



Department of Energy
Washington, DC 20585

September 15, 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. William Elkins
Project Director
Bechtel National, Inc.
2435 Stevens Center Place
Richland, Washington 99354

NEA-2008-03

Dear Mr. Elkins:

This letter refers to the review by the U.S. Department of Energy (DOE) of the issues concerning an alleged retaliation first reported by an employee at the Hanford site in 2005. Following the employee's termination, he filed a 10 C.F.R. Part 708 complaint. DOE's Employee Protection Program at Part 708 has been designated a nuclear safety regulation and, therefore, is enforceable under the Price-Anderson Amendments Act (PAAA) at 42 U.S.C. § 2282a. A finding by the DOE Office of Hearings and Appeals (OHA) of retaliation against an employee for raising nuclear safety concerns may constitute an independent nuclear safety violation under the PAAA.

On March 15, 2007, OHA initially decided, in Case Number TBH-0042, that the terminated employee made two nuclear safety-related disclosures protected under Part 708 to management at Bechtel National, Inc. (BNI). OHA also found that BNI failed to establish that the employee would have been selected for termination through a reduction in force, absent his protected disclosures to BNI management. Following its consideration of appeals filed by the employee and BNI, OHA determined in an opinion dated February 13, 2008, (TBA-0042 and TBA-0064), that BNI's liability should be sustained and its appeal denied.

By letter dated April 15, 2008, BNI was notified that DOE was considering an enforcement action with respect to whether BNI had violated the nuclear safety requirement prohibiting DOE contractors from retaliating against any employee who discloses information protected by Part 708. BNI was invited to supplement the record compiled by OHA with any material that BNI believed may affect an enforcement decision. BNI submitted documents to DOE on April 28, 2008, participated in a telephone conference on June 17, 2008, and submitted additional information and documents by July 1, 2008.



DOE review of this information identified that BNI had not performed a root cause analysis nor developed corrective actions specific to the retaliation at issue. The submitted documentation, however, demonstrated that in response to DOE's concerns in 2005 and 2006, BNI began to institute processes to improve the effectiveness of its Employee Concerns Program and, through its Nuclear Safety and Quality Imperative, to improve the workplace safety culture. Examples included the institution of an employee exit interview process, the performance of annual workplace culture surveys, and the development of "questioning attitude" training for employees. Although not specifically responsive to the retaliation issue, these processes were viewed as effective in promoting a safety conscious work environment and a questioning attitude among the workforce. All documents were incorporated into the record of this proceeding which also includes the relevant decisions of OHA, and the Office of Enforcement's May 9, 2007, Investigation Summary Report which examined, among other matters, nuclear safety issues submitted by the employee to DOE.

Based upon our evaluation of OHA's information and case records, DOE has concluded that a nuclear safety violation of Part 708 occurred. The enclosed Preliminary Notice of Violation (PNOV) describes the facts relied upon in our determination, the violation, and a proposed civil penalty of \$41,250.

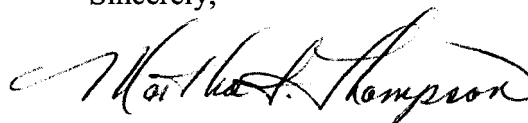
DOE considers Part 708 violations to be particularly significant, as they contravene the fundamental principles of a safety conscious workplace and may affect employees' willingness to raise safety issues. In categorizing the severity level of this specific violation, DOE considered the egregiousness of this case, including the level of management involvement; the specific acts of retaliation, and BNI's attempts to resolve the case prior to the OHA adjudicatory hearing. DOE found that supervisory management's knowledge of the employee's nuclear safety concerns, followed by management's quick selection of him for lay-off through the use of negative performance ratings, displayed a significant disregard for BNI's responsibility to encourage free and open workplace communication without any fear of reprisal.

