working on an assessment because of the customer feedback. (TR 984-986) Mr. Loud stated that he did not do any independent investigation of what the team leaders told him. (TR 985) However, he also stated that some members of the assessed organizations expressed displeasure to him regarding news media disclosure of

assessment issues. (TR 1081-1082)

Mr. Loud did not address the situation because he was not sure how to address it at that point. (TR 986) He decided that "the best way to deal with it would be in the upcoming performance appraisals." (TR 986) Mr. Loud stated that he did not consider disciplining Complainant. (TR 986) According to Mr. Loud, some of the group was angry about the disclosure and Complainant's actions. (TR 987) Mr. Loud stated that not using Complainant on assessments "really wasn't an option." (TR 987) He explained that he

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"couldn't let other people dictate who we used on independent assessments", and that he intended to use Complainant as long as he was with the group. (TR 987) Mr. Loud put Complainant back on assessments within a month or two after he became group leader. (TR 988-989) Mr. Loud believed that Complainant's predominant activity, when he was not doing assessments, was reviewing QA manuals and books.²⁴ (TR 988)

Complainant stated that he never heard about any complaints from the assessed organizations until the formal hearing, and he was not aware work was being taken away from him. (TR 1154)

G. LANL's Employee Performance Assessment Process

Victoria McCabe is the Office Leader of the Human Resources Policy and Communication Office at LANL. (TR 424) Her duties are to "manage a function which coordinates, writes and disseminates Laboratory policy relating primarily to human resources and other types of employee responsibility matters." (TR 424) Ms. McCabe explained that an Employee Performance Assessment contains a "matrix" section, the purpose of which is to "describe the job factors or tasks that are expected of the employee and to give space for an indication of performance relative to those factors or tasks." (TR 429; EX C-1) She also explained that there is a "comments" section, the purpose of which is "for the supervisor or manager to expound on the ratings that are contained in the matrix." (TR 430)

If an employee is not satisfied with the performance appraisal, the mechanism set out in AM 109 is for the employee to approach the next level supervisor or manager and discuss the problem with them. (TR 432) A mediation center is also available to provide for a mechanism for employees and supervisors to discuss and resolve any differences. (TR 432) Ms. McCabe stated that an ombudsman office opened in the fall of 1997. (TR 433)

Ms. McCabe explained that the performance appraisal is not considered a disciplinary tool according to AM 112. (TR 433) However, she also explained that there is a correlation between the performance appraisal and salary, and that both the matrix and the comments section can be taken into account. (TR 434) Ms. McCabe described the performance appraisal system as "more performance based management where there are actually goals set out for the employee and some more quantitative measure of whether the employee has achieved those goals or not." (TR 435) She explained that the performance appraisal policy at AM 109 describes "general expectation", but that it is possible, and likely, to find some deviation in the process among groups, divisions and managers at LANL. (TR 435-436)

With regards to AM 729, Ms. McCabe stated that, where an employee believes that the performance appraisal is a form of retaliation, there is no requirement that they exhaust the internal mechanism available to review that performance appraisal. (TR 447; EX C- 21) Ms. McCabe agreed that there is no grievance procedure for an adverse performance appraisal, although a salary action could be grieved. (TR 448) She also agreed that a comment in a performance appraisal could be taken into account as one of the factors in

determining an individual's pay increase in a particular year. (TR 449)

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Floyd Segura is presently Project Leader in the Compensation and Benefits Group at LANL. (TR 478) Prior to this, he was the Group Leader of Compensation and Benefits at LANL. (TR 479) Mr. Segura explained that LANL is on an October 1 to September 30 fiscal year. (TR 480) Thus, the fiscal year for 1998 begins in October of 1997. (TR 480) He also explained that the salary review exercise for 1998 would begin in September of 1997, and that a salary increase would become effective in the closest beginning of a pay period to the fiscal year. (TR 480-481)

With regards to salary review, Mr. Segura explained that the process managers are asked to use is to look at their employees and place them into peer groups based on job series²², job title and similarities in jobs. (TR 484) Managers are asked to look at the performance evaluation that was done for that particular year, look at the employee's performance, their job content which is equal to their total contribution, look at their salary in alignment relative to the peers within their peer group, and then make salary decisions based on that information. (TR 484-485) Mr. Segura explained that managers have flexibility within the guidance given by the Compensation Group. (TR 485) Specifically, he stated that managers have flexibility to place their people into peer groups as they see appropriate, and to determine raises based on salary alignment, performance and "those kinds of things." (TR 485)

The Director's role in salary determinations is to determine what the allocations are going to be for the four major job series. (TR 488) The manager's role is to allocate merit funds to each of their groups, and they have the flexibility to do that based either on the total payroll in each group or to do it based on other factors like salary alignment and salary needs within the organization. (TR 489) The group leaders submit proposals to their division directors on the individual raises of the employees within their groups. (TR 489)

According to Mr. Segura, for fiscal year 1998, the DOE authorized LANL to increase the technical staff member payroll by four percent. (TR 494) He further explained that because of the performance-based management salary system, the four percent is just what LANL is authorized to increase the total staff member payroll. (TR 494-495) Thus, the percentage increase for each individual could be much lower or much higher depending on their performance, job content and their salary alignment within their peer group. (TR 495)

Mr. Segura explained that managers should form peer groups so that there are similarities and that the similarities can be explained to the people in the peer group. (TR 496) He stated that it would be appropriate to join technical staff members across the division into one peer group, especially if there are a small number of technical staff members in each group. (TR 496) Once a peer group is formed, you look at performance, job content and then salary alignment within that peer group. (TR 497) Mr. Segura stated that factors such as academic degrees and years of experience are less important considerations than the performance

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and job content. (TR 497) He also stated that obtaining a degree does not automatically result in a pay increase, although the obtaining of an advanced degree or special certification are factors that should be taken into consideration when making salary determinations. (TR 497-498, 504)

Mr. Segura stated that an employee's performance assessment, as well as good and bad comments should

be taken into consideration. (TR 505) He further stated that if there were any other documents taken into consideration, they should be shown to the employee. (TR 511) Mr. Segura indicated that in the case of an assessor, the work to be considered in the salary determination is the assessing work. (TR 513)

Mr. Segura explained that most salary determinations are made at the team level, then the group leader would review them, followed by review by the division director. (TR 498) He also explained that there is some review at the director level, but that this review would deal with trends and not individual salary increases. (TR 498)

Mr. Segura stated that, in most cases, a team leader's salary would be greater than a non-team leader's salary. (TR 500) Similarly, Mr. Segura stated that employees with leadership roles would more likely receive higher salary increases over employees without leadership roles, because those with leadership roles would have greater job content. (TR 500) He also stated that employees with significantly higher performance ratings than others would have greater salary increases. (TR 501)

It was Mr. Segura's experience that managers have abused their discretion in making salary determinations. (TR 506) He stated that it would be improper to use the salary review process to penalize someone who blew the whistle on unsafe conditions. (TR 507-508)

Mr. Segura did not know whether an employee's salary determination is grievable within LANL's employee complaint process. (TR 517) However, he did state that an employee could go to the Employee Relations Group or the Ombuds Office with salary concerns. (TR 518)

H. Complainant's Performance Assessment

On August 8, 1997, Complainant received his Employee Performance Assessment, prepared by Mr. Loud²⁶, for the review period from June 1, 1996, to May 31, 1997. (CX 14) The performance assessment contained an "Evaluation Matrix" which listed seven "Job Factors or Tasks." (CX 14) The seven job factors included; teamwork, customer service, technical/programmatic management, adaptability, tactical goal support, institutional and organizational participation, and professionalism. (CX 14) Complainant received a "Fully Satisfactory Performance" for each job factor except for technical/programmatic management, for which he received an "Exceptional Performance." (CX 14) The performance assessment contains a "Comments" section, which is required for "Exceptional Performance", "Performance Needs Improvement" and "Unsatisfactory Performance." (CX 14) Complainant's performance assessment

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contained the following comments:

Joe is a well recognized expert in Quality Assurance and continuously strives to maintain and enhance his expertise in this area. He recertified as an ISO 9000 Lead Auditor during this period and is one of only a handful of Laboratory employees to hold this distinction. He has provided leadership to the group in development of standards and operating practices to increase our effectiveness. Joe also added to his professional credentials during this period by obtaining a Master of Business Administration/Technology Management degree.

There was some unfavorable customer feedback during this period regarding the unrestricted distribution of some of Joe's assessment issues. Since Joe routinely works with customers in sensitive and service oriented fashion, I am confident that the trust and confidence of these and other customers can be reestablished through use of new and existing AA/Laboratory channels for issue

escalation and resolution. I look forward to working with Joe to use these systems to enhance the Laboratory's ability to identify and correct significant ES&H deficiencies.

(CX 17; EX I) Mr. Loud explained that he included the sentence regarding "unfavorable customer feedback" because it was true, it was something that needed to be on the record, and it was something Complainant needed to know about. (TR 1013) It was also included so "we would have an agreement where we could do a more effective job of what we're chartered to do which is to do internal assessments at the Laboratory." (TR 1087) Mr. Loud explained that the effectiveness of the organization was at stake because of customers' concerns that Complainant had gone to the media. (TR 1069)

Complainant was "rather offended" at the manner in which the customer complaints were introduced, as he had heard no complaints from anyone prior to reviewing the assessment. (TR 155) He asked to be permitted an opportunity to comment, and then he entered his comments in the appraisal. (TR 155, 1016-1017; CX 14; EX I-11) Complainant's comment, in relevant part, stated as follows:

The comment about the ... "unrestricted distribution of some of Joe's Assessment issue." ... refers to my providing input to the Concerned Citizens for Nuclear Safety (CCNS) law suit brought against the Laboratory.

The Laboratory channels I attempted to utilize to escalate and alert Lab management of my concerns failed, because line management refused to acknowledge my concerns and denied the existence of the issues and facts I brought to their attention.

The Court ruled in favor of CCNS and acknowledged my concerns as being valid and corroborated.

(CX 14; EX I-11)

In response to Complainant's comments, Mr. Loud wrote a note, dated August 27, 1997, to Complainant. (TR 1021-1022; EX I-12; CX 15) The note stated as follows:

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Joe, I was very pleased we could find common ground during your performance appraisal meeting regarding the use of group and Laboratory systems for issue identification and resolution. Based on our discussion, I think we can resolve the customer satisfaction issues we discussed. Regarding the clarification comments you submitted after our meeting, I want to further clarify that my concerns regarding customer satisfaction were not related to any involvement you may have had with the CCNS lawsuit. We didn't discuss this lawsuit during our meeting and I did not even recall your CCNS participation at that time.²⁷ My present concerns and my comments during our meeting were related to media coverage referencing our internal assessment issues. Understandably our customers do not want to read about their real and/or perceived deficiencies in media sources such as the Santa Fe Reporter. We need to be sensitive to these customer concerns and avoid media interaction leading to such coverage of internal assessment issues. Again, I am confident that the course of action we agreed to during your performance appraisal will allow us to avoid this type of customer dissatisfaction in the future.

