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Mr. Zaid, we are faxing LANS' Motion to Dismiss Claims Made by Complainant James Edward Doyle Against Los Alamos National Security, LLC

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"IN CONFIDENCE"

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Dr. James Edward Doyle)
)
Filing Date: February 23, 2015)
)
_____)

Case No. WBI-15-0002

**Motion to Dismiss Claims Made by Complainant
James Edward Doyle Against Los Alamos National Security, LLC**

Los Alamos National Security, LLC (LANS) hereby makes this motion to dismiss under 10 C.F.R. Section 708.28(b)(5), on the grounds that Complainant James Edward Doyle cannot meet his burden of showing by a preponderance of the evidence that he was let go as part of a reduction in force in retaliation for having filed a complaint under 10 C.F.R. Part 708.

I INTRODUCTION

There is no reason to conduct a hearing in this matter because Doyle cannot meet his initial burden of proving that his participation in Part 708 proceedings was a contributing factor in his layoff.

It is indisputable that Doyle had funding problems for many years. Management recognized the issue, repeatedly counseled Doyle about it, attempted to assist him and made clear to Doyle that his lack of funding threatened his job. All of this happened long before Doyle filed a complaint under Part 708, in November 2013. As Doyle’s performance reviews show, his lack of funding was a problem since at least 2009. The problem became more acute over time, resulting in Doyle’s name appearing on a reduction-in-force list three times before he was finally laid off. While Doyle may look for some explanation for his layoff other than his own failure to acquire funding, which was one of his job requirements, it is impossible for him to legitimately dispute the fact that this issue predated *any* protected activity by *at least four years*.

An employee cannot use Part 708 to shield himself from adverse employment action for not satisfying the requirements of his position. Yet that is precisely what Complaint Doyle tried to do by filing a Part 708 complaint after recognizing that his continuing employment at Los Alamos National Laboratory (LANL or the Laboratory) was in serious jeopardy due to his lack of funding. Doyle’s management consistently informed him of the severity of his funding problems. Indeed,

management's warnings to Doyle became increasingly more serious over time, as the Department of Energy National Nuclear Security Administration (NNSA) pressed LANS to curtail the mis-use and over-use of its unfunded "transition labor" charge code, and financially penalized LANS for retaining scientists like Doyle who did not have funded work. While Doyle tried to respond to management's concerns, he was unsuccessful.

Doyle wants the OHA to simply ignore the funding issue, asking it to believe that his funding problems were virtually nonexistent until he filed a Part 708 complaint against LANS. But, as neutral OHA investigator recently concluded,

"[I]t appears from the evidence gathered that LANS will be able to establish a solid business reason for the RIF. Roughly five years prior to the termination at issue here, well before the matters at issue here arose, a LANS internal audit and related DOE oversight resulted in increased oversight and management of unfunded labor consistent with standards acceptable to the DOE contracting officer. More recently, Dr. Doyle has lacked stable funding for work in his area of expertise, and his assertion that LANS management did not make efforts to find work outside his area of expertise is contradicted by the documentation of record.

...

"[T]he decision to terminate Dr. Doyle was consistent with the decisions made with respect to other employees and the overall LANS effort to manage its transition labor consistent with standards acceptable to the DOE contracting officer."

(Investigative Report, pp. 6, 11.)

Doyle cannot show temporal proximity between the filing of his first part 708 complaint on November 6, 2013 and the July 8, 2014 notification of his layoff. And even if there was temporal proximity, there is absolutely no evidence of discriminatory animus. As the neutral OHA investigator pointed out, LANS had legitimate business reasons for laying off Doyle for a multi-year history of insufficient funding that was only getting worse. This destroys temporal proximity.

Since Doyle cannot establish that his use of the Part 708 process had any role in his layoff, LANS respectfully asks the OHA to dismiss the instant complaint.

II. BACKGROUND INFORMATION

A. The NNSA Required LANS to Limit the Use of Transition Labor by Unfunded Scientists Like Doyle

Doyle, like every other Scientist 3 at LANL, was responsible for securing funding for himself and for other employees, including the graduate students he mentored. One of Doyle's job duties, as stated in both his job description and performance evaluations, was to "[a]cquire[] Internal/external funding for self and others."¹ This is because LANL competes with other national laboratories and with universities for funding on many national security and energy-related programs. Scientists are required to obtain this funding to support both the programmatic work and the overhead of the Laboratory. If Laboratory scientists do not successfully obtain funding, there is no money to support the staff.