During its evaluation, DOE gave weight to evidence in the record that senior management officials above the position of first line supervisor were not involved in the retaliation. In addition, DOE considered the fact that BNI tried to resolve the employee's complaint prior to the hearing in October of 2006; for example, BNI attended mediation with the aggrieved employee, made one or more settlement proposals, and attempted to conduct additional settlement negotiations at various times. After consideration of these factors, DOE concludes that a Severity Level II violation is the appropriate categorization; however, the participation of higher-level management would have prompted consideration for elevating the severity level.

In calculating the civil penalty, no mitigation was warranted for self-identification due to the lack of timely reporting. Although specific corrective actions were not developed in association with the retaliation, partial mitigation was applied in recognition of BNI's efforts to institute safety-conscious programs and procedures, and to train management on the importance of promoting questioning attitudes in a nuclear environment.

Pursuant to 10 C.F.R. § 820.24, *Preliminary Notice of Violation*, you must respond within 30 days of the date of this letter, and follow the instructions specified in the enclosed PNOV when preparing your response. Your response should document any additional specific actions taken to date that are not presently contained in the record. After reviewing your response to the PNOV, including any proposed additional corrective actions entered into the Noncompliance Tracking System, DOE will determine whether further enforcement action is necessary to ensure compliance with DOE nuclear safety requirements.

Sincerely,



Martha S. Thompson
Acting Director
Office of Enforcement
Office of Health, Safety and Security

Enclosure

cc: Richard Jurbala, BNI
Richard Azzaro, DNFSB

Preliminary Notice of Violation

Bechtel National, Inc.
Hanford Site

NEA-2008-03

The U.S. Department of Energy (DOE) adopted procedural rules in 10 C.F.R. Part 820 to provide for the enforcement of DOE nuclear safety requirements, for which civil penalties may be imposed under the Price-Anderson Amendments Act (PAAA), 42 U.S.C. § 2282a. Pursuant to 10 C.F.R. § 820.20(b)(1), DOE may assess civil penalties against a DOE contractor for the violation of any DOE nuclear safety requirement.

DOE's whistleblower protection regulations at 10 C.F.R. Part 708, *DOE Contractor Employee Protection Program*, prohibit retaliation against DOE contractor employees who believe they have disclosed information concerning danger to the public health or safety. Under Part 708, DOE's Office of Hearings and Appeals (OHA) has responsibility for resolving whistleblower complaints. Part 708 has been designated a DOE nuclear safety requirement enforceable under the PAAA. 57 Fed. Reg. 7533 (March 3, 1992).

If a DOE contractor violates Part 708, a nuclear safety requirement, by retaliation against a worker who raised nuclear safety-related information or concerns, then DOE may determine whether an independent violation of Part 820 exists. *Id.* Contractor retaliation may be subject to the investigatory and adjudicatory procedures of both Part 708 and Part 820, providing relief to the employee under Part 708, and the imposition of civil penalties against the DOE contractor under Part 820. 64 Fed. Reg. 12862 (March 15, 1999). Additionally, the Director of the Office of Enforcement (the Director) may use the same facts collected in OHA investigations and proceedings to support the issuance of a Preliminary Notice of Violation (PNOV), a Final Notice of Violation (FNOV), and the assessment of civil penalties under 10 C.F.R. §§ 820.24-25. Appendix A to Part 820, § XIII, *Whistleblower Enforcement Policy*, ¶ b. Based upon the record available, the Director may initiate a nuclear safety enforcement action for contractor retaliation without additional investigation or information. *Id.* at ¶ e.

As a result of a review by DOE into: (1) nuclear-safety related disclosures made by a former Bechtel National, Inc. (BNI) employee; (2) the employee's complaint referred to DOE's OHA for investigation and hearing; (3) DOE's May 9, 2007, Investigation Summary Report reviewing, among other matters, BNI's deficiencies in software procurement; and (4) OHA's initial and appellate decisions dated March 15, 2007, and February 13, 2008, respectively, DOE has determined that a nuclear safety violation occurred.

In accordance with 10 C.F.R. § 820.20(b)(1), and Appendix A, § XIII, *Whistleblower Enforcement Policy*, the violation is discussed below.