(CX 15; EX I-12) Mr. Loud explained that he wrote the note because he felt Complainant's comments were inaccurate, and he wanted to correct it for the record. (TR 1022) Mr. Loud's concerns were based on Complainant's comments in the *Santa Fe Reporter*, and he was not concerned with CCNS. (TR 1108-1110) According to Complainant, Mr. Loud indicated that the note would be added to his performance appraisal.

(TR 158)

On September 8, 1997, Complainant sent an e-mail to Mr. Loud regarding Mr. Loud's August 27, 1997 note. (TR 159, 1025; CX 18; EX L-1) Complainant had questions about the "customer concerns." (CX 18; EX L-1) He felt that if the note were entered into his appraisal, it would have an adverse action on further employment, and he felt it did not accurately characterize the situation as it had transpired. (TR 159-160) In the e-mail, Complainant reserved the right to go outside the Laboratory when people's lives are at stake. (TR 161; CX 18; EX L-1)

Mr. Loud responded to Complainant's e-mail with an e-mail of his own dated September 25, 1997. (TR 1026; CX 19; EX L-4) Mr. Loud explained that he wanted to make it clear to Complainant that he did not want to interfere with Complainant's legal rights, but he wanted to reemphasize that he was still concerned about the issue. (TR 1028) He also explained that he made the comment about not going to the media, because he "didn't believe that was within [Complainant's] legal rights."²⁸ (TR 1028-1029) Mr. Loud indicated that he was referring specifically to releasing information that would have been learned from work within the group. (TR 1029)

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On October 3, 1997, Complainant prepared a memo documenting a conversation he had with Mr. Loud regarding his raise. (TR 173, 1030; CX 20) Complainant objected to the negative comments in his performance assessment relating to customer dissatisfaction. (TR 173-174) According to Complainant, Mr. Loud stated that he did not have much participation in the performance assessment, but that it was probably Mr. Derkacs or Ms. Brittin who did. (TR 174) According to Complainant, Mr. Loud indicated that he felt Complainant contributed more to the Laboratory than was reflected in the raise. (TR 175) Mr. Loud presented Complainant with a notification of his raise, which was dated September 30, 1997. (TR 176; CX 21) Complainant's raise was 2.75 percent. (TR 175; EX J)

According to Mr. Loud, it was "conceivable" that he told Complainant that he wished the raises were more, because he did not feel that there was a very big pool to begin with. (TR 1060) He explained that he does not remember telling Complainant that he had nothing to do with Complainant's salary determination, although he added that he might have been referring to the size of the pool. (TR 1060) Mr. Loud also did not recall telling Complainant that he would try to make it up the next year. (TR 1061) He did recall that Complainant stated that he could do more. (TR 1062) Mr. Loud assumed Complainant was referring to the fact that he was not being used on some assessments, and he agreed with Complainant's statement. (TR 1062) Mr. Loud indicated that he was not commenting that Complainant's contribution was actually greater than that which was reflected in his pay increase. (TR 1062-1063)

Ms. Brittin indicated that she became aware of the comment regarding "unfavorable customer feedback" sometime in the summer of 1997, when Mr. Loud brought it to her attention. (TR 890) According to Ms. Brittin, Mr. Loud wanted to communicate to Complainant that there were issues concerning the way he distributed some of the assessment issues. (TR 891) She did not believe that the comment referring to "unfavorable customer feedback" was made in retaliation for Complainant's statement to CCNS. (TR 909) She explained that she did not discuss the "unfavorable customer feedback" with Complainant because she was away from the laboratory for most of the time between September of 1996 and May of 1997. (TR 891) She also explained that the performance assessment was the proper way to address the issue since it was the place to provide feedback to employees. (TR 891-892)

Mr. Loud did not recommend Mr. Gustafson's raise for fiscal year 1997²⁹, although he did make salary

recommendations for the employees in the AA-2 group.³⁰ (TR 1045-1046; EX J) Mr. Loud recommended Complainant's salary increase for fiscal year 1998. (TR 1046; EX J) He explained that the salary determinations were made by using the performance appraisals and the ratings within those appraisals to group people with similar ratings with the idea that higher ratings should be entitled to higher compensation. (TR 1047) Then, at a meeting of all of AA's management, the group leaders "do a little trading", as there is a finite amount of money from which to distribute. (TR 1047-1048)

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Mr. Loud made his salary recommendation based on performance and job content, and he explained that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) According to Mr. Loud, job content was the "only objective differentiation" between Complainant, Mr. Beckmann and Mr. Emerson. (TR 1103) Mr. Loud agreed that one of the reasons he gave more money to Mr. Beckmann was because he was the team leader of the management self-assessment. (TR 1103) Mr. Loud noted that Complainant's job content had been affected that year, as Complainant had been taken off assessments because of customer complaints. (TR 1106-1107) However, he explained that he never took into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113)

Mr. Loud stated that the performance appraisal system can be a disciplinary tool, but that he was not using it as a disciplinary tool in this case. (TR 1014) He admitted that his second paragraph in the comments section was not required and that it could give the impression that Complainant's performance needed improvement, although that was not his intent. (TR 1077) According to Mr. Loud, comments in a performance appraisal might be taken into account in making salary decisions, and that they might be evaluated in terms of promotion. (TR 1083-1084)

After discussing the salary determinations with the group leaders, the recommendations are sent to Ms. Brittin for approval. (TR 1058) Mr. Loud indicated that Ms. Brittin approved the recommendations that came from the management team. (TR 1058) Mr. Loud believed that Complainant's rating in the raises was an accurate reflection of his contribution to the group, although he would have liked a bigger pot of money to divide at the outset. (TR 1058) According to Ms. Brittin, she did not recall Complainant's raise recommendation being changed at the team management meeting. (TR 904-905) She indicated that Complainant's raise was appropriate and based on his contribution to the organization. (TR 905)

Complainant did not see a completed copy of the performance appraisal, including Mr. Loud's August 27, 1997 note, until early 1998. (TR 169) He "got rather mad" because he had sent the e-mail to Mr. Loud regarding his reservations about the note being entered into the appraisal, and because he had requested additional information.³¹ (TR 169) Complainant pointed out that the Administrative Manual requires that, before a performance assessment addendum is placed in the employee's official personnel file, the employee and the supervisor must read, discuss, and sign the assessment replacement or addendum.³² (TR 169-170) Complainant stated that he never signed Mr. Loud's note. (TR 170)

Complainant provided four reasons why he was upset about Mr. Loud's note. First, it would have an adverse impact on his employment, both at the Laboratory and as a reflection on prior employment.³³ (TR 170-171) Second, the administrative procedure which details how such comments were to be entered was not observed. (TR 171) Third, the comment has a chilling effect on his ability to raise concerns without intimidation and the threat of retaliation. (TR 170) Fourth, the comment does not relate to his performance, but to the dissatisfaction of others based on his whistleblowing activities. (TR 170, 298)

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Complainant did not seek a higher level of management review of his performance appraisal, as is allowed by AM 109.23. (TR 313-314, 892; EX C-4)

Complainant indicated that he has been asked to assist a different group for a period of six months, with the possibility of an extension. (TR 312) He also indicated that the group has the choice of whether to accept his participation. (TR 313) Complainant assumed that the group would have the opportunity to see his performance appraisals if they wanted. (TR 313)

II. Preliminary Matter

Respondent has argued that Complainant's speech is not protected by the First Amendment to the United States Constitution because it fails the balancing test enumerated by the United States Supreme Court in **Pickering v. Board of Education**, 391 U.S. 563, 88 S.Ct. 1731 (1968) and **Connick v. Myers**, 461 U.S. 138, 103 S.Ct. 1684 (1983). (EX X at 20-25) According to Respondent, although Complainant's speech was of public concern, his chosen method of delivering the speech was unduly disruptive to Respondent's business activities, and thus, Complainant's speech falls outside the gambit of First Amendment protection. (EX X at 25)

This Administrative Law Judge finds Respondent's arguments unpersuasive. None of the cases cited by Respondent in its post-hearing brief, with regards to the First Amendment issue, concerned matters arising out of the employee protection provisions of the ERA. Those provisions are set forth at 42 U.S.C. §5851, and I will conduct my analysis pursuant to them, and pursuant to the implementing regulations set forth at 29. C.F.R. Part 24.

III. Discussion

This case proceeded to a full hearing on the merits. Accordingly, examining whether Complainant has established a **prima facie** case is no longer particularly useful and this Administrative Law Judge shall consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that he was discriminated against for engaging in protected activity. See **Boudrie v. Commonwealth Edison Co.**, 95-ERA-15 (ARB 04/22/97); **Boytin v. Pennsylvania Power and Light Co.**, 94-ERA-32 (Sec'y 10/20/95); **Marien v. Northeast Nuclear Energy Co.**, 93-ERA-49/50 (Sec'y 09/18/95). To carry that burden, Complainant must prove that Respondent's stated reasons for placing the comment regarding "negative customer feedback" in his performance assessment, and for giving him a 2.75% pay increase for fiscal year 1998, are pretextual, i.e., that they are not the true reasons for the adverse actions and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 94-TSC-3/4, at p. 4 (Sec'y 12/01/95); **Hoffman v. Bossert**, 94-CAA-4, at p. 4 (Sec'y 09/19/95). It is not sufficient that Complainant establish that the proffered reasons were unbelievable; he must establish intentional discrimination in order to prevail. **Leveille, supra**.

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A complainant under the ERA must prove that retaliatory action was taken against him because he engaged in conduct listed in 42 U.S.C. §5851(a)(1), (2) or (3), which the Secretary has interpreted broadly to mean any action or activity related to nuclear safety. **Keene v. Ebasco Constructors, Inc.**, 95-ERA-4 (ARB 02/19/97) (complainant engaged in protected activity where he reported safety concerns that were neither frivolous nor extraneous to the safety interests promoted by the whistleblower protections of the

ERA); **Van Beck v. Daniel Constr. Co.**, 86-ERA-26 (Sec'y 08/03/93)(complainant engaged in protected activity where he expressed concerns about non-nuclear hazards present during the construction phase of a nuclear power plant which had a potentially substantial effect on nuclear safety). Cf. **Roberts v. Rivas Environmental Consultants, Inc.**, 96-CER-1 (ARB 09/17/97)(dismissing complaint because employee raised concerns about occupational safety and health matters, rather than CERCLA protected activities); **Tucker v. Morrison & Knudson**, 94-CER-1 (ARB 02/28/97)(holding that certain safety concerns raised by complainant were not protected by the CERCLA because they did not relate to *environmental* safety, but rather to *occupational* safety)(emphasis in original).