Doyle's layoff was part of a series of layoffs at the Laboratory, based on NNSA insistence that LANS address the issue of unfunded scientists charging significant time to the Laboratory's "transition labor" account. That account exists solely in order to provide scientists with a way to record hours worked while they are in short, periodic transitions between funded projects or work assignments.

In July 2012 the NNSA Contracting Officer instructed LANS to increase its focus on the use of transition labor. This followed a LANS audit report addressing the issue, as well two earlier reports from the Office of Inspector General. NNSA expressed great concern about the perceived overuse of transition labor at the Laboratory, and what it believed to be the Laboratory's inaction with respect to scientists who did not have funded work.

After a series of contentious negotiations, LANS entered into two agreements with NNSA covering use of transition labor through Fiscal Year 2012—one for over \$150,000 and the second for over \$850,000. The agreements resulted in the amounts at issue being deemed unallowable costs under LANS' Prime Contract with NNSA. By penalizing LANS so harshly for permitting scientists like Doyle to work without funding for extended periods, NNSA made clear that it would not permit the situation to continue. It forced LANS to take action, which ultimately resulted in the layoff of multiple scientists, including Doyle.

¹ Exhibit 1, Job Description for Scientist 3, at LANS 0003; Exhibit 2 Doyle Performance Review for Review Period 7/1/09 – 9/30/10, at LANS 0020; Exhibit 3 Doyle Performance Review for Review Period 10/1/10 – 9/30/11, at LANS 0028; Exhibit 4 Doyle Performance Review for Review Period 10/1/11 – 9/30/12, at LANS 0036. All of the documents cited as exhibits in this motion were provided to the OHA on March 13, 2015 and to Complainant on April 3, 2015.

B. Doyle Had Chronic Funding Problems Beginning Long Before His First Part 708 Complaint

1. Doyle was admonished for not obtaining funding for himself and others since at least 2009

a. July 2009 through September 2010

Doyle's performance evaluations for 2009 through 2013 show a history of funding problems that got more severe as time went on. Doyle's evaluation for the review period covering July 1, 2009 through September 30, 2010 has multiple references to Doyle's need to be more conscientious of his funding. The manager comments repeatedly refer to management's concerns about this:

- "Jim needs to follow his project funding as the [Principal Investigator] to insure he does not overrun the budget."
- "Jim does still need to be more on top of his projects as the [Principal Investigator] and make sure that the funding is adequately appropriated and spent."
- "Jim needs to make sure that we know his funding situation."
- "[H]e needs to better use his students and make sure they have work and funds and especially attention."

(Exhibit 2, at LANS 0023-0024.)

Doyle's performance summary reads:

"... Jim still does not always following through on his efforts fully. We have worked on improving his performance in this area this year, Jim has made some progress but needs, to continue to focus on discipline and organization to complete tasks and projects so as to maintain funding and reputation to build our programs. . . . He must take responsibility for these staff and make sure that they are properly mentored and funded. He needs to remember to make sure that the group management knows his schedule, funding issues, and project status to meet deadlines in a timely fashion."

(Exhibit 2 at LANS 0025.)

b. October 2010 through September 2011

Doyle's funding became more of a problem in the 2010-2011 fiscal year, which was over two years before Doyle filed his 2013 Part 708 complaint. By this point Doyle's performance was

falling below expectations, and needing improvement. The comments in Doyle's performance for the review period covering October 1, 2010 through September 30, 2011 state:

- "Goal: I will take a leadership position in developing new program activities in the area of nuclear arms reduction verification policy and technology."

