COMPLAINANT'S AFFIRMATION
(Required by 10 CFR Part 708.12 (d) and 708.13)

I MARK DAVID SICILIANO affirm that:
(Full Name)

a. I have not pursued a remedy available under State or other applicable law;

b. All facts contained in this complaint are true and correct to the best of my knowledge and belief; and

c. With regard to the Company Grievance Procedure: (Mark all that apply.)

X (1) All attempts at resolution through applicable grievance – arbitration procedures have been exhausted. Provide the date on which the grievance – arbitration procedure was terminated and the reason for termination;
[redacted] WITH [redacted] FROM 22 SEP UNTIL 11 DEC ON THIS. [redacted] IS FROM BA[redacted]

_____ (2) A grievance was filed under applicable grievance – arbitration procedures, but more than 150 days has passed and a final decision has not been issued. Provide the date that you filed your grievance.

_____ (3) The company has no grievance – arbitration procedure.

_____ (4) The company has a grievance procedure but you are not required to participate and you choose not to.

If you do not provide the above information your complaint may be dismissed for lack of jurisdiction.

Complainant: Mark David Siciliano
(Signature)

Date: 11 December 2009

Please attach this required affirmation to your complaint along with the requested information regarding use of the company grievance procedures.)

Department of Energy
Washington, DC 20585

APR - 7 2010

Mark D. Siciliano
9733 Andee K Lane
Pocatello, ID 83204

[redacted]

Battelle Energy Alliance, LLC
[redacted]
2525 North Fremont Avenue
Idaho Falls, ID 83415

[redacted]
Seattle, WA 98104

Re: Case No. TBI-0098

Dear Mr. Siciliano and Ms. [redacted]

This letter concerns Ms. Siciliano's Part 708 Complaint against Battelle Energy Alliance, LLC (BEA). This letter discusses the issues and the scope of the investigation.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program prohibits a DOE contractor from retaliating against an employee for disclosing information that the employee reasonably believes reveals (i) a substantial violation of law, rule, or regulation, (ii) a substantial and specific danger to employees or public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* § 708.36.

The Program establishes a DOE process for requesting relief from retaliation. The DOE process begins when the employee files a complaint. 10 C.F.R. Part 708, Subpart B. If the complaint is not informally resolved, the complainant may request that the

complaint be forwarded to OHA for an investigation and hearing. *Id.* § 708.21. In general, the purpose of an investigation is to help focus the issues for the hearing by identifying the relevant, disputed factual issues and gathering information on those issues.

B. Procedural History

Mr. Siciliano is an employee of Battelle Energy Alliance (BEA) at the Department of Energy (DOE) Idaho National Laboratory (INL). In December 2009, Mr. Siciliano filed a Complaint of Retaliation (the Complaint) at the DOE Idaho Operations Office. In the Complaint, Mr. Siciliano contends that he made protected disclosures and that BEA retaliated against him by reassigning him to another position. BEA filed a response, contending that the Complaint lacks merit on its face. The parties did not informally resolve the Complaint, and Mr. Siciliano requested that it be forwarded to the DOE Office of Hearings and Appeals (OHA) for an investigation and hearing. On March 15, 2010, OHA received the Complaint, and the OHA Director appointed me to serve as the Investigator. On March 29, 2010, Mr. Siciliano submitted a reply to the BEA response. Mr. Siciliano subsequently submitted several documents.

C. The Complaint

In his Complaint, Mr. Siciliano alleges that, during 2008 and 2009, he served as a BEA department manager and made a number of protected disclosures. Mr. Siciliano further alleges that, in a meeting on September 22, 2009, Mr. Siciliano's supervisor, [redacted], told him that upper management would not consider him for a BEA department manager position in the upcoming reorganization. Cplt. at 2, 45. After that meeting, Mr. Siciliano sought meetings with various higher level managers, some of whom met with him. *Id.* at 3.

On October 1, 2009, Mr. Siciliano submitted an "equity concern" to the BEA diversity office, in which he objected to (i) not being considered for a department manager position in the upcoming reorganization and (ii) the setting of his pay level when he acquired his current position in 2007. In addition, he alleges discrimination based on a disability. Cplt. at 2, 39-46, 53-55. Twelve days later, on October 13, 2009, Mr. Sicilano sent a memorandum to his superiors, stating that a higher level manager had not complied with a requirement to report travel to a foreign country. *Id.* at 2, 53-55.

On December 7, 2009, BEA implemented the reorganization and reassigned Mr. Siciliano from his "department manager" position to a "relationship manager" position. *Id.* at 2. Mr. Siciliano maintains that the reassignment was retaliatory. He seeks reinstatement, adjudication of his equity concern, and various actions with respect to a higher level manager. Cplt. at 4.

As noted above, BEA contends that the Complaint lacks merit on its face. BEA contends, *inter alia,* that Mr. Siciliano did not make a protected disclosure and that his reassignment cannot be considered adverse, or sufficiently adverse, to constitute a "retaliation."

II. Discussion

A. Whether Mr. Siciliano Made a Protected Disclosure

A complainant has the burden of demonstrating, by a preponderance of the evidence, that he made a protected disclosure. A protected disclosure concerns information that an employee reasonably believes reveals the following:

> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority[.]

10 C.F.R. § 708.5(a). If a disclosure does not fall within one of these categories, it cannot give rise to Part 708 relief.

Mr. Siciliano alleges that he made the following ten protected disclosures:

(1) In January 2008, Mr. Siciliano told his management that employees objected to being required to designate themselves as "responsible" for a security infraction when, in fact, they were not responsible. Cplt. at 1, 39-41; Reply at 1.

(2) During 2008 and 2009, Mr. Siciliano provided "suggestions" to "improve [his division's] security posture," including a February 2009 memorandum to his leadership. Cplt. at 2, 7-10 (February 2009 email).