On the basis of the totality of this closed record, I find and conclude that Complainant has established by a preponderance of the evidence that he engaged in protected activity and that Respondent was aware of it. Complainant raised concerns regarding the need for as-built configuration design (TR 81-82, 1143-1144; CX 4), implementation of the quality assurance program (TR 75-76, 122-124; CX 2; CX 27), the potential for leaks between the concrete placements at the plutonium facility (TR 128-129), and problems with the radionuclide monitoring system (TR 127-132, 1148-1149; EX G). This Administrative Law Judge finds Complainant's concerns to be within the parameters of the ERA as they relate to nuclear safety. See **Smith v. Esicorp, Inc.**, 93-ERA-16 (Sec'y 03/13/96).

Complainant raised his concerns in the BUS and TSFF assessments, and in his March 22, 1996 memo. (EX G, H; CX 2) Such internal safety and quality control complaints are within the scope of protected activities covered by the ERA. **Kansas Gas & Elec. Co. v. Brock**, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011, 92 L.Ed. 2d 724, 106 S.Ct. 3311 (1986). Complainant is employed at LANL as an internal assessor in the Office of Audits and Assessments (ALJ EX 18), and he is a subject matter expert in the area of quality assurance. (EX W at 22) Employees performing quality control and quality assurance functions are engaged in activity protected by Section 5851 of the ERA. **Richter v. Baldwin Associates**, 84-ERA-9 to 10 (Sec'y 03/12/86)(order of remand)(citing **Mackowiak v. University Nuclear Systems, Inc.**, 735 F.2d 1159(9th Cir. 1984)("In a real sense, every action by quality control inspectors occurs 'in an NRC proceeding,' because of their duty to enforce NRC regulations.)); **Collins v. Florida Power Corp.**, 91-ERA-47 and 49 (Sec'y 05/15/95)(employees engaged in quality control work in nuclear power facilities are precisely the people the ERA whistleblower provision is designed to protect).

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In early 1996, Complainant raised his concerns regarding quality assurance and the potential for leaks in the plutonium facility with Mr. Le Doux of the Department of Energy. (TR 83, 464-466) Complainant provided his October 7, 1996 statement to Congressman Richardson and Senator Bingaman, among others. (TR 139; CX 27) These contacts with a federal agency and the New Mexico congressional delegation are protected under the employee protection provision of the ERA. See **Saporito v. Florida Power & Light Co.**, 89-ERA-7 and 17 (Sec'y 06/03/94)(employee who bypassed the chain of command to speak directly with the Nuclear Regulatory Commission engaged in protected activity).

Complainant also provided CCNS with his October 7, 1996 statement. (TR 139) CCNS submitted Complainant's statement, as an attachment to another document, to Judge DeGiacomo in connection with the Clean Air Act lawsuit. (TR 404-405) It was Complainant's expectation that by giving his statement to CCNS, he could get his concerns to the court. (TR 375-376) I find that Complainant's contact with CCNS is protected activity. See **Scott v. Alyeska Pipeline Service Co.**, 92-TSC-2 (Sec'y 07/25/95)(providing information to a private person for transmission to responsible government agencies, or for use in environmental lawsuits against one's employer is protected activity under the CAA, SWDA, TSCA, and FWPCA), citing **Simon v. Simmons Indus.**, 87-TSC-2 (Sec'y 04/04/94). See also **Nunn v. Duke Power Co.**, 84-ERA-7 (Sec'y 07/30/87)(complainant may be able to establish that contact with public interest

group was protected activity pursuant to 42 U.S.C. §5851 (a)(2) and (a)(3)).

Finally, Complainant was quoted in articles published in the *Santa Fe New Mexican* and the *Santa Fe Reporter*. (CX 10, 11; EX E, D) His comments related to the quality assurance program, and to his findings from his assessments of the tritium and plutonium facilities. (CX 10, 11; EX E, D) Communications with the media are protected activities under the Act. *Wedderspoon v. City of Cedar Rapids, Iowa*, 80-WPC-1 (Sec'y 07/28/80); *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y 07/26/95)(contact with the press is protected activity under the whistleblower statutes); *Floyd v. Arizona Public Service Co.*, 90-ERA-39 (Sec'y 09/23/94)(complainant engaged in protected activity when he met with a newspaper reporter and provided him documents concerning safety at the respondent's nuclear facility).

Complainant has also established by a preponderance of the evidence that Respondent was aware of his protected activity. To establish the element of knowledge of complainant's protected activities, the evidence must show that respondent's managers responsible for taking the adverse actions had knowledge of the protected activities. *Floyd v. Arizona Public Service Co.*, 90-ERA-39 (Sec'y 09/23/94).

Mr. Loud, who prepared Complainant's performance assessment, was aware of much of Complainant's protected activity. According to Ms. Brittin, she briefly discussed Complainant's October 8, 1996 statement with Mr. Loud. (TR 871-872) Mr. Loud admitted that he saw the article in the *Santa Fe Reporter*, and he added that he was "surprised" and "saddened to some degree" because he believed it would have a detrimental impact on the group. (TR 979-980) Mr. Loud also admitted that some

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members of the assessed organizations expressed displeasure to him regarding news media disclosure of the assessment issues. (TR 1081-1082) Furthermore, all three team leaders informed Mr. Loud that they had negative customer feedback concerning Complainant's participation in certain assessments. (TR 984) Mr. Loud was also aware of Complainant's participation in the CCNS lawsuit, although he stated that he did not recall such participation at the time of the performance appraisal meeting. (CX 15; EX 1-12)

Ms. Brittin, who reviewed and approved Complainant's performance assessment, was also aware of Complainant's activity. Ms. Brittin did receive a copy of Complainant's March 22, 1996 memo to Mr. Derkacs, and she conceded that the memo did reference health and safety issues. (TR 837, 917-919) She also received a copy of Complainant's October 7, 1996 statement, after it was faxed to her by the Public Affairs Office. (TR 870) Ms. Brittin read the articles in both the *Santa Fe New Mexican* and the *Santa Fe Reporter*, and she was aware of Complainant's participation with CCNS. (TR 872, 882, 961)

The uncontroverted evidence also establishes that Mr. Jackson, the Deputy Director of the Laboratory, was aware of Complainant's protected activity. Complainant sent a copy of his March 22, 1996 memo to Mr. Jackson. (TR 79; CX 2) According to Mr. Le Doux, he informed Mr. Jackson that Complainant was concerned about getting a report through audits and assessments, and that Complainant was concerned about concrete placements. (TR 469-470) Mr. Le Doux also stated that Mr. Jackson informed him that LANL had followed up on Complainant's concerns. (TR 470) In June or July of 1997, Complainant spoke with Mr. Jackson about some of his concerns. (TR 260)

Mr. Derkacs, who prepared an interim performance assessment for Complainant³⁴, was also aware of Complainant's protected activity. Complainant's March 22, 1996 memo was addressed to Mr. Derkacs, and the memo set forth Complainant's concerns over the quality assurance program. (TR 75-76; CX 2) Furthermore, after publication of the article in the *Santa Fe Reporter*, Mr. Derkacs made some "snide

remarks" in passing to Complainant. (TR 261) According to Mr. Griffin, he informed Mr. Derkacs that he could not use Complainant on projects associated with Mr. Villarreal and Ms. O'Rourke because they did not want Complainant gathering information that could possibly be released to the public. (TR 542)

Other Employees at LANL were also aware of Complainant's protected activity. Both Mr. Griffin and Mr. King read the article in the *Santa Fe New Mexican*. (TR 534, 592) Mr. King and Mr. Frostenson both read the article in the *Santa Fe Reporter*. (TR 595, 726) According to Mr. Griffin, Mr. Carathers was aware of Complainant's contacts with the media, as Mr. Carathers remarked that the airing of the Laboratory's dirty laundry in public was unacceptable. (TR 538-539) Mr. Villarreal and Ms. O'Rourke both read the article in the *Santa Fe New Mexican*, after which they requested Complainant not be assigned to assessments of their facilities. (TR 646-653, 682-687) According to Mr. Frostenson, Ms. Gavett requested that Complainant not be used on an assessment that was being planned because she did want to read about her problems in the newspaper. (TR 732)

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Respondent argued that the comment in Complainant's performance assessment regarding "unfavorable customer feedback", and the 2.75% pay raise for fiscal year 1998 were not adverse employment actions. Respondent further argued that the comment in the performance assessment was not an adverse action because it did not meet the ERA definition of an adverse action, the comment was a proper statement of fact regarding "true" customer feedback, and Complainant suffered no adverse consequences as a result of the notation in his performance appraisal. This Judge rejects each of these arguments and addresses each in turn.

Respondent argued that the comment regarding "unfavorable customer feedback" does not meet the definition of adverse action because the "entries reflect positively on the Complainant and record the Supervisor's willingness to work with, and confidence in the, Complainant." (EX X at 30) However, the narrative contained in a performance appraisal may constitute adverse action, even if the ultimate rating does not. **Varnadore v. Oak Ridge National Laboratory**, 92-CAA-2 and 5, 93-CAA- 1 and 94-CAA-2 and 3, slip op. at 32 (ARB 06/14/96), citing **Bassett v. Niagra Mohawk Power Corp.**, 85-ERA-34, slip op. at 4 (Sec'y 09/28/93). Thus, the fact that Mr. Loud's comment contains other statements that could be perceived as positive does not negate the overall tone of the comment. Furthermore, this Administrative Law Judge does not find that Mr. Loud's comments, that he is "...confident that the trust and confidence of these and other customers can be reestablished...", and that he "...looks forward to working with..." Complainant, reflect positively on Complainant. Such comments show that customers no longer trust or have confidence in Complainant, because of his engaging in protected activity.