"Year-End Results:

Performance: Falls Below Expectations

... GL COMMENTS:

Jim has worked with a number of potential sponsors and submitted two proposals in this area, though only one was for external funding. Jim has certainly tried to develop this area for LANL, and has been doing so in at a difficult time when congressional funding of such work is severely limited. Nevertheless, Jim accepted the responsibility to "take a leadership position in developing new program activities in this area", and these have not materialized. Even though some labs, such as PNNL, ORNL, and LLNL have grown this area in the past few years, Los Alamos has exhibited no growth, and ***Jim has not been able to support himself nor his postdoc.*** We will continue to work with Jim to look for opportunities in this area, but few people at the Laboratory have the connections to be more successful in this area than does Jim."

(Exhibit 3, at LANS 0029, emphasis added.)

- "Behavioral Competencies ...
COMMUNICATION ...

Performance: Falls Below Expectations

GL COMMENTS:

... Recently, some of Jim's papers have benefited from additional editing, particularly in areas that were a bit farther from his technical experience and expertise. He has also been challenged in negotiating the sensitive Laboratory internal policy and administrative environment, encountering difficulties with senior laboratory leadership based on some of his publications. ***He has also been challenged in keeping management informed of his funding situation, in identifying and securing additional funding from internal program leaders,*** and in communicating effectively with some of his past and recent program sponsors. ..."

(Exhibit 3, at LANS 0031, emphasis added.)

- "Performance Summary & Rating ...

Performance Rating: Needs Improvement.

(Exhibit 3, at LANS 0033, emphasis added.)

c. October 2011 through September 2012

By the 2011-2012 fiscal year – over a year before Doyle filed his original Part 708 complaint – his funding issues had become a major problem. Doyle’s performance continued being rated as falling below expectations and needing improvement. The comments in Doyle’s performance for the review period covering October 1, 2011 through September 30, 2012 not only reflect these growing problems but also Doyle’s awareness of their seriousness:

- “Goal: [B]ecome established on a project team with stable funding

[Employee] Mid-Year Comments:

Still trying to establish stable funding. . . .

[Employee] Year-End Results:

I am still seeking stable funding for FY13. Currently I project 60-70% funding. . . .

Performance: Falls Below Expectations

. . . Manager comments: Jim continued to be recognized as an expert in arms control policy and nonproliferation. ***However this has not translated into stable funding. He did develop or contribute to several proposals; however funding has proven difficult to secure, especially in a time of shrinking federal budgets in these areas. Despite a fairly significant investment of program development funding, Jim’s proposals have led to less than a quarter of FTE of funding for FY13. Overall Jim’s performance on the goal of developing stable funding falls short of expectations.***”

(Exhibit 4, at LANS 0036-0037, emphasis added.)

- “Goal: Participate in international activities related to Nonproliferation and the Nuclear Fuel Cycle”

“Year-End Results:

Performance: Falls Below Expectations

. . . Manager comments: Jim continued his work on this goal, ***however funding was extremely limited and opportunities for growth were few.*** Even the limited level of Jim’s activity in this area was strongly tied with specific individuals in the CNP-program office; with changes in the CNP program office at LANL, these opportunities are at risk of shrinking further. Jim is encouraged strongly to continue to develop relationships with new personnel at the CNP-PO; group management will support his as well.”

(Exhibit 4, at LANS 0038-0039, emphasis added.)

- “Behavioral Competencies:
APPLICATION OF KNOWLEDGE AND CONTINUOUS LEARNING”

“Performance: Falls Below Expectations

Manager comments: Jim did not provide input on this goal. ***Given the tight funding climate, Jim is encouraged to continue to develop skills and capabilities in areas outside his main areas of expertise.”***

(Exhibit 4, at LANS 0039, emphasis added.)

- “PERSONAL LEADERSHIP”

“Performance: Falls Below Expectations

Manager comments: Jim has taken self-motivated steps in proposal development, but this did not translate into funding. Given the downturn in NA-24 funding, ***Jim should be taking proactive steps to exploring other sources of funding as well as other potential application areas for his skill set.”***

(Exhibit 4, at LANS 0040, emphasis added.)

- “Performance Summary & Rating

Performance Rating: Needs Improvement

... Jim's funding during the last year has been unstable. His work over the year was spread out over a large number of individual projects - essentially, a patchwork of projects that enabled him to stay supported on programmatic work for most of the year. This was interspersed with limited periods when he did not have funded work. ***Overall this is a critical area where Jim's performance needs improvement.*** Group management will continue to work with Jim to identify opportunities, however Jim is encouraged to look for areas to expand his skills and capabilities.”

