Department of Energy
Washington, DC 20585
NOV - 9 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Motion to Dismiss
Initial Agency Decision

Names of Petitioners:	Mark D. Siciliano Battelle Energy Alliance LLC
Dates of Filings:	March 15, 2010 August 16, 2010
Case Numbers:	TBH-0098 TBZ-0098

This Decision will consider a Motion to Dismiss filed by Battelle Energy Alliance LLC (Battelle), the Management and Operating Contractor for the Department of Energy's (DOE) Idaho National Laboratory (INL), in connection with the pending Complaint of Retaliation filed by Mark Siciliano against Battelle under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The Office of Hearings and Appeals (OHA) assigned the hearing component of Mr. Siciliano's Part 708 Complaint proceeding, Case No. TBH-0098, and Battelle's Motion to Dismiss, Case No. TBZ-0098. For the reasons set forth below, I have determined that Battelle's Motion should be granted and that Mr. Siciliano's Complaint of Retaliation should be dismissed.

I. Background

A. The DOE Contractor Employee Protection Program

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

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross

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mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Mr. Siciliano filed his Part 708 Complaint on December 11, 2009, at the DOE's Idaho Operations Office. In his Complaint, Mr. Siciliano alleged that, during 2008 and 2009, he made a number of protected disclosures and, as a result of his so doing, Battelle engaged in a series of retaliatory actions against him, including reassigning him to a new position in December 2009. Battelle filed its response to the Part 708 Complaint on March 4, 2010, contesting that Mr. Siciliano had made any disclosure protected under Part 708, and arguing that Mr. Siciliano's reassignment was not retaliatory for a number of reasons, including that the reassignment did not result in a materially adverse change in his employment conditions. The Employee Concerns Manager of the Idaho Operations Office transmitted the Complaint to OHA for an investigation, followed by a hearing when informal resolution of the Complaint proved unsuccessful.

On March 16, 2010, the OHA Director appointed an Investigator (OHA Investigator) who conducted an investigation into the allegations contained in Mr. Siciliano's Complaint. During the course of the investigation, Mr. Siciliano filed a supplemental complaint, alleging that Battelle had engaged in further retaliation by excluding him from a March 2010 meeting involving his area of expertise. The OHA Investigator advised the parties that she would consolidate the supplemental complaint filing with her investigation of the December 2009 Complaint. On June 30, 2010, the OHA Investigator issued the Report of Investigation (ROI) in this case. In the ROI, the OHA Investigator concluded that of the ten alleged protected disclosures, only one was arguably a protected disclosure under Part 708.[1] With regard to that one disclosure, the OHA Investigator found that Mr. Siciliano cannot demonstrate, by a preponderance of the evidence, that this protected disclosure was a contributing factor to the decision to reassign him. Moreover, the OHA Investigator found that even if Mr. Siciliano could meet his evidentiary burden in this case, it is likely that Batelle would be able to demonstrate by clear and convincing evidence that it would have reassigned Mr. Siciliano absent any proven protected disclosure.

[1] The OHA Investigator found that eight of the ten disclosures were not, on their face, protected disclosures. She also found that with respect to a ninth disclosure, Mr. Siciliano had not demonstrated, by a preponderance of the evidence, that he reasonably believed that Battelle was requiring its employees to admit responsibility on a security form for actions that they did not commit.

Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. On July 14, 2010, I sent a letter to the parties and asked them to submit briefs addressing the following issues:

(1) Whether they agree with the Investigator's assessment that eight[2] of the ten alleged disclosures made by Mr. Siciliano are not protected under 10 CFR Part 708;
(2) Whether there is any evidence to support a finding that Mr. Siciliano had a "reasonable" belief that Battelle was requiring its employees to admit responsibility on DOE Form 5639.3 for security infractions that they did not commit;
(3) Whether there is any evidence to support a finding that Mr. Siciliano's allegations regarding a Batelle senior manager (*i.e.* that the senior manager had not met a security reporting requirement) was a contributing factor to an act of retaliation;
(4) Whether Mr. Siciliano's December 2009 reassignment constituted an act of retaliation for purposes of 10 CFR Part 708;

Mr. Siciliano submitted his brief on these issues on August 4, 2010; Battelle tendered its brief on August 15, 2010. I subsequently requested additional information from Mr. Siciliano on the issue of remedies in this case. Mr. Siciliano filed a "Statement of Requested Remedies" on September 24, 2010, and supplemented that filing, *sua sponte*, on October 14, 2010.