(3) In June 2009, Mr. Siciliano told a DOE official that a DOE security requirement was overly restrictive. Cplt. at 1, 11-21.

(4) In July 2009, Mr. Siciliano "drafted value statements" to improve leadership and management" of his division. Cplt. at 2, 25-32.

(5) In August 2009, Mr. Siciliano had a "verbal exchange" with a higher-level BEA manager who "blamed [Mr. Siciliano's department] in an open forum for the security shortfalls" that incurred in the entire division. Cplt. at 1, at 33-38.

(6) On October 1, 2009, Mr. Siciliano "submitted an equity concern because [he] was misled when [he] was hired as a Department Manager 3." Cplt. at 2, 39-46, 53-55.

(7) In an October 13, 2009, memorandum to his superiors, Mr. Sicilano stated that a higher level manager had not met a security reporting requirement with respect to travel to a foreign country.

(8) In November 2009, Mr. Siciliano objected to the BEA decision to divest itself from certain work. Cplt. at 2, 46-49.

(9) BEA management has a perception that Mr. Siciliano does "not care about security." Cplt. at 2.

(10) Mr. Siciliano has a disability. Cplt. at 2.

As discussed below, it appears to me that only two of these alleged protected disclosures warrant further consideration.

Item 1 may constitute a protected disclosure. Directing employees to admit an infraction that they did not commit would appear to constitute an "abuse of authority." 10 C.F.R. §708.5(a)(3). BEA's response, however, argues that this communication is an objection to the completion of a DOE form. I plan to inquire into the nature and timing of the communication.

Item 7 (Mr. Siciliano's October 13, 2009 memorandum concerning non-compliance with a security reporting requirement) appears to constitute a protected disclosure. Although BEA contends that

the memorandum reflects a *de minimis* violation, that characterization is not supported by OHA precedent. *See AMPRO Protective Services, Inc.*, VWA-0015 (1997) (disclosure of failure to file an incident report concerning an unlocked, classified safe was a protected disclosure).

Items 2 through 6, and 8 do not appear to be protected disclosures. Instead, they are communications, most of which Mr. Siciliano characterizes as remarks, suggestions, exchanges, or an "equity concern." Given Mr. Siciliano's description of these communications, it is difficult to see how they would fall into one of the three categories of protected disclosure listed above.

Similarly, Items 9 and 10 do not appear to be protected disclosures. Item 9 is a management perception that Mr. Siciliano does not care about security, and Item 10 is a disability. Neither is a communication and, therefore, is not a disclosure, let alone a "protected disclosure." Moreover, Item 10 - discrimination based on a disability - is an equal employment opportunity matter outside the scope of Part 708. *See* 10 C.F.R. Part 708.4(a) (excluding claims based on "race, color, religion, sex, age, national origin, or other similar basis"); 65 Fed. Reg. 6314 (2000) ("EEO violations are not covered" by Part 708).

B. Whether Items 1 and 7 were Contributing Factors to Mr. Siciliano's Reassignment

A complainant has the burden of demonstrating, by a preponderance of the evidence, that a protected disclosure was a contributing factor to an alleged retaliation. 10 C.F.R. § 708.29. Complainants typically meet this burden by demonstrating that (i) the person taking the adverse action had actual or constructive notice of the protected disclosure and (ii) the retaliation occurred sufficiently soon after the protected disclosure to permit a reasonable inference that the disclosure was a contributing factor to the retaliation. *See generally Dean P. Dennis*, TBA-0072 at 4 (2009).

Whether Items 1 and 7 were contributing factors to the reassignment is unclear at this point. Item 1 - the January 2008 communication - occurred (i) over one and one-half years before the September 22, 2009 meeting in which Mr. Siciliano was informed that he would not be considered for a department manager position and (ii) almost two years before the December 7, 2009 reassignment. Item 2 - the October 13, 2009

communication - occurred after the September 22, 2009 meeting and, therefore, could not have contributed to the management view conveyed in that meeting. I will inquire into these matters to determine if there is additional, relevant information.

C. Whether the Remedies Sought are Available Under Part 708

As noted above, Mr. Siciliano seeks reinstatement. Reinstatement is a Part 708 remedy. *See* 10 C.F.R. § 708.36. Mr. Siciliano's "equity concern" relates to the determination of his pay level over two years ago, prior to any alleged protected disclosure. Accordingly, the establishment of that pay level cannot constitute a retaliation giving rise to Part 708 relief. Finally, to the extent that Mr. Siciliano requests actions against the manager who allegedly retaliated against him, Mr. Siciliano requests remedies not available under Part 708. *See* 57 Fed. Reg. 7533 (1992).

D. The Scope of Investigation

Based on the foregoing, it my preliminary assessment that the investigation will focus on the following:

(1) Mr. Siciliano's January 2008 communication to higher management;

(2) Mr. Siciliano's September 22, 2009 meeting with Wayne Austad; and

(3) BEA's reorganization and Mr. Siciliano's reassignment.

I do not believe that sensitive or classified programmatic details or security issues are relevant to the investigation. Accordingly, I will conduct interviews under unclassified procedures and, therefore, no classified information should be discussed. In addition, if the parties wish to discuss sensitive matters, they are required to advise me in advance so that I can decide whether they are relevant to the investigation and, if so, insure that security procedures are properly followed. The parties should not submit documentary evidence unless I request it.

If the parties have any questions, they should contact me at Office of Hearings and Appeals, L'Enfant Plaza Bldg./HG-4, Department of Energy Washington, DC 20585-1615, [redacted] [redacted].

(telephone); [redacted] (fax); or [redacted] (e-mail).

Sincerely,

[redacted]

Investigator
Office of Hearings and Appeals