(Exhibit 4, at LANS 0041, emphasis added.)

d. October 2012 through September 2013

Doyle's funding problems became more acute in late 2012. As discussed below, Doyle's name first appeared on the Reduction-In-Force (RIF) “trigger list” in December 2012. In other words, he had spent so much of his time doing unfunded work that he was a candidate for layoff. Doyle's performance evaluation highlights how critical it had become for him to obtain funding if he wished to continue his employment at the Laboratory:

- “Work Achievement Goal: Demonstrate excellence in science and technology and Programmatic execution in support of global security, energy security or other institutional goals.
[C]ontinue to build my professional reputation by publishing in peer-reviewed Journal and making presentations at government and professional events.
Successfully manage and complete project tasks in the areas of nuclear security, arms control and nuclear energy.

Manager Mid-year Comments: . . . *Jim did not have programmatic funding for over half of the period covered by this mid-year performance review. Identifying stable funding for the rest of the year continues to be a challenge; Jim, group management as well as cognizant program management are actively seeking options to fill coverage gaps. As was noted at the FY12 year-end performance assessment and discussed with Jim subsequently, this is an issue for concern in terms of performance, as securing stable funding for oneself (plus others) is one of the expectations of Jim’s Scientist 3 position.”*

(Performance Review for Review Period 10/1/12 – 9/30/13, Exhibit 5, at LANS 0045-0046, emphasis added.)

- Work Achievement Goal: Demonstrate technical leadership . . .

Manager Mid-year Comments: Jim has continued to be active in developing proposals for new work. *A substantial fraction of Jim’s productive hours in fiscal October, November, and December (and a smaller fraction in the second quarter of FY13) had to be charged to Transition Labor. Indeed a significant portion of his effort on developing new Proposals was supported by Transition Labor funding when he was unable to secure full programmatic funding coverage for himself. . . .*

(Exhibit 5, at LANS 0049, emphasis added.)

- “Overall Performance Summary:
Jim’s performance during this review period has been mixed. His performance in areas related to execution of his assigned tasks met expectations of his position, but *fell significantly below expectations in other areas - especially related to his ability to secure sustained funding for himself. For the first part of the year, he had considerable difficulty in securing funding for himself and he was on unfunded status for an extended period.* For the second half, he was largely able to secure funding for himself . . . *Overall Jim needs to continue his efforts to secure funding for himself - this is one of the key expectations of his level 3 position. . . .*

Development Opportunities:

. . . Jim also needs to broaden his program development and proposal development efforts to ensure he can secure funding for himself, in a sustained manner for the entire year.”

(Exhibit 5, at LANS 0050, emphasis added.)

Likely understanding how desperate his situation had become, Doyle began offering excuses for his insufficient funding—claiming that everything was fine until LANL management started retaliating against him for publishing an article that disclosed classified information. Management correctly pointed out that Doyle’s problems long pre-dated his publication:

- “Work Achievement Goal:
Support program development in global security, energy security or in support of other institutional goals. Overall goal is to fulfill the level 3 requirement of securing funding to the level of 1 FTE.
Continue to complete proposals to sponsors for work in the areas of nuclear security, nonproliferation, verification and monitoring and nuclear energy.
Work with the Office of Strategic Outcomes and other program offices as appropriate on various program development initiatives.

Employee Mid-year Input:

. . . I believe that much of the reason I have had difficulty teaming with other LANL staff to generate more program funding is due to actions by upper management to retaliate against exercise of my intellectual freedom rights. Because other staff know that management is against my external publishing activities they are unlikely to work with me.

In general, the goal of securing funding to the level of 1 FTE has been negatively impacted by management actions related to the mishandling of a document I authored. This incident consumed vital time during the months of February and March 2013, damaged my relationship with my sponsors and degraded my ability to compete for scarce sponsor funds. . . .