Citing to **Varnadore v. Oak Ridge National laboratory**, 92- CAA-2 and 5, 93-CAA-1 and 94-CAA-2 and 3 (ARB 06/14/96), Respondent argues that the comment regarding "negative customer feedback" is a mere statement of fact that does not constitute an adverse action. (EX X at 30) In **Varnadore**, the respondent introduced the complainant at a meeting by stating, "we all know him." **Id.** With regards to this statement, the ARB reasoned as follows:

Given the amount of publicity that the Varnadore cases have generated, Minter's comment was merely a statement of fact. Certainly nothing which even arguably had an adverse impact on Varnadore's work environment can be read into this innocuous remark.

Id. The situation in the present matter is distinguishable from the one in **Varnadore**. Here, Mr. Loud included the comment in Complainant's performance assessment, as opposed to making the comment to a gathering of people. Comments in a performance assessment can be taken into account as one of the factors

in determining an individual's pay increase in a particular year. (TR 449) In fact, Mr. Loud stated that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) Mr. Loud also stated that comments in the performance assessment are part of Complainant's

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permanent record, and could be evaluated in terms of promotion. (TR 1083-1084) Thus, as the comment regarding "unfavorable customer feedback" was included in Complainant's performance assessment, and as Mr. Loud admitted that the performance assessment weighed heavily in making the salary determination, it would be incongruous to find that the comment did not have an adverse impact on Complainant's work environment.

Furthermore, the comment regarding "unfavorable customer feedback" cannot be considered an "innocuous remark", as was the comment in **Varnadore**. While the comment in **Varnadore** was obviously an acknowledgment of the complainant's alleged whistleblowing activities, the comment itself was harmless. In the present matter, the comment regarding "unfavorable customer feedback" is, on its face, a negative reflection on Complainant's job performance.

Respondent's final argument was that Complainant has suffered no adverse consequences as a result of the comment in the performance assessment, specifically noting that Complainant has been asked to assist another group within the Laboratory. (EX X at 31) As previously discussed, the comment regarding "unfavorable customer feedback" was included in Complainant's performance assessment, and Mr. Loud admitted that the performance assessment weighed heavily in making the salary determination. Thus, the comment did cause Complainant to suffer an adverse consequence. Furthermore, negative comments made in a performance evaluation can, in themselves, constitute an adverse action. **Bassett v. Niagara Mohawk Power Corp.**, 85-ERA-34 (Sec'y 09/28/93)(negative comments and warnings contained in performance evaluation are an adverse work evaluation, affected the terms of complainant's employment, and they constitute an adverse employment action).

Also, the fact that a group within the Laboratory later requested Complainant's participation does not lead to the conclusion that the comment has not interfered with opportunities available to Complainant. Mr. Carathers, Mr. Villarreal, Ms. O'Rourke, Mr. Ruminer and Ms. Gavett all informed the team leaders that they did not want Complainant participating in assessments of their facilities because of his contacts with the media. (TR 538-539, 554, 646-653, 683-684, 731-732) Mr. Griffin, Mr. King and Mr. Frostenson each indicated that they acceded to requests to keep Complainant off the assessment teams. (TR 542, 600-601, 733-734)

Ms. Brittin agreed that she was concerned enough about the feedback from the assessed organizations to allow work to be taken away from Complainant without his knowledge. However, she later characterized the actions as "aligning our resources...to better serve the interests of our customers..." (TR 969) Euphemisms aside, the result is clearly the same: work was taken away from the Complainant. Although these incidents, which formed the basis of the unfavorable customer feedback, occurred *prior* to the comment being included in Complainant's performance assessment, to argue that Complainant's work environment was not affected *after* inclusion of the comment strains credulity.

Respondent generally asserts that Complainant's 2.75% pay raise for fiscal year 1998 does not constitute an adverse action, although Respondent did not set forth any specific rationale in its post-hearing brief to support this conclusion.

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This Administrative Law Judge finds that Complainant's 2.75% pay raise for fiscal year 1998 does constitute an adverse action. Whistleblower provisions prohibit discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment, including transfers to a less desirable position, even if no loss of salary is involved. **Carter v. Electrical District No. 2 of Pinal County**, 92-TSC-11 (Sec'y 07/26/95), citing **DeFord v. Sec. of Labor**, 700 F.2d 281, 283, 287 (6th Cir. 1983); **Jenkins v. U.S. EPA**, 92-CAA-6, (Sec'y 05/18/94). Although Complainant did receive a pay increase for fiscal year 1998, for the reasons stated below, I find that such increase does constitute an adverse action.

As previously noted, salary determinations at the Laboratory are based on performance and job content. (TR 490) An employee's performance assessment, as well as good and bad comments, should be taken into consideration. (TR 505) Mr. Loud admitted that his salary recommendation was based on performance and job content, and that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) In fact, Mr. Loud stated that the performance assessment was the only document used in determining Complainant's pay raise. (TR 1100-1101) Given Mr. Loud's admitted reliance on the performance assessment in making the salary determination, and given that the performance assessment contained the comment regarding "unfavorable customer feedback", it is evident that such comment was a factor in the pay raise given to Complainant. It is equally evident that such comment had a detrimental impact on Complainant's pay raise, as "unfavorable customer feedback" is, on its face, a negative comment.

Furthermore, Mr. Loud stated that job content was the "only objective differentiation" between Complainant, Mr. Beckman and Mr. Emerson. (TR 1103) Mr. Loud noted that Complainant's job content had been affected because Complainant was taken off assessments because of customer complaints. (TR 1106-1107) As previously discussed, these customer complaints arose out of Complainant's contacts with the media regarding health and safety issues at LANL. (TR 538-539, 554, 646-653, 683-684, 731-732) Thus, work was taken away from Complainant because of his protected activity, and this reduction in work was used to justify Complainant's pay raise.

I note that Mr. Loud explained that he did not take into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113) However, had work not been taken away from Complainant, he would have had a greater job content than that which was considered by Mr. Loud. Under either scenario, Complainant's job content was reduced because of his protected activity, and this reduction had a negative impact on Complainant's pay raise.

Respondent has also argued that the comment in Complainant's performance assessment and the 2.75% pay raise are not causally related to protected activity because they were made for legitimate business reasons and served a valid business purpose. (EX X at pp. 32-44) Specifically, Respondent argues that it was trying to accomplish the objectives

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outlined in the Administrative Manual. (EX X at 33) The objectives of the performance assessment, as set out in AM 109.05, are as follows:

The performance assessment process should provide employees and supervisors with a mutual understanding of job responsibilities and provide a basis for a meaningful assessment of performance. This process should also improve job performance, job satisfaction, and productivity of

the employees; develop and maintain open communication between employees and their supervisors; Provide input into the salary review process; and encourage a discussion of employee development.

(CX 25-10; EX C)

This Administrative Law Judge recognizes the whistleblower statutes do not restrict an employer in its operational decisions. **Bauch v. Landers**, 79-SDW-1 (Sec'y 05/10/79)(quoting the ALJ's R.D.O.). See also **Ray v. Harrington**, 79-SDW-2 (Sec'y 07/13/79). The statutes do not, and should not, preclude management from taking steps to assure and maintain the effectiveness of its staff in enforcing a particular environmental statute and the employer should not be faulted for mandating an adverse action, such as reassignment or termination or removal, to achieve this action. However, in **Timmons v. Franklin Electric Coop.**, 1997-SWD-2 (ARB 10/01/98), the ARB held that it did not run afoul of the prohibition against DOL supplanting the employer's business judgment when they found that complainant's termination was prompted by his protected activity, and not by respondent's explanation of poor work performance.

Respondent, despite arguments to the contrary, has virtually admitted that the comment regarding "unfavorable customer feedback" was related to Complainant's protected activity. The "unfavorable customer feedback" in question came from LANL employees, such as Mr. Carathers, Ms. O'Rourke, Mr. Villarreal, Mr. Ruminer and Ms. Gavett, and it was in reference to Complainant going to the media with his safety and health concerns. (TR 538-539, 687, 652-653, 554, 732) Mr. Loud, in his August 27, 1997 note to Complainant, stated as follows:

...My present concerns and my comments during our meeting were related to media coverage referencing our internal assessment issues. Understandably our customers do not want to read about their real and/or perceived deficiencies in media sources such as the Santa Fe Reporter. We need to be sensitive to these customer concerns and avoid media interaction leading to such coverage of internal assessment issues. ...

(CX 15; EX I-12) Mr. Loud explained that his concerns were based on complainant's comments in the *Santa Fe Reporter*, although he was not concerned with CCNS. (TR 1108-1110) Thus, Respondent's argument, that the comment in Complainant's performance assessment was not in retaliation for Complainant's protected activity, is disingenuous at best, as the comment is admittedly made in reference to Complainant's contacts with the media over health and safety issues.

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Respondent's argument that the comment was made for legitimate business reasons and served a valid business purpose does not place its actions outside the purview of the Act. As the ARB explained in **Timmons v. Franklin Electric Coop.**, 1997-SWD-2 (ARB 12/01/98):

... It is well-settled that the employee protection provided by the SWDA and similar statutes does not prohibit an employer from imposing a wide range of requirements on employees. See, e.g., **Kahn v. U.S. Sec'y of Labor**, 64 F.3d 271, 279 (7th Cir. 1995)(under the Energy Reorganization Act); see also **Smith v. Monsanto Chem. Co.**, 770 F.2d 719, 723 n.3(8th Cir. 1985)(noting, in a case arising under Title VII of the Civil Rights Act of 1964, that employer may develop arbitrary, ridiculous and even irrational policies as long as they are applied in a nondiscriminatory manner), cert. denied, 475 U.S. 1050 (1986). When an employer applies an otherwise legitimate criterion in such a way that it interferes with the exercise of specific whistleblower rights, however, the employer acts in violation of the employee protection provision of the corresponding statute. See **Assistant Sec'y and Ciotti v.**

Sysco Foods of Philadelphia, ARB No. 98-103, ALJ Case No. 97- STA-00030, July 8, 1998, slip op. at 8 (citing **Self v. Carolina Freight Carriers Corp.**, Case No. 91-STA-25, Sec. Dec., Aug. 6, 1992, slip op. at 5).

An employer's expectation that an employee interact with others in the company as a "team player" does not constitute a proscribed criterion *per se*. See **Odom v. Anchor Lithkemko/International Paper**, ARB No. 96-189, ALJ Case No. 96-WPC-0001, Oct. 10, 1997, slip op. at 12; **Erb v. Schofield Mgmt.**, ARB No. 96-056, ALJ Case No. 95-CAA-1, Sept. 12, 1996, slip op. at 2-3. Nonetheless, the extension of that expectation to a point where it interferes with protected activity is prohibited.