VIOLATION

Title 10 C.F.R. § 708.43, states: "DOE contractors may not retaliate against any employee because the employee (or any person acting at the request of the employee) has taken an action listed in §§708.5(a)–(c)."

Protected actions listed in 10 C.F.R. § 708.5(a) include: "(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [an] employer, or any higher tier contractor, information that [an employee] reasonably believe[s] reveals (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"

Contrary to the nuclear safety provisions cited above, BNI supervisors retaliated against an employee by selecting him for termination through a reduction in force, 3 months after he had made disclosures to management which were protected under 10 C.F.R. § 708.5(a). Specific information in support from OHA's decisions includes the following:

1. The employee had expressed concerns to his supervisors that malfunctions in an integrated control network system he was testing for the Waste Treatment and Immobilization Plant (WTP) might cause an emergency situation once the WTP started operation. The information reported by the employee to management was a protected nuclear safety-related concern.
2. Shortly after the employee reported his protected concern to management, he was selected for inclusion in a reduction in force through a ratings process that permitted management to subjectively influence his inclusion among the employees scheduled for termination.
3. Prior to his termination, the employee unsuccessfully raised his safety-related issues and fear of impending reprisal to BNI's Employee Concerns Program.
4. By Initial Agency Decision dated March 15, 2007, OHA determined that the employee reasonably believed his disclosures to management revealed a substantial and specific danger both to his co-workers and public health and safety, and that his protected disclosures contributed to the retaliatory action taken against him. By Decision and Order dated February 13, 2008, OHA sustained the initial liability determination against BNI.

OHA's conclusion that BNI management retaliated against the employee in response to his protected disclosures constitutes, in and of itself, a violation of DOE's nuclear safety requirement barring contractor retaliation against whistleblowers. DOE must ensure that its contractors do not impose retaliatory deterrents to the free flow of information necessary to ensure safe nuclear operations at DOE facilities.

This constitutes a Severity Level II violation.
Proposed Civil Penalty - \$ 41,250

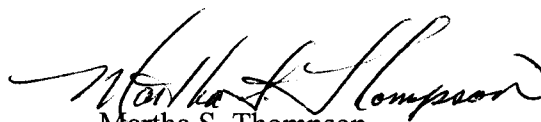
REPLY

Pursuant to the provisions of 10 C.F.R. § 820.24, BNI is hereby required, within 30 days after the filing of this PNOV, to submit a written reply by overnight carrier to the following address:

Director, Office of Enforcement
Attention: Office of the Docketing Clerk
U.S. Department of Energy
19901 Germantown Road
Germantown, MD 20874-1290

Copies should also be sent to the Assistant Secretary for Environmental Management and the Manager of the DOE Office of River Protection, as well as to my office. This reply should be clearly marked as a "Reply to a Preliminary Notice of Violation" and should include the following for the violation: (1) an admission or denial of the alleged violation; (2) any facts, explanations, and arguments which support a denial that a violation has occurred as alleged; and (3) a demonstration of any reason why the proposed remedy should not be imposed or should be mitigated. Copies of all relevant documents shall be submitted with the reply. The reply shall include a discussion of the relevant authorities that support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE. If additional mitigation of the proposed civil penalty is requested, BNI should address the adjustment factors described in 10 C.F.R. Part 820, appendix A, § IX.3. Corrective actions that have been or will be taken to avoid further violations should be delineated with target and completion dates in DOE's Noncompliance Tracking System.

If BNI agrees to comply with the proposed remedy in its reply and waives any right to contest the Notice or the remedy, the penalty of \$41,250 must be paid within 60 days after the reply is filed by check, draft, or money order payable to the Treasurer of the United States (Account 891099) and mailed to the Director, Office of Enforcement, Attention: Office of the Docketing Clerk, at the above address. In such cases, this PNOV will constitute a Final Order upon the filing of the reply. If BNI should fail to reply within the time specified, the Director will request that a default order be issued against BNI.


Martha S. Thompson
Acting Director
Office of Enforcement

Washington, DC
this 15th day of September 2008