C. Factual Overview

Battelle hired Mr. Siciliano in May 2007 to work as a Relationship Manager supporting the U.S. Special Operations Command (SOCOM) in INL's National and Homeland Security Directorate (the Directorate) under [redacted]. In August 2007, Mr. Siciliano became the Acting Manager for the Special Materials and Processes Department and reported to [redacted]. One year later, in August 2008, Mr. Siciliano accepted a permanent position as Manager for the Special Materials and Processes Department with collateral duties as the Relationship Manager for the SOCOM.

In December 2008, the Directorate discovered a classified document that had been misplaced at some earlier date. An inquiry ensued and several members of Mr. Siciliano's department and he were questioned about their knowledge of, and possible involvement with, the misplaced document. Eventually, several of Mr. Siciliano's employees and he were required to complete

[2] Those eight purported disclosures are: (1) the "suggestions" provided by Mr. Siciliano during 2008 and 2009 to "improve his [division's] security posture," including a February 2009 memorandum to his leadership; (2) Mr. Siciliano's statement in June 2009 to a DOE official that a DOE security requirement was overly restrictive; (3) the "value statements" drafted by Mr. Siciliano in July 2009 to improve leadership and management in his division; (4) the verbal exchange that Mr. Siciliano had in August 2009 with a higher-level Battelle manager who allegedly improperly attributed security shortfalls to Mr. Siciliano's department; (5) the equity concern submitted by Mr. Siciliano in October 2009 in which Mr. Siciliano alleged that he was misled when he was hired as a "Department Manager 3;" (6) Mr. Siciliano's objection in November 2009 to Battelle's decision to divest itself from certain work; (7) Mr. Siciliano's belief that Battelle management perceived him not to care about security; and (8) Mr. Siciliano's disability. Each disclosure set forth above will be referred to in this Decision by the corresponding numeric designation given in this footnote. In addition, Disclosure Number 9 will refer to Mr. Siciliano's allegations that a senior manager had not met a security reporting requirement, and Disclosure Number 10 will refer to Mr. Siciliano's communications concerning the security incident report at issue in his Complaint.

Part II of DOE Form 5639.3, entitled, "Notification of Security Incident" (hereinafter referred to as DOE Form 5639.3 or the relevant security form).[3] One of Mr. Sicilano's disclosures concerns his view that Battelle was requiring its employees to admit responsibility by completing the security incident reporting form in question. The record contains the relevant security forms for Mr. Siciliano and four of his employees. Box 2 on each of the relevant security forms is entitled, "Name and title of person responsible for incident." Battelle Security had typed the names, titles, social security numbers and organization code for Mr. Siciliano and his four employees in Box 2 when it presented DOE Form 5639.3 to each of them. Box 3 had pre-typed the clearance number for each of the five persons in question.

Each of Mr. Siciliano's employees denied involvement with the security incident in question and refused to sign the box requesting the signature of the responsible individual. In addition, Mr. Siciliano, as the supervisor for each of the four, completed Box 7 which asked for the corrective or disciplinary action flowing from the security incident by noting the following: (1) there was no objective proof indicating the employee was responsible; (2) that he had counseled the employee regarding their option to file grievances through Employee Concerns and HR; and (3) some employees had used the term "witch hunt" in connection with their having to complete Part II of the relevant security form. Mr. Siciliano signed each of the relevant security forms in his capacity as supervisor on March 4, 2009, March 5, 2009, March 20, 2009, and March 20, 2009 respectively.