In the present matter, the objectives of the performance assessment, as set forth in AM 109.05, do interfere with Complainant's protected activity. The "unfavorable customer feedback" relates solely to Complainant's media contacts concerning health and safety concerns, and comments in performance assessments are taken into account when making salary determinations. (TR 505) The tone and the content of the comment clearly manifest an intent to inform the Complainant that his engaging in protected activity was not met with approval. The provisions of Respondent's Administrative Manual do not take precedence over the employee protection provisions of the Act.

Furthermore, the situation in the present case is similar to those in which an employer expects an employee to interact with others at the company as a "team player." Although Mr. Loud did not specifically use the phrase "team player" in Complainant's performance assessment, his comment plainly implies that Complainant is not

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a "team player", and that Complainant must stop engaging in protected activity if he wants to be considered a "team player." Mr Loud's comment stated as follows:

There was some unfavorable customer feedback during this period regarding the unrestricted distribution of some of Joe's assessment issues. **Since Joe routinely works with customers in sensitive and service oriented fashion, I am confident that the trust and confidence of these and other customers can be reestablished through use of new and existing AA/Laboratory channels for issue escalation and resolutions.** I look forward to working with Joe to use these systems to enhance the Laboratory's ability to identify and correct significant ES&H deficiencies.

(Emphasis added)(CX 17; EX I)

Mr. Loud emphasized his point more clearly in his September 25, 1997 e- mail to Complainant, wherein he stated, in relevant part, as follows:

... In no case, however, should assessment issues be passed along to the media or to any organization outside of appropriate and established avenues for such disclosure. Uncontrolled disclosure of our assessment issues can lead to alienation of our customers and make it more difficult for the group to obtain the cooperation necessary to provide the Laboratory with an accurate and vitally important assessment of its ES&H status.

(CX 19) Mr. Loud explained that he made the comment about not going to the media, because he "didn't believe that was within [Complainant's] legal rights." (TR 1028- 1029) Although he later explained that he misspoke if he stated that Complainant had no legal right to go to the media, he added that, as a supervisor,

he feels he has the right to ensure that his organization is run as effectively as possible. (TR 1086) Mr. Loud's comments establish that Complainant lost the trust of other LANL employees because of his engaging in protected activity, and that if he wanted to regain that trust, he would have to cease engaging in such protected activity. Thus, Respondent's expectation that Complainant be a "team player" has interfered with his protected activity, and therefore, is prohibited. See *Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB 12/01/98)

While some members of the AA2 group saw themselves as mere "servants" (TR 593-594), Complainant commendably persisted in his attempts to force Respondent to address the safety and health issues he identified. Clearly, Complainant, unlike some Laboratory employees, does not think that "a little knowledge can be a dangerous thing." (TR 647)

This Administrative Law Judge also finds that Respondents asserted reasons for including the comment in Complainant's performance assessment are not credible because actions taken by Complainant's superiors are not consistent with those asserted reasons. Respondent argues that AM 109.05 serves the legitimate business purposes of: 1) increasing

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dialogue between employees and their supervisors; 2) clarifying employees' job duties, and 3) identifying problems. (EX X at 33) It is doubtful that Respondent was truly interested in increasing dialogue, clarifying job duties or identifying problems, as no one at LANL spoke to Complainant about his actions until August 8, 1997. See *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y 10/26/92)(respondent's stated reason for laying off complainant, poor job performance and attitude, were not credible where the three instances of poor performance were not discussed with complainant or foreman's superiors).

Ms. Brittin never discussed with Complainant his October 7, 1996 statement, or the articles in the *Santa Fe New Mexican* and the *Santa Fe Reporter*, even though she was concerned over their contents.³⁵ (TR 871-874, 883) Mr. Loud was "surprised" and "saddened to some degree" when he saw the article in the *Santa Fe Reporter*. (TR 979-980) Although Mr. Loud assumed the role of group leader for AA2 in March of 1997, he did not inform Complainant of the "unfavorable customer feedback" until August of 1997. (TR 974, CX 14) In fact, when Mr. Loud took over as group leader, he scheduled meetings with all the employees (TR 982), and yet he never informed Complainant of the "unfavorable customer feedback." Mr. Loud explained that he was not sure how to address Complainant's situation when he took over as group leader, and that he felt that the best way to deal with it would be in the performance assessment. (TR 986)³⁶ Given the widespread concern by LANL employees over Complainant's contacts with the media, the fact that no one spoke with Complainant about his actions until August of 1997, and as Complainant was being kept off of assessments at the request of customers, this Administrative Law Judge finds it is untenable that the comment regarding "unfavorable customer feedback" was included in Complainant's performance assessment out of a desire to comply with the objectives of AM 109.05.

A great deal of testimony in this matter has been dedicated to the confidentiality of assessments performed by the AA2 group. Mr. Griffin, Mr. King and Mr. Frostenson each stated that there is an expectation that assessments are to remain an internal document to the Laboratory (TR 544, 587, 723-724), although neither Mr. King nor Mr. Griffin are aware of any written policy setting forth that assessments are for internal use only. (TR 608- 609, 570) Ms. Brittin also stated that it was her expectation that assessment reports are for internal distribution only.³⁷ (TR 828- 836) Even assuming that it was LANL's policy that assessments are for internal use only, this Administrative Law Judge finds that such a policy interferes with

Complainant's right to go to the media with his health and safety concerns, and thus, is in violation of the employee protection provisions of the ERA. See *Timmons v. Franklin Electric Coop.*, SWD-2 (ARB 12/01/98).

This Administrative Law Judge also finds that Respondent's failure to follow its performance assessment policies is evidence of pretext. See *Van Der Meer v. Western Kentucky University*, 95-ERA-38 (ARB 04/10/98)(evidence of improper motivation on the part of Respondent was established by, *inter alia*, its failure to follow a well-established policy of informal resolution of faculty grievances) AM 109.29 states that a "departing supervisor should conduct a performance assessment with an employee

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when there is a change of supervision." Mr. Derkacs did prepare a performance assessment for Complainant when he left his position as group leader, however, that performance assessment was not conducted with Complainant. (RX S)

Mr. Loud failed to adhere to the Administrative Manual when he included his August 27, 1997 note in Complainant's performance assessment. Although Mr. Loud suggested to Complainant that the note would be added to the performance assessment (TR 158), Complainant sent Mr. Loud an e-mail on September 8, 1997, raising his concerns about the note being included in the performance assessment. (TR 159-161; CX 18; EX L-1) When Complainant first saw his completed performance assessment in early 1998, he "got rather mad" because he had sent the e-mail to Mr. Loud regarding his reservations about the note being included. (TR 169-170) Ms. McCabe explained that it is mandatory that when an employer puts a comment in the performance assessment he has to inform the employee before it becomes part of the official performance assessment, because the language of AM 109.204 requires that the employee and supervisor must read, discuss and sign the addendum. (TR 451-452; EX C-5) Complainant did not sign Mr. Loud's August 27, 1997 note which he made part of the performance assessment. (EX I-12)

Respondent also argues that Complainant's 2.75% pay raise was not made in retaliation for his protected activity, but was taken for a legitimate business reason and served a valid business purpose. (EX X at 37-44) Specifically, Respondent argues that it was merely trying to comply with salary review process as set out in AM 202. (EX X at 37-44) The policy of the salary determination, as set out in AM 202.32, is as follows:

Salary increase decisions must reflect employee job performance, as documented in the performance assessment, relative to the employee's peer group performance; the relative importance of the employee's skill to the organization; the alignment of the employee's salary with the salaries of other employees making similar contributions; and the amount of the SIA available for each employment series in an organization. Individual salary increases are reviewed and approved by appropriate managers.

Where management has considerable discretion in personnel matters, there is a potential that management will use this discretion in a discriminatory fashion. See *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2, 5 and 93-CAA-1 (ALJ 06/07/93)(where the record indicated that management had considerable discretion in determining how excused absences are factored into a personnel appraisal, the ALJ concluded that there was substantial leeway for applying this factor in a discriminatory manner.)

The evidence of record

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establishes that Respondent had considerable discretion in determining pay raises for employees, and that such discretion was used to deny Complainant an adequate pay raise for fiscal year 1998. According to Mr. Segura, LANL's salary management philosophy is to provide the flexibility to managers to attract and retain the best possible workforce, and to reward behaviors and values that are critical to LANL's success. (TR 493) He explained that managers have flexibility within the guidance given by the Compensation Group. (TR 485) Specifically, managers have flexibility to place their people into peer groups as they see appropriate, and to determine raises based on salary alignment, performance and "those kinds of things." (TR 485)

Mr. Loud made his salary recommendation based on performance and job content, and he explained that the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) Complainant's performance assessment contained the reference to "unfavorable customer feedback." (CX 14) As this comment reflects negatively on Complainant's performance, and as it was made in relation to his protected activity, it is clear that the rate of Complainant's pay raise was based on his engaging in protected activity. I note that the only negative comment in Complainant's performance assessment is the one which relates to his protected activity.

According to Mr. Loud, job content was the "only objective differentiation between Complainant, Mr. Beckmann and Mr. Emerson. (TR 1103) Both Mr. Loud and Ms. Brittin indicated that Complainant's raise was based on his contribution to the organization. (TR 1058, 905) However, Complainant's job content was affected because he was taken off of assessments due to customer complaints. (TR 1106-1107) Thus, the rate of Complainant's pay raise was influenced by his engaging in protected activity. Mr. Loud explained that he never took into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113) However, if Complainant did not have work taken away from him, he would have had greater job content than that which was considered by Mr. Loud.

Respondent emphasizes that both Mr. Beckmann and Mr. Emerson were assessment team leaders during the applicable review period, while Complainant was not. (EX X at 40-44) As previously noted, Mr. Loud stated that job content was the "only objective differentiation" between Complainant, Mr. Beckmann and Mr. Emerson. (TR 1103) Although Complainant was not an assessment team leader during the applicable time period, he was the team leader for the revision of the Director's Policy. (TR 1152-1153) When Mr. Loud was questioned concerning Complainant's participation in this assignment, he stated that he did not recall what was being referred to. (TR 1163) Complainant, when not working on assessments, was obviously engaging in more than just "reviewing QA manuals and books". (TR 988) This Administrative Law Judge finds that Mr. Loud's attempt to minimize Complainant's role as team leader for the revision of the Director's Policy inescapably points to the conclusion that it was Complainant's protected activity, and not his job content, that determined his salary increase.

Accordingly, this Judge finds and concludes that the Respondent's stated reasons for including the comment in Complainant's performance assessment regarding "unfavorable customer feedback", and for awarding Complainant only a 2.75 percent pay raise in fiscal year 1998 are pretextual. Complainant has proven, by a preponderance of the

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evidence, that Respondent's true reason for these actions was in retaliation for Complainant's engaging in protected activity.

