Department of Energy
Washington, DC 20585

JUL 19 2001

Mr. David D. Powell, Jr.
Holland and Hart
P.O. Box 8749
Denver, CO 80201-8749

Re: OHA Case No. VBB-0010

Dear Mr. Powell:

This letter concerns the complaint of reprisal submitted by Dr. Jagdish Laul to the Department of Energy under 10 C.F.R. Part 708. You have filed a petition for Secretarial review of the appeal decision issued in that case on March 9, 2001. You submitted a Statement of Issues to be reviewed (Statement) on June 11, 2001. On July 10, 2001, Ms. Alene Anderson submitted a Response to your Statement on behalf of Dr. Laul.

The Part 708 regulations applicable to the petition provide that the Secretary will reverse or revise an appeal decision by the Director of the Office of Hearings and Appeals only under extraordinary circumstances. 10 C.F.R. § 708.35(d). As discussed below, you have not shown that extraordinary circumstances warranting Secretarial review exist in this case.

Dr. Laul filed a Complaint alleging that his employer, Excalibur Associates, Inc. (Excalibur), a subcontractor of Kaiser-Hill Company, the DOE's M&O contractor at its Rocky Flats Field Office, retaliated against him for participating in an activity protected under Part 708. The retaliations took the form of four adverse personnel actions: (i) reducing Dr. Laul's authority, (ii) reducing the work available for Dr. Laul by entering into a subcontract with another firm, (iii) rating Dr. Laul the lowest of all 12 Excalibur employees, and (iv) discharging him. In a September 1, 2000 Initial Agency Decision (IAD), an Office of Hearings and Appeals Hearing Officer determined that Dr. Laul had established that his Part 708 protected activity was a contributing factor to the Excalibur adverse personnel actions, and that Excalibur did not show by clear and convincing evidence that it would have taken these same adverse actions in the absence of the protected activity.

In determining that the protected activity was a contributing factor to the Excalibur retaliations, the IAD found that it was appropriate to impute constructive knowledge of the protected

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activity to Excalibur, even though Excalibur management had no direct knowledge of that activity. That determination was based on the following findings. First, the protected activity was directly known to Kaiser-Hill. In this regard, the Hearing Officer determined that a number of Kaiser-Hill management employees were aware of Dr. Laul's protected activity and made adverse comments about the activity and about Dr. Laul, himself. These "directly knowledgeable" employees worked closely with other Kaiser-Hill managers who were members of the Hazardous Assessment Committee (HAC Managers). Further, one HAC manager was a subordinate of a Kaiser-Hill employee who made specific negative comments about Dr. Laul's whistleblower activities. The HAC manager group was responsible for providing Excalibur with the negative ratings that led to the adverse personnel actions and ultimately to Dr. Laul's discharge.

Thus, the IAD found a two-part linkage from Kaiser-Hill knowledgeable employees through Kaiser-Hill HAC managers to Excalibur managers, in determining that Excalibur improperly terminated Dr. Laul. The linkage involved evidence that Kaiser-Hill knowledgeable employees held negative views of Dr. Laul's protected activity, and evidence that these employees had close contact with other Kaiser-Hill employees, who in turn gave negative reviews of Dr. Laul to Excalibur. The IAD found by a preponderance of evidence that Kaiser-Hill knowledgeable employees provided tainted, negative views of Dr. Laul to other Kaiser Hill employees who dealt directly with Excalibur. I affirmed the IAD in the appeal decision issued on March 9, 2001. Jagdish C. Laul, 28 DOE ¶ 87,011 (2001).

In your Statement of Issues you object to the finding of contributing factor and imputed knowledge through this two-part linkage from the directly knowledgeable Kaiser-Hill management employees via the Kaiser-Hill HAC managers to Excalibur management. In this regard, you contend that the Hearing Officer did not have a sufficient basis for concluding that the knowledgeable Kaiser-Hill employees offered negative opinions about Dr. Laul to Kaiser-Hill HAC managers, and that these negative reviews were then communicated to Excalibur employees.

In essence, then, the objections you raise relate to the credibility and weight that the Hearing Officer gave to the witnesses' testimony and to other evidence regarding Kaiser-Hill employees' negative assessments of Dr. Laul. These are matters clearly within the province of the Hearing Officer, who presided at the hearing and heard all the testimony. You have set forth no

reasonable basis for overturning any of those findings. The objections you raise indicate a simple disagreement with the Hearing Officer's conclusions regarding the credibility of witnesses and the weight assigned to their testimony.

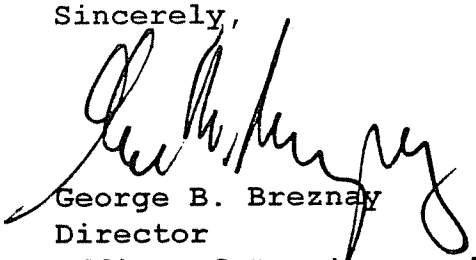
In fact, the record clearly establishes that the Hearing Officer had a substantial basis for his findings. The Hearing Officer specifically referred to the remarks and conduct that he found demonstrated that Excalibur managers were ultimately tainted by negative opinions about Dr. Laul, which were initially communicated by Kaiser-Hill knowledgeable employees. E.g., Jagdish C. Laul, 28 DOE ¶ 87,006 at 89,051-53 (2000). In sum, your objection regarding the weight assigned to the evidence in this case suggests no extraordinary circumstances that merit review by the Secretary.

The other objection you raise concerns a purported unfairness in holding Excalibur fully responsible for providing a monetary remedy to Dr. Laul. In this regard, you state that Excalibur was not aware of Dr. Laul's protected activity, and that it is unfair to hold the firm wholly liable under these circumstances. You further note that Kaiser-Hill has never been a party to this proceeding, thereby implying that Kaiser-Hill should be held responsible for the remedy here. These assertions do not rise to the level of extraordinary circumstances warranting review by the Secretary. The Excalibur firm did not accept the offer by the Hearing Officer to join Kaiser-Hill in this proceeding. March 15, 2000 Letter from Thomas L. Wieker, Hearing Officer, to David Zwisler, Attorney for Excalibur. While Excalibur objects to its sole liability for the remedy here, this result came about through its own decision not to join Kaiser-Hill. Insofar as Excalibur was the employer that retaliated against the employee based upon his protected activity, as found by the Hearing Officer, Excalibur is properly held liable. Adopting the position Excalibur advocates would leave the employee without a remedy.

Accordingly, the petition for Secretarial review is hereby dismissed, and the appeal decision issued to you on March 9, 2001, constitutes the final agency decision on your complaint.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 287-1436.

Sincerely,



George B. Breznay
Director
Office of Hearings and Appeals

cc: Ms. Alene Anderson
Project on Liberty and the Workplace
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