Regarding his own DOE Form 5639.3, Mr. Siciliano prepared a memorandum on July 1, 2009, in which he denied knowledge of the security incident and pointed out that the incident had occurred prior to his becoming a Battelle employee. He also complained that he is identified on that form as "the person responsible for this incident and was being asked to sign the form as the person responsible for the incident." Mr. Siciliano also stated that he believed the DOE form "implies guilt and is not in alignment with the most rudimentary roots of due process." He added that "it is offensive, arbitrary and capricious to say the least and it needs to be revised. . ."

[redacted], was aware of Mr. Siciliano's objection to Battelle's use of DOE Form 5639.3 and had heard from the Director of Battelle's Safeguards and Security Office that Mr. Siciliano was telling his employees to go to Human Resources concerning the forms. [redacted] reported to the OHA Investigator that he had met with [redacted] about the matter.

On July 1, 2009, Mr. Siciliano's immediate supervisor, [redacted], completed Part II of DOE Form 5639.3 for Mr. Siciliano. [redacted] first crossed out the words, "responsible for the incident" in two places on the form. Next, he related the following three points which are important to this Decision: (1) he had discussed with Mr. Siciliano that the form is used as part of the investigation process and does not establish culpability; (2) he opined that Mr. Siciliano's recommendation that the form needs to be revised to more accurately establish culpability and determine when an infraction should be issued was a good one; and (3) he stated that Mr. Siciliano had no clear role in the security incident.

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[3] INL slightly modified DOE Form 5639.3 for its own use. The only difference between the DOE security form and INL's version of the security form is a negligible one, *i.e.* the INL form includes a box for the employee's clearance number.

Mr. Siciliano alleges in his Complaint that Battelle's senior management perceived him as not caring about security requirements, and Battelle viewed some of Mr. Siciliano's interactions with others, particularly DOE, as lacking a degree of professionalism. Mr. Siciliano's August 2009 mid-year performance evaluation reflects the latter viewpoint.

In June 2009, the Directorate's senior management began discussions regarding a reorganization in the Directorate. Mr. Siciliano's supervisor, [redacted] informed Mr. Siciliano in August 2009 about the reorganization and that he would not be assigning Mr. Siciliano to a department manager position in the upcoming reorganization. On October 1, 2009, Mr. Siciliano filed an equity concern with the Battelle Diversity Officer, arguing that he should be in a higher pay band and that he should be placed in a department manager position in the reorganization. Soon thereafter, on October 12, 2009, Mr. Siciliano reported to several managers that [redacted] had allegedly failed to follow security reporting requirements. In November 2009, Mr. Siciliano complained to upper management about [redacted] decision to discontinue doing a particular kind of work. In December 2009, the Directorate announced the reorganization. The reorganization eliminated two divisions, including [redacted] division which included the department headed by Mr. Siciliano. [redacted] was reassigned to a relationship manager position, with collateral duties. The functions of Mr. Siciliano's department were moved to an existing department in another division. Mr. Siciliano retained his relationship manager position and salary, but was placed in a higher pay band.

II. The Legal Standard

As noted above, the regulations set forth at 10 C.F.R. Part 708 provide an administrative mechanism for resolving whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the Complainant and the contractor with regard to their allegations and defenses, and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the Complainant under Part 708 to establish, by a preponderance of the evidence, that he or she made a protected disclosure, participated in a proceeding, or refused to participate as described in 10 C.F.R. 708.5, and that such act was a contributing factor to a retaliatory action. 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua, Lucero*, Case No. TBH-0039 (2007), *citing Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990). If Mr. Siciliano meets this threshold showing with regard to any of his alleged protected disclosures, he must next prove that at least one of his disclosures was a contributing factor to his reassignment or other act of retaliation. One way a complainant can meet this evidentiary burden is to provide evidence that "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in a personnel action." *See David Moses*, Case No. TBH-0066 (2008), *Ronald Sorri*, Case No. LWA-0001 (1993).