Complainant argued in the alternative that, if this matter was viewed as a dual motive case, Complainant would still prevail. (CX 40 at 20) This Judge only reaches the dual motive analysis if I determine there is a legitimacy to Respondent's stated reasons for the adverse employment action, a conclusion which I have specifically rejected for the aforementioned reasons.

Nevertheless, I note that the burdens of production and persuasion in whistleblower cases are governed by the statutorily delineated burdens of proof added by the 1992 amendments to the ERA. If a complainant successfully proves that his protected activity was a "contributing factor" to the adverse action, the respondent must then demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior," 42 U.S.C. §5851(b)(3)(D). **Talbert v. Washington Public Power Supply Sys.**, 95-ERA- 35 (ARB 09/27/96). It is this Judge's reasoned conclusion that the Respondent has not presented clear and convincing evidence that it would have taken the same action if Complainant had not engaged in protected activity because the evidence establishes that Respondent's actions were made in response to Complainant's having raised safety and health concerns.

IV. Damages

This Judge, having found the Respondent in violation of the ERA, is required to issue a preliminary order, effective immediately, awarding affirmative action to abate the violation and attorney fees and costs. 29 C.F.R. Part 24.7(c)(2). **Overall v. Tennessee Valley Auth.**, 97-ERA-53 (ARB 04/27/98); **Varnadore v. Oak Ridge Nat'l Lab.**, 94-CAA-2/3 (Sec'y 09/11/95). This Judge must also issue a recommended order on the appropriate compensatory damages, if any. 29 C.F.R. Part 24.7(c)(1).

Complainant Gutierrez requests the complete expungement of the "negative comment" in his annual performance appraisal of August 8, 1997, as well as Mr. Loud's August 27, 1997 addendum (TR 195), a four percent increase in his annual salary retroactive to October 1, 1997²⁸, plus interest, emotional distress damages in the amount of \$15,000.00, reimbursement of vacation days lost in the course of litigating the claim (TR 196), and compensation of Complainant's reasonable time, attorney's fees and costs expended in pursuing the complaint. In his post- hearing request for relief, the Complainant also requested LANL's adoption of a new

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whistleblower policy that contains the following elements (CX 40):

1. A clear statement that Laboratory employees have the right to disclose public safety concerns to outside organizations, the media, and elected officials.
2. A three person panel with the authority to immediately and timely investigate any allegations of the Laboratory's violation of the whistleblower policy and the underlying public safety concerns. The panel will then make detailed findings on the basis of the investigation. The findings will be public. One member of the panel will be appointed by management, one member will be a non-supervisory Laboratory employee selected through a closed ballot election among all non- supervisory employees, and one member will be selected by the other two members.
3. The new policy will not supplant nor supercede other available whistleblower remedies.

The appropriate remedy in any given case is dictated by the violation for which the Respondent is found liable. In the present matter, this Judge has found that the Respondent violated the ERA by including the

comment referring to "unfavorable customer feedback" in Complainant's performance assessment, and by awarding Complainant only a 2.75% pay increase for fiscal year 1998. Complainant may recover those damages which were caused by these actions.

Accordingly, this Administrative Law Judge finds that it would not be appropriate to require LANL to adopt a new whistleblower policy, as set forth in Complainant's post-hearing brief. (CX 40 at 41-42) The creation of such a remedy is beyond the authority of this Administrative Law Judge. 29 C.F.R. §24.7(c)(1). I note that pursuant to 29 C.F.R. §24.2(d)(1), every employer subject to the Act is required to

...prominently post and keep posted in any place of employment to which the employee protection provisions of the Act apply a fully legible copy of the notice prepared by the Occupational Safety and Health Administration, printed as appendix A to this part, or a notice approved by the Assistant Secretary for Occupational Safety and Health that contains substantially the same provisions and explains the employee protection provisions of the Act and the regulations in this part. ...

29 C.F.R. §24.2(d)(1)

Complainant seeks a four percent (4%) increase in his annual salary retroactive to October 1, 1997, plus interest from that date. (CX 40 at 41) Respondent argues that Complainant's 2.75% salary increase was based solely upon his job performance and job content, and therefore, Complainant is not entitled to the 4% pay increase. (EX Y at 5-12) In the alternative, Respondent argues that the maximum Complainant should receive is the difference between his actual pay increase, 2.75% and 3.38%, the highest pay increase in his comparable group. (EX Y at 12-13)

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The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/30/91).

Complainant has the burden of establishing the amount of back pay that a respondent owes. **Pillow v. Bechtel Construction, Inc.**, 87-ERA-35 (Sec'y 07/19/93). However, uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. **McCafferty v. Centerior Energy**, 96-ERA-6 (ARB 09/24/97). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay, and "uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party]." **EEOC v. Enterprise Ass'n Steamfitters Local No. 638**, 542 F.2d 579, 587 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977), quoting **Hairston v. McLean Trucking Co.**, 520 F.2d 226, 233 (4th Cir. 1975). See **NLRB v. Browne**, 890 F.2d 605, 608 (2d Cir. 1989)(once the plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate the liability). **Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.**, 91-ERA-13 (Sec'y 10/26/92), slip op. at 9-10)

This Administrative Law Judge finds that a 4% pay raise will restore Complainant to the same position he would have been in had he not been discriminated against.

For fiscal year 1998, Mr. Frostenson received four exceptional performances and a 5.31 percent pay increase (TR 331, 1048-1049; EX I-95; EX J-1), Mr. Geoffrion received four exceptional performances and a 4.09 percent pay increase (TR 331-332, 1050; EX I-69; EX J-1), Mr. Griffin received three exceptional performances and a 4.98 percent pay increase (TR 333, 1049; EX I-168; EX J-1), Mr. King

received three exceptional performances and a 3.78 percent pay increase (TR 333-334, 1051-1052; EX I-121; EX J-1), Mr. Beckman received on exceptional performance and a 3.38 percent pay increase (TR 334, 1052- 1053; EX I-48; EX J-1), Mr. Emerson received one exceptional performance and a 3.19 percent pay increase (TR 334-335; EX I-148; EX J-1), and Mr. Gustafson received no exceptional performance and a 2.23 percent pay increase. (TR 335; EX I-27) Complainant received on exceptional performance and a 2.75 percent pay increase. (EX I; EX J-1)

According to Mr. Loud, he made his salary recommendation based on performance and job content, and the performance assessment weighed heavily in making the salary determination. (TR 1099-1101) Mr. Loud admitted that Complainant's job content had been affected, as Complainant had been taken off assessments because of customer complaints. (TR 1106-1107) He explained that he never took into consideration that Complainant was not fully engaged during the assessment period, and that he considered all the team members to have similar job content. (TR 1113) However, as previously held above, had Complainant not been taken off of assessment, his job content would then have been greater than that considered by Mr. Loud. Thus, Complainant's pay raise was lower than what it would have been had he not engaged in protected activity.

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Mr. Loud stated that job content was the "only objective differentiation" between Complainant, Mr. Beckman and Mr. Emerson. (TR 1103) Mr. Loud agreed that one of the reasons he gave more money to Mr. Beckman was because he was the team leader of the management self-assessment. (TR 1103) However, Complainant did serve as the team leader for the revision of the Director's Policy, although this was not an assessment. (TR 1152-1153; EX I-9) Mr. Loud admitted that he did not recall what was being referred to where it was noted that Complainant served as the team leader for the revisions of the Director's Policy and the associated implementation documents. (TR 1163) Complainant was also assigned to represent Laboratory participation in the American Society of Mechanical Engineers Research and Development QA Group. (TR 1150) During the applicable assessment period, Complainant received his Master's degree in Business Administration Technology Management. (TR 350- 351; CX 30) Mr. Derkacs commented on Complainant's performance assessment that Complainant was the only subject matter expert in the group who supported the independent assessment program and participated in almost all of the AA-2 assessments requiring QA support. (EX S)

The record shows that Mr. Loud did not take into consideration all of Complainant's duties during the relevant assessment period, and that Complainant's pay raise was adversely impacted because he was kept off of assessments due to his engaging in protected activity. I find that a four percent pay raise will restore Complainant to the same position he would have been in had he not been discriminated against. Mr. Segura explained that for fiscal year 1998, the DOE authorized LANL to increase the technical staff member payroll by four percent. (TR 494) He further explained that the percentage increase for each individual could be much lower or much higher depending on their performance, job content and their salary alignment within their peer group. (TR 495) Given that the salary determination requires the weighing of several factors, and can not be reduced to a precise mathematical formulation, I find that Complainant is entitled to a four percent salary increase retroactive to October 1, 1997, plus interest.³² Interest on a back pay award shall be paid at the rate specified in 26 U.S.C. §6621 until the date of compliance with the Secretary's order. *Sprague v. American Nuclear Resources, Inc.*, 92-ERA-37 (Sec'y 12/01/94).

Complainant has also requested reimbursement of vacation days lost in the course of litigating this claim. (TR 196) Such vacation days are recoverable, as they represent terms, conditions and privileges of employment. See 42 U.S.C. § 5851. Complainant testified that he lost a number of vacation days, although he failed to identify how many vacation days were lost. (TR 196) However, as the formal hearing in this

matter lasted five days, this Administrative Law Judge finds that Complainant is entitled to reimbursement of five vacation days.

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. See **Generally DeFord v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983)(decided pursuant to the ERA); **Nolan v. AC Express**, 92-STA-37 (Sec'y 01/17/95)(decided pursuant to an analogous provision of the STA). Where appropriate, a complainant may recover an award for emotional distress when his

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or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. See **Bigham v. Guaranteed Overnight Delivery**, 95-STA-37 (ALJ 05/08/96)(adopted by ARB 09/05/96); **Crow v. Noble Roman's Inc.**, 95-CAA-8 (Sec'y 02/26/96). See Also **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/31/91). Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Jones v. EG&G Defense Materials, Inc.**, 1995-CAA-3 (ARB 09/29/98); **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92).

It is appropriate to review awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in a whistleblower case. Accordingly, this is precisely what this Judge has done. See **Smith v. Esicorp, Inc.**, 1993-ERA-16 (ARB 08/27/98)(wherein the Board reduced the ALJ's recommendation of \$100,000 in compensatory damages to \$20,000)⁴⁰; **Doyle v. Hydro Nuclear Services**, 89-ERA-22 (ARB 09/06/96)(wherein the Board affirmed the ALJ's recommendation of \$40,000 compensatory damages)⁴¹; **Bingham, supra** (wherein the Board increased the ALJ's award of compensatory damages from \$2,500 to \$20,000 after reviewing the observations and accounts of complainant's emotional distress)⁴²; **Gaballa v. Atlantic Group, Inc.**, 94-ERA-9 (Sec'y 01/18/96)(wherein the Secretary reduced the ALJ's recommended compensatory damage award from \$75,000 to \$25,000)⁴³; **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92)(wherein the Secretary reduced the compensatory award from a recommended amount of \$20,000 to \$10,000)⁴⁴; **McCouston v. Tennessee Valley Auth.**, 89-ERA-6 (Sec'y 11/13/91)(wherein the Secretary increased compensatory damages from the ALJ's recommended award of \$0 to \$10,000)⁴⁵; **Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (08/16/93)(wherein the Secretary reduced the ALJ's recommended award of compensatory damages to \$5,000).⁴⁶

In **Van Der Meer, supra**, the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant was awarded, however, \$40,000 in compensatory damages because the respondent took the extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures in its handbook and complainant testified that he felt humiliated.

[Page 48P> The Complainant testified that in the past year he was registering high blood pressure, a condition which he never had before. (TR 198) He stated that he has had to go back to LANL's onsite occupational medical facility three times to check his high blood pressure, and one time for his annual

checkup. (TR 317) According to Complainant, his physician gave him indications that he was perhaps under stress. (TR 199) Complainant explained that there has been a great loss of time away from his family, and that his family has suffered emotional distress out of fear that his career would suffer.⁴⁷ (TR 381) At the formal hearing, Complainant presented himself as a dedicated employee who became frustrated and distressed over Respondent's unwillingness to address the safety and quality control issues he identified. Based on the foregoing, this Judge recommends a compensatory damage award in the amount of \$15,000.00.⁴⁸

Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with his complaint. 42 U.S.C. §5821(b)(2)(B). Complainant did not submit an itemization of costs and expenses incurred in connection with his complaint. Moreover, Complainant's attorney did not submit a fee petition detailing the work performed, the time spent on such work, and the hourly rates of those performing the work.

The Rules of Practice and Procedure before the Office of Administrative Law Judges allow the administrative law judge to make part of the record any motion for attorney fees authorized by statute, any supporting documentation, and any determinations thereon. 29 C.F.R. §18.54(c). Accordingly, Complainant shall, within twenty (20) days from receipt of this Recommended Decision and Order, file and serve a fully supported application for costs and expenses including attorney fees. Thereafter, Respondent shall have ten (10) days from receipt of the application in which to file a response.

V. RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, this Judge **RECOMMENDS** the following **PRELIMINARY ORDER**:

- (1) Respondent shall provide Complainant with a four percent (4%) salary increase retroactive to October 1, 1997, plus interest from that date. Interest shall be calculated pursuant to 26 U.S.C. §6621.
- (2) Respondent shall reimburse Complainant with five vacation days.
- (3) Respondent shall immediately expunge Complainant's performance assessment of the second paragraph in the comments section, which references "unfavorable customer feedback". Respondent shall also immediately expunge Complainant's performance assessment of Mr. Loud's August 27, 1997 note.

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- (4) Respondent shall pay Complainant compensatory damages in the amount of \$15,000.00.

It is **FURTHER RECOMMENDED** that:

- (5) Complainant shall, within twenty (20) days from receipt of this Recommended Decision and Order, file and serve a fully supported application for costs and expenses including attorney fees. Thereafter, Respondent shall, within ten (10) days from receipt of the application, file a response.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

DWD:jgg

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board; U.S. Department of Labor; Frances Perkins Building; Room S-4309; 200 Constitution Avenue, N.W.; Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten (10) business days of the date of this Recommended Decision and Order and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

¹On January 5, 1999, the second day of hearings in this matter, S.R. Skaggs, Ph.D., a former Armor Program Manager at the Los Alamos National Laboratory, faxed a letter to the Office of the Clerk, United States District Court for the District of New Mexico. (ALJ EX 19) Counsel for both parties indicated that they did not solicit the letter in any way. This Administrative Law Judge held that the *ex parte* communication would not be considered as Dr. Skaggs was not identified by either side as a witness, the unsubstantiated allegations made in the letter were not subject to any corroborating evidence, and because neither counsel had the opportunity to cross-examine the author. (TR 385-388)

²A "murder board" is a process by which documentation is reviewed in order to determine if it is something of value. (TR 581)

³Victoria McCabe, the Office Leader of the Human Resources Policy and Communication Office at LANL, stated that there is no Laboratory-wide policy contained in the administrative process requiring that a particular document has to be stamped "confidential" or "for internal use", although documents that are intended to be kept confidential are generally labeled as such. (TR 453) She explained that there are policies related to document control that are not contained in the administrative manual and are not the province of her office, classified documents being one of them. (TR 453)

⁴Accidents included people getting shocked on electrical wires while cutting through walls and floors, items being lifted were being dropped and damaged, people were getting injured and maimed as a result of using equipment inappropriately, there was a shooting at the guards, and one of the guards was accidentally killed. (TR 75)

⁵Mr. Derkacs is presently employed as a technical staff member in ESH-5, deployed in NIS Facility Management Unit 75. (EX W at 4)

⁶In Laboratory parlance, the individuals, directors, deputy directors and group leaders of the programs to be assessed are referred to as "customers." (TR 172)

⁷Ms. Brittin stated that Complainant was given a two percent raise in 1996 because of delays in completing the BUS assessment, and she indicated that Mr. Derkacs recommended the raise. (TR 864) She explained that the raise process involves the management team examining to make sure the raises are equitable across the board. (TR 864) She further explained the management team, comprised of the AA group leaders, would look at the LANL policy and the salary guidelines, and then look at the contribution of the employee

to the organization. (TR 865) The employee's contribution would be based on the performance appraisal and the employee's contribution with respect to the others in the group. (TR 865) Ms. Brittin had no concerns that Complainant's raise reflected anything other than his contributions. (TR 866)

⁸Complainant addressed Ms. Brittin's comments in a matrix dated April 22, 1996, and in a memo to her dated May 7, 1996. (TR 937-943; CX 36; CX 37)

⁹Mr. Frostenson stated that all of the team leaders and assessors have spoken of frustration in Ms. Brittin's level of detail that she takes with employees. (TR 802) However, he also stated that delays in processing reports were not caused by management with the intent to delay publications or protect disclosure of sensitive information. (TR 738) Mr. Derkacs explained that Ms. Brittin's management style was that of a "more observant monitor." (EX W at 32) Mr. King explained that Ms. Brittin "nitpicks a little bit", but that such "nitpicking" does not result in watered down findings. (TR 605) Mr. Griffin stated that there have been significant delays in Ms. Brittin responding to reports given to her. (TR 548) However, he did not believe that she kept reports so that sensitive findings would not be released, nor did he believe her comments "water[ed] down" his reports. (TR 549)

Ms. Brittin explained that, while she now reviews all of the assessment reports to be published by AA-2, initially she did not. (TR 838) She changed her practice in late 1994 when she got a letter from a customer which criticized the quality and value of the inspections. (TR 839) Ms. Brittin stated that she did not delay the BUS assessment report to cover up issues, nor did she change Complainant's report so that the findings were substantially changed. (TR 966-967) She believed she strengthened the report by highlighting the findings. (TR 967)

¹⁰Mr. Le Doux received a copy of Complainant's March 22, 1996 memo to Mr. Derkacs. (TR 88, 467; CX 2; CX 3)

¹¹Complainant testified that he never heard back from Mr. Le Doux regarding his concerns. (TR 85)

¹²Tritium is a material that is utilized in nuclear bombs. (TR 127)

¹³CCNS is a non-profit public education organization which focuses on nuclear safety issues. (TR 390) CCNS brought suit in the United States District Court for the District of New Mexico against the United States Department of Energy and Siegfried S. Hecker. (CX 31) The suit was brought to remedy violations of the Clean Air Act by Los Alamos National Laboratory. (CX 31) On April 2, 1996, Senior Judge Edwin Mechem granted in part and denied in part, CCNS's Motion for Partial Summary Judgement. (CX 31)

¹⁴Complainant does not seek any damages based on his fiscal year 1997 salary increase. (CX 40 at 41)

¹⁵AM 721.01 states as follow:

An employee may not use proprietary data or privileged information obtained through Laboratory employment for personal purposes, for favoritism in the purchase of goods or services, or in any **unauthorized manner**. For example, see AM 1002.20. Such information must be held in confidence until it is released through the proper channels to **Laboratory employees**, to the public, or to potential vendors. See AM 707 and AM 1002.63.

¹⁶According to Mr. Griffin, the assessment team was denied access because an experiment was being conducted, but they were told to come back later that afternoon or the next day. (TR 564) Because of the

shortness of the assessment, Mr. Griffin did not elect to go into that area, although Mr. Kruse and Mr. King did go into that area. (TR 564)

¹⁷AM 707.01 states as follows:

Employees must obtain approval from the Public Affairs Office before releasing any news item or official statements concerning the Laboratory or before releasing any Laboratory materials for commercial electronic or printed purposes.

¹⁸Although the article in the *Santa Fe New Mexican* uses the term "inspectors", Complainant stated that he used the term "assessors." (TR 228)

¹⁹WIPP is the Waste Isolation Pilot Plant. (TR 640)

²⁰Complainant stated that he had no knowledge that the *Santa Fe Reporter* would have a copy of his October 7, 1996 statement. (TR 257)

²¹Mr. Carathers passed away prior to commencement of the hearing in this matter. (EX X at 8)

²²Mr. Griffin's time frame is questionable, as the article in the *Santa Fe New Mexican* was not published until October 28, 1996. (CX 10; EX E)

²³Mr. Griffin explained that he received higher priority requirements from the operations working group and the Director's Office to conduct assessments not related to the QA programs at WIPP, so there was no longer an issue on this point. (TR 543)

²⁴Complainant stated that, during the review period, he was assigned to represent Laboratory participation in the American Society of Mechanical Engineers Research and Development QA Group. (TR 1150) He was also the team leader for the revision of the Director's Policy, although this was not an assessment. (TR 1152-1153)

²⁵There are four major job series at LANL: technical staff members, technicians, office support and general support people, and specialist staff members which are the administrative exempt employees. (TR 484)

²⁶Mr. Derkacs, who was group leader from June 1, 1996 through March 7, 1997, prepared an interim performance assessment. (TR 999-1000; EX S) Mr. Derkacs gave Complainant the same ratings in the "Evaluation Matrix" as did Mr. Loud. (EX S; CX 14) Mr. Loud explained that he did not change the ratings given by Mr. Derkacs because he felt that it was "more appropriate" to use Mr. Derkacs' ratings since the predominance of Complainant's activities were his responsibility. (TR 1010-1011) Mr. Derkacs' interim performance assessment also contained the following comment, which Mr. Loud replaced with his own comment (EX S):

Joe is a subject matter [expert?] in QA, a lead QA auditor, an active member of several professional societies and very knowledgeable of QA requirements and applications. He was the only QA subject matter expert in the group who supported the independent assessment program and consequently participated in almost all of the AA-2 assessment requiring QA support.