B. The Contractor's Burden

If the Complainant satisfies his evidentiary burden, the burden then shifts to the Contractor to show, by clear and convincing evidence, that it would have taken the same action absent any protected disclosures. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, Case No. TBH-0034 (2007). OHA Hearing Officers have relied on the Federal Circuit for guidance in evaluating whether the contractor has met its evidentiary burden in a Part 708 case. *See David Moses*, Case No. TBH-0066 (2008), *Dennis Patterson*, Case No. TBH-0047 (2008). Specifically, the Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, examines: (1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . ." *See Kalil v. Dept. of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007).

III. Analysis

A. Disclosures Number 2, 3, 4, 7 and 8

Mr. Siciliano concedes in his August 4, 2010, Brief that five of his ten disclosures set forth in his Complaint do not fall within the definition of "protected disclosure" under 10 C.F.R. § 708.5. Siciliano Brief at 14. Those five disclosures are Disclosures Number 2, 3, 4, 7 and 8. Accordingly, I will dismiss those five disclosures from this proceeding.

B. Disclosure Number 1

Regarding Disclosure Number 1, *i.e.*, his "suggestions" in 2008 and 2009 to improve the security posture of his division, Mr. Siciliano now argues that the suggestions were actually disclosures of information that revealed a threat to the public safety. Siciliano Brief at 13. He argues further in his Brief that Battelle's failure to embrace his suggestions amounted to "gross misconduct." *Id.* at 14.

As an initial matter, Mr. Siciliano has not provided any information that would allow me to conclude that he communicated information to his management which revealed a *substantial and specific danger* to employees or to public health and safety (emphasis added) for purposes of 10 C.F.R. § 708.5(a)(2). In making this finding, I have reviewed an e-mail dated February 17, 2009, from Mr. Siciliano to a number of persons entitled, "security thoughts" which he appended to his Complaint as pages 8-11. The four-page e-mail lists a number of topics but is preceded by the introductory paragraph which states as follows:

> Thank you for volunteering to be our moderator for next week's security working Group. While it's fresh in my mind, I wanted to send you a few of my thoughts. Some of these suggestions may be out of my sphere of influence, but I'm hopeful that They will stimulate dialogue and other ideas from my colleagues.

There is nothing in the four-page e-mail that even remotely relates to a safety concern let alone a disclosure of a "substantial and specific danger to employees or to public health or safety." Hence, the "suggestions" do not rise to the level of a protected disclosure under 10 C.F.R. § 708.5 (a)(2).

As for Mr. Siciliano's contention that Battelle management's failure to embrace his suggestions constituted "gross mismanagement" or "gross misconduct," I find no support for this position in the documentary evidence in the case. There is nothing in the communications between Mr. Siciliano and Battelle management that suggests he was relating information that constituted "gross mismanagement." Rather, in its Brief, Battelle accurately characterizes Mr. Siciliano's suggestions as "brainstorming" in preparation for a meeting. *See* Battelle Brief at 18. Gross mismanagement "does not include decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. [It] means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." *See Embree v. Dept. of Treasury*, 70 M.S.P.R. 79 (1996). A careful reading of the e-mail in question shows that Mr. Siciliano listed "pros" and "cons" relating to his suggestions. The manner in which Mr. Siciliano communicated his suggestions indicates that the matters under discussion were "debatable." In addition, there is nothing in the e-mail or elsewhere in the record indicating that Mr. Siciliano ever stated that Battelle's failure to implement Mr. Siciliano's suggestions would create a substantial risk of significant adverse impact on INL's ability to accomplish its mission.[4] Hence, I find that there is no factual basis for Mr. Siciliano's contention that Battelle's failure to consider his security suggestions constitutes "gross mismanagement" or "gross misconduct" under 10 C.F.R. § 708.5(a)(3).

In the end, I must find that Mr. Siciliano did not make a protected disclosure for purposes of Part 708 when he made suggestions to improve the security posture of his department. Accordingly, I will dismiss Disclosure Number 1.

C. Disclosure Number 5

Mr. Siciliano challenges the OHA Investigator's finding that the equity concern he raised (Disclosure Number 5) with Battelle's Diversity group does not rise to the level of a protected disclosure under Part 708. In his Brief, Mr. Siciliano claims that Battelle fraudulently induced him to take a position at a particular grade based upon assertions that others managers were being paid at the same level. Brief at 11. He claims that Battelle arbitrarily assigned pay grades to persons essentially performing the same work. *Id.* According to Mr. Siciliano, this action constitutes an abuse of authority. *Id.*

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[4] In his Brief, Mr. Siciliano claims that Battelle's senior leadership recently was required to brief Congress on some security matters which Mr. Sicliano now believes would not have been necessary had Battelle taken his suggestions. There is absolutely nothing in the record that links Mr. Siciliano's suggestions or "security thoughts" about policy matters to whatever inquiries Congress may have made recently to Battelle.

An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to other preferred persons. *Jessup V. Dept. of Homeland Security*, Docket No. AT-1221-07-0049-W-1 (September 17, 2007); *Wheeler v. Dept. of* Veterans *Affairs*, 88 M.S.P.R. 236 (2001); *Frank Isbell*, Case No. VWA-0034 (1999).

In its Brief, Battelle states that it performed a job audit and compensation review with regard to Mr. Siciliano's concerns. On December 22, 2009, a representative of Battelle's Diversity group met with Mr. Siciliano for two hours and reviewed its findings which included that Mr. Siciliano was properly classified as a "Manager 3," that Mr. Siciliano was the highest paid person occupying the "Manager 3" category, and the one person reviewed who occupied a Manager 4 position had been hired as a "strategic hire" and possessed a Ph.D. Battelle Brief at 7.

First, there is no information in the record to support Mr. Siciliano's position that he reasonably believed that Battelle management had abused its authority in not hiring him at a Manager 4 level, or that they had fraudulently induced him to take the position that was classified as a Manager 3 position. Second, even if Mr. Siciliano had presented such evidence, the record would not support a finding that any such disclosure in this regard could be construed as a contributing factor to the reorganization that resulted in Mr. Siciliano's transfer. [redacted] informed Mr. Siciliano in August 2009 about the reorganization and that he would not be assigning Mr. Siciliano to a department manager position in the upcoming reorganization. Mr. Siciliano filed his equity concern complaining about his job classification on October 1, 2009, **after** he learned of the impending reorganization. The senior managers at Battelle who made the decision to reorganize and eliminate two divisions, including the one in which Mr. Siciliano worked, could not have had any actual or constructive knowledge of a disclosure that was made **after** they had decided and informed Mr. Siciliano that the reorganization would occur. For all the foregoing reasons, I will dismiss Disclosure Number 5 from further consideration.

D. Disclosure Number 6

Mr. Siciliano also challenges the finding in the ROI that the concerns he voiced to upper-level management about Battelle's decision to divest itself from certain work did not constitute a protected disclosure. He argues that Battelle's action constituted "gross mismanagement" because it caused the loss of millions of dollars of future work for INL and adversely impacted the mission of the organization. Siciliano Brief at 12. He also contends that [redacted] abused his authority in deciding not to continue doing a particular kind of work due to the security risks inherent in that kind of work because [redacted] wanted to avoid risks to further his personal career. *Id.* at 13.

Mere differences of opinion between an employee and his supervisors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement. *See White v. Dept. of the Air Force*, 391 F.3d 1377 (Fed. Cir. 2004). Moreover, the Deputy Secretary of Energy in *Mehta v. Universities Ass'n*, 24 DOE ¶ 87,514 (1995) held that:

> Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulations demands a careful balancing lest the term encompass all disagreements between a contractor and its employees . . .[t]here must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

Id. at 89,065.[5] OHA has followed the Deputy Secretary's holding in other cases. *See Ronny J. Escamilla*, Case No. VWA-0012 (1997).[6]

Deciding what kind of work to undertake and making risk assessments are inherently managerial functions. For this reason, I find that Mr. Siciliano's disagreement with management's decision to decline doing work that had associated security risks do not rise to the level of a protected disclosure in that it does not reveal "gross mismanagement."