²⁷Complainant took issue with the statement that the CCNS lawsuit was never raised at the performance

appraisal meeting. (TR 302)

²⁸Mr. Loud later explained that if he stated that Complainant had no legal right to go to the media, he misspoke. (TR 1086) He stated that "anybody's got a legal right to go to the media", but that as a supervisor, he feels that he has a right to ensure that his organization is run as effectively as possible. (TR 1086)

²⁹Lee D'Anna made the salary recommendation for Mr. Gustafson, as Mr. Gustafson was part of the AA-1 group. (TR 894-895; EX J-1)

³⁰Mr. Frostenson received four exceptional performances and a 5.31 percent pay increase. (TR 331, 1048-1049; EX I-95; EX J-1) Mr. Geoffrion received four exceptional performances and a 4.09 percent pay increase. (TR 331-332, 1050; EX I-69; EX J-1) Mr. Griffin received three exceptional performances and a 4.98 percent pay increase. (TR 333, 1049; EX I-168; EX J-1) Mr. King received three exceptional performances and a 3.78 percent pay increase. (TR 333-334, 1051-1052; EX I-121; EX J-1) Mr. Beckmann received on exceptional performance and a 3.38 percent pay increase. (TR 334, 1052-1053; EX I-48; EX J-1) Mr. Emerson received one exceptional performance and a 3.19 percent pay increase. (TR 334-335; EX I-148; EX J-1) Mr. Gustafson received no exceptional performance and a 2.23 percent pay increase. (TR 335; EX I-27) Complainant received one exceptional performance and a 2.75 percent pay increase. (EX I; EX J-1)

³¹Mr. Loud was not sure if he told Complainant that he was going to include the note dated August 27, 1997, in Complainant's performance assessment, although he explained that it was not his intent to hide the fact that it was being included. (TR 1091-1092)

³²Ms. McCabe explained that it is mandatory that when a supervisor puts a comment in a performance appraisal he has to inform the employee before it becomes part of the official performance appraisal, because the language of AM 109 states that the employee and supervisor must read, discuss and sign. (TR 451-452; EX C-5)

³³Complainant stated that for the last five years, he has been involved in litigation over personnel issues, in particular, a 1995 reduction in force. (TR 371) He explained that, while researching in connection with that case, he found that managers were using negative comments, such as the one given to him to lay people off without consideration as to their merit, performance or other factors which should have been taken into account. (TR 371) According to Complainant, right before the reduction in force, some employees who had exceptional performance were given a negative comment so they could use that as an excuse to put that individual on the list for a reduction in force. (TR 371-372)

³⁴Mr. Loud did not change the ratings given by Mr. Derkacs because he felt that it was "more appropriate" to use Mr. Derkacs' ratings since the predominance of Complainant's activities were his [Mr. Derkacs'] responsibility. (TR 1010-1011)

³⁵Ms. Brittin explained that she did not discuss the article in the *Santa Fe Reporter* with Complainant because she was away from the Laboratory much of the time on personal matters from September of 1996 through May of 1997. (TR 883) However, Ms. Brittin was not away for this entire period, and she admitted that she did not instruct any subordinate to speak with Complainant while she was away. (TR 952)

³⁶I note that the "Comments" section of an Employee Performance Assessment is only required to be filled out where the employee receives an "Exceptional Performance", "Performance needs improvement", or

"Unsatisfactory Performance". (CX 14) Complainant received one "Exceptional Performance", and Mr. Loud included a paragraph explaining that rating. (CX 14) Mr. Loud's second comment, regarding to "unfavorable customer feedback", was not related to any finding of "Exceptional Performance", "Performance Needs Improvement", or "Unsatisfactory Performance". Mr. Loud admitted that the second comment was not required and it could give the impression that Complainant's performance needed improvement, although that was not his intent. (TR 1077)

³⁷Ms. McCabe explained that there is no Laboratory-wide policy contained in the administrative process requiring that a particular document has to be stamped "confidential" or "for internal use", although documents that are intended to be kept confidential are generally labeled as such. (TR 453) She further explained that there are policies related to document control that are not contained in the administrative manual and are not the province of her office, classified documents being one of them. (TR 453)

³⁸Complainant did not make any complaints about his fiscal year 1997 raise, as he understood it to be an alignment to bring some of the individuals in the group in line with the rest. (TR 287-288)

³⁹I note that a four percent pay increase is greater than the pay increases received by Mr. Beckman and Mr. Emerson, each of whom were team leaders and, and like Complainant, received one exceptional performance. However, such a result is necessitated because Complainant's pay increase was adversely affected by his engaging in protected activity. Such a disparity is not unheard of under LANL's salary review process. For example, Mr. Griffin received three exceptional performances and a 4.98% pay raise (TR 333, 1049; EX 1-168; EX J-1), while Mr. Geoffrion received four exceptional performances and only a 4.09 percent pay raise. (TR 331-332, 1050; EX 1-69; EX J-1)

⁴⁰The evidence established that the discriminatory conduct was limited to several cartoons lampooning complainant, complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and evidence of mental and emotional injury was limited to his own testimony and that of his wife.

⁴¹The evidence which supported an award in this amount consisted of complainant consulting physicians who prescribed anxiety and depression medications, as well as other medications for chest pain; a treating psychologist testified that respondent's discriminatory acts caused complainant's anxiety disorder and post-traumatic stress disorder and respondent failed to offer any countervailing evidence on causation; and that same psychologist testified complainant's wife and children noticed a radical change in complainant's behavior, a serious strain in the marital relationship, and that divorce proceedings were begun, although the couple did eventually reconcile.

⁴²At hearing, complainant testified to his lowered self-esteem and uncommunicativeness, to his change in sleep and eating habits, and to the adverse effect on his marriage. He also testified that he was not interested in socializing, felt 'less than a man' because he could not support his family, and that the family experienced a sparse Christmas. Finally, complainant testified that the family had to cancel their annual summer vacation and charge the credit cards to the limit. Complainant's wife testified she noticed complainant's withdrawal in the weeks after Christmas.

⁴³The ALJ recommended a \$75,000 compensatory damage award based on the treating psychologist's finding that complainant suffered from chronic stress, paranoid thinking, a general distrust of others, a lack of confidence in his engineering judgment, a fear of continuing repercussions, and a general feeling of apathy. The psychologist further testified complainant will forever suffer from a full-blown personality disorder and a permanent strain on his marital relationship. The Secretary reduced the award based on the fact that the same psychologist indicated this psychological state was caused in part by a co-respondent

who had previously settled out of the case and that part of the settlement compensated for part of complainant's compensatory damages.

⁴⁴In **Lederhaus**, the evidence established complainant remained unemployed for 5 1/2 months after his termination, he was harassed by bill collectors, foreclosure was begun on his home and he was forced to borrow \$25,000 to save the house. In addition, complainant's wife received calls at work from bill collectors and her employer threatened to lay her off. Complainant had to borrow gas money to get to an unemployment hearing and experienced feelings of depression and anger. Complainant fought with his wife and would not attend her birthday party because he was ashamed he could not buy her a gift, the family did not have their Christmas dinner, and complainant would not go to visit his grandson. In fact, complainant cut off almost all contact with his grandson. The evidence revealed complainant became difficult to deal with and this was corroborated by testimony from complainant's wife and neighbor. Complainant contemplated suicide twice.

⁴⁵The evidence revealed the complainant was harassed, blacklisted, and fired. In addition, complainant lost his livelihood, he could not find another job, and he forfeited his life, dental and health insurance. The blacklisting and termination exacerbated complainant's pre-existing hypertension and caused frequent stomach problems necessitating treatment, medication, and emergency room admission on at least one occasion. Complainant experienced problems sleeping at night, exhaustion, depression and anxiety. Complainant introduced into evidence medical documentation of symptoms, including blood pressure, stomach problems, and anxiety. Complainant's wife corroborated his complaints of sleeplessness and testified he became easily upset, withdrawn, and obsessive about his blood pressure.

⁴⁶The testimony of complainant, his wife, and his dad established complainant was of the opinion that firing someone was like saying that person is no good. The evidence also established complainant felt really in a low and that he relied on his dad to come out of depression. The termination affected complainant's self-image and impacted his behavior, which became short with his wife. The wife testified to the stress and emotional strain on the marital relationship and the father testified to complainant's pride and work ethic and the fact that complainant felt sorry for himself after the termination.

⁴⁷Complainant identified his family as his wife, Bertha, and his in-laws. (TR 382)

⁴⁸I note that, although Complainant explained that his family has suffered emotional distress out of fear that his career would suffer (TR 381), no part of the recommended award is based on this consideration. Complainant is entitled to compensatory damages as a result of his own emotional distress, but the ERA does not provide for the awarding of compensatory damages to the family of a complainant. 42 U.S.C. §5851(b)(2)(B).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUN 25 1998

Clerk, U.S. District Court
District of Columbia

C. LAWRENCE CORNETT,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 98-1124 (TFH)
)	
DEPARTMENT OF ENERGY, et al.,)	
)	
Defendant.)	

MEMORANDUM OPINION

Pending before the Court are the parties' dispositive motions. Plaintiff has moved for summary judgment, and the federal defendants have moved to dismiss, or, in the alternative, for summary judgment. The Court held a hearing on these motions on June 15, 1998; after considering the arguments at the hearing, and the pleadings submitted by the parties, the Court will deny plaintiff's motion, will grant defendants' motion, and will dismiss the case.

I Background

This case arises out of the Department of Energy's Contractor Employee Protection Program, which was created to prevent contractor retaliation against whistleblowers. See 10 C.F.R. Part 708. Plaintiff won a judgment under those provisions against defendant Maria Elena Torano Associates ("META"), and he seeks to compel the Department of Energy ("DOE") to enforce that judgment.

Plaintiff's case originates from his work for defendant META on the company's first major government contract. META won the contract to prepare a Programmatic

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