As for Mr. Siciliano's contention that [redacted] abused his authority in refusing to continue doing a particular kind of work, I find, based on the record, that Mr. Siciliano did not communicate his concerns in this regard in a way that a disinterested person would have construed his comments as claiming that [redacted] had abused his authority. Mr. Siciliano clearly disagreed with [redacted] decision, but his statements belie any suggestion that he ever revealed his belief that [redacted] had abused his authority. By way of example, I note that Mr. Siciliano provided an update to his boss on November 4, 2009, about the loss of work in which he stated that the "client was very disappointed with our decision" to stop the work, but that he fully understood the situation and would work with the group to explain Battelle's position and improve the group's reputation. This verbiage does not support Mr. Siciliano's claim of a protected disclosure.

For all the above reasons, I will dismiss Disclosure Number 6.

E. Disclosure Number 9

Mr. Siciliano contends that the OHA Investigator erred in finding that his allegations regarding a senior manager at Battelle were not a contributing factor to his reassignment. I find no merit to Mr. Siciliano's argument.

As noted in Section I. C. above, Battelle management informed Mr. Siciliano in August 2009 that the Directorate in which he worked would be reorganized and that he would not be retaining his Manager position in the newly reorganized Directorate. Two months after he learned of the reorganization and that he would not be assigned to a management position (on October 12,

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[5] It is noteworthy that the *Mehta* case was decided under an earlier version of the Part 708 regulations, one that allowed disclosures of mere mismanagement, as opposed to gross mismanagement, to proceed under Part 708.

[6] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entered the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

2009), Mr. Siciliano reported his concerns about [redacted] to several managers. Battelle managers could not have had actual or constructive knowledge of Mr. Siciliano's October 12, 2009, disclosure when they told him in August 2009 about their decision to reorganize the Directorate and his fate in the reorganization. Thus, I must find that the information revealed by Mr. Siciliano about [redacted] was not a contributing factor to his reassignment as the result of the reorganization.

F. Disclosure Number 10

In his Complaint, Mr. Siciliano contends that he told Battelle management that his employees were being required to admit responsibility for security infractions that they did not commit. In the ROI, the OHA Investigator noted that Battelle had given Mr. Siciliano a written memorandum explaining that the security form in question was to be used for the employees to provide their version of events. The OHA Investigator found, for this reason, that Mr. Siciliano had not proven by a preponderance of evidence that he reasonably believed that Battelle was requiring it employees to admit guilt on a certain security form. In his Brief, Mr. Siciliano objects to the OHA Investigator's finding in this regard and states that he "absolutely had a reasonable belief that [Battelle] was requiring its employees to admit responsibility on DOE Form 5639.3 for security infractions they did not commit." Siciliano Brief at 15. He disputes that neither he nor his employees received any memorandum from Battelle giving guidance on how to complete the security form in question prior to his bringing the matter to Battelle's attention.

While there appears to be a factual dispute about whether Mr. Siciliano received the memorandum in question, I find nevertheless that the record does not support a finding that Mr. Siciliano had a reasonable belief that Battelle management was abusing their authority or engaging in gross mismanagement by requiring him and his employees to admit liability for a security incident that they did not commit. The facts are clear that Mr. Siciliano made interlineations on Form 5639.3 to reflect that none of his employees was "responsible" for the security incident in question. Mr. Siciliano then provided detailed written comments to explain why he believed that his employees were not culpable for the security incident in question. Moreover, none of Mr. Siciliano's employees signed the box which asked for the signature of the person responsible for the security incident. Instead, in each instance, the employee wrote "I was not responsible for the security incident." Through their proactive actions, the four employees took responsibility to ensure that the form could in no way be construed as an admission of guilt for a security incident that later could have potentially been adjudged to be a security infraction. Mr. Siciliano, as their supervisor, also provided written comments on the respective forms which clearly stated that none of the four employees bore any responsibility for the security incident in question. Similarly, Mr. Siciliano completed Part II of the relevant security form in such a way that it was clear from the face of that document that he was not admitting any guilt for a security incident that he did not commit. In his instance, his supervisor, [redacted] also provided detailed comments which addressed Mr. Siciliano's concerns that someone might misinterpret Part II of DOE Form 5639.3 as an admission of guilt. While it appears that Battelle Security was using Part II of DOE Form 5639.3 to gather facts incident to an investigation instead of using that form to document the results of its completed investigation, I nonetheless find that this practice did not rise to the level of gross mismanagement or an abuse of authority on Battelle's

part. As previously noted in this Decision, gross mismanagement requires an element of blatancy and means "a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." I find that Battelle Security's use of Part II of DOE Form 5639.3 prior to its completion of its investigation does not equate to blatant mismanagement, nor did it create a substantial risk of significant adverse impact on its ability to accomplish its mission. Furthermore, there is no abuse of authority here because it does not appear that Battelle Security arbitrarily and capriciously exercised its power which adversely affected its employees' rights. My decision might have been different had Battelle Security refused to allow its employees to make corrections to, or interlineations on, the relevant security form to clarify their non-involvement in the matter under scrutiny. Instead, Battelle Security allowed its employees to "set the record straight." In the end, while it might not be a best practice to use DOE Form 5639.3 in the manner in which Battelle did, Battelle's actions in allowing its employees (and the employees' supervisors) the opportunity to provide relevant information regarding the security incident in question and to deny culpability, negates a finding of either gross mismanagement or abuse of authority.

Based on all the foregoing, I find that Disclosure Number 10 does not rise to the level of a protected disclosure under Part 708.[7]

G. Protected Conduct

Mr. Siciliano filed a supplemental Complaint on June 8, 2010, alleging that Battelle had retaliated against him for filing his December 11, 2010, Complaint when the company failed to invite him to an event on March 24, 2010, which allegedly involved his area of expertise. The filing of a Part 708 Complaint constitutes protected activity. 10 C.F.R. § 708.5(b); *see also Thomas T. Tiller*, Case No. VWA-0018 (1998). Accordingly, I find that Mr. Siciliano engaged in protected activity on December 11, 2009, when he filed his Part 708 Complaint.

Based on the record before me, I do not find, however, that Battelle's failure to invite Mr. Siciliano to an event in March 2010 constitutes an act of retaliation under 10 C.F.R. § 708.2. Retaliation is defined under Part 708 as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g.* discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges or employment) . . ." 10 C.F.R. § 708.2. Mr. Siciliano does not specify in its Supplemental Complaint whether and how the lack of an invitation to the March 2010 event negatively or materially impacted his "compensation, terms, conditions or privileges of employment. Based on the record before me, I find that Battelle's failure to invite Mr. Siciliano to the event in question is a "trivial" matter that does not rise to an act of retaliation under Part 708.

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[7] Because I find that Mr. Siciliano did not raise a protected disclosure with regard to his concerns about Battelle's use of Part II of DOE Form 5639.3, I need not address Mr. Siciliano's allegation that he suffered an additional act of retaliation (i.e., the re-opening of the investigation into his involvement the security incident in question) for having raised issues about that form.

H. Summary

As fully discussed above, I have found that none of the ten disclosures contained in Mr. Siciliano's Complaint rises to the level of a protected disclosure under 10 C.F.R. § 708.5(a). I found further that while Mr. Siciliano engaged in protected conduct by filing his Part 708 Complaint, he did not suffer an act of retaliation when Battelle failed to invite him to a March 2010 event. Accordingly, I find that Battelle's Motion to Dismiss should be granted and Mr. Siciliano's Complaint should be dismissed.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Battelle Energy Alliance LLC on August 16, 2010, Case No. TBZ-0098, be and hereby is granted as set forth in paragraph (2) below and denied in all other respects.

(2) The Complaint filed by Mark D. Siciliano against Battelle Energy Alliance LLC, on December 11, 2009, as supplemented on June 8, 2010, Case No. TBH-0098, be and hereby is dismissed.

(3) This is an Initial Agency Decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15th day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

Hearing Officer
Office of Hearings and Appeals

Date: NOV - 9 2010