Manager Mid-year Comments:

Jim's difficulty in obtaining funding is a problem pre-dating the issues surrounding the referenced document. Jim had less than half-time Programmatic funding for most of the period covered by this mid-year performance review. A substantial fraction (271 hours total) of Jim's productive hours in fiscal first quarter of FY13 had to be charged to Transition Labor as he did not have sufficient programmatic funding (this period is before the document incident referenced in Jim's input above). Indeed a significant portion of his effort on developing new proposals was supported by Transition Labor funding during that time. For the second quarter Jim had a total of 167 hours on unfunded status.

The cumulative fraction of time Jim has been unable to support himself programmatically (starting as early as October 2012) puts him at risk for comparing unfavorably relative to the performance of his peer group. Some of Jim's proposals (NA-22 for example) were principally aimed at FY14 funding. He is

encouraged to continue his program development efforts for FY14, even as he seeks to identify near-term work opportunities for the remainder of FY13.

While Jim's expertise in nonproliferation policy is well-established, the relative lack of breadth in Jim's skill set, especially in the analytical area, continues to be a limitation when group management and others have attempted to find funded projects for Jim. Breadth of skills becomes especially important in an era of increasingly austere federal funding. He is encouraged to broaden his skill sets to enable him to be more marketable to other potential projects at the Laboratory.

Employee Year-end Results:

I continue to believe that much of the reason I have had difficulty teaming with other LANL staff to generate more program funding is due to actions by upper management to retaliate against the arguments of my external publications. . . .

Manager Year-end Comments:

Group management does not concur with Jim's statements that imply his inability to secure funding for himself has been impacted by issues related to the document he authored. *As was stated previously, the bulk of Jim's time in unfunded status occurred prior to the document incident.* When the incident did occur, Jim's responses did not meet expectations - details have been discussed with Jim in secure settings.

Jim's performance on this goal fell significantly below expectations. He was unable to secure funding for himself for over a quarter of his time over the full year. Jim needs to expand his program development and proposal development efforts to ensure he can secure funding for himself in a sustained manner for the entire year."

(Exhibit 5, at LANS 0047-0049, emphasis added.)

2. Doyle charged so much time to the Laboratory's transition labor account that his name began appearing on the RIF trigger list

Between July 2012 and July 2014, when LANS notified Doyle of his layoff, Doyle charged over 27% of his time to transition labor. Doyle charged some hours to transition labor every month from July 2012 through May 2013. He began charging transition labor again in December 2013 and continued to do so each month through July 2014. The June 2014 RIF Consideration Request Form for Doyle, discussing some of his excessive charges to the transition labor account, is attached as Exhibit 6.

Before any regular employee loses employment through a RIF, there is an established review process to ensure fairness and the exercise of appropriate business judgment. The decision to terminate Doyle's employment went through the identical review process followed for all other regular employees considered for layoff. This review process includes line management at the

Associate Director and Principal Associate Director levels, Laboratory Counsel, Human Resources and the Laboratory Integrated Stewardship Counsel (LISC), which is a committee comprised of high-level LANS managers whose purpose is to ensure that all Lab resources are managed in a consistent, appropriate fashion.

The LISC reviews employees' use of transition labor once it reaches a significant level. The cutoffs for LISC review are 300 hours in a three-month period and/or 450 hours in a six-month period. For the three month period, this means someone has been on transition labor about 57% of the available hours. For the six month period, this represents about 43% of the available hours. At the 300 and 450 hours marks, the individual's name appears on a RIF trigger list. While the LISC reviews every case of an employee exceeding these amounts of transition labor, the LISC response varies depending upon the circumstances in each case, as discussed below. Doyle reached these limits on three separate occasions, which is more than any other employee.

On the first occasion that Doyle's name appeared on the RIF trigger list, in January 2013, the Associate Director responsible for Doyle's organization recommended layoff; however, his Principal Associate Director made the decision not to sever employment. Instead, he wanted to continue management's efforts to find funded work for Doyle.

Doyle's Division Leader oversaw the effort to find funding for him. This included weekly reviews of available work, distribution of Doyle's *curriculum vitae* to managers with potential funding, assignment to projects where the skill fit was less than perfect in an effort to see if the fit could be developed over time and personal solicitations of program managers to place Doyle. Doyle also attempted to find funding himself, but he had limited success.

Doyle's name appeared on the RIF trigger list again in March 2013, but no action was taken at that time because management was waiting on the outcome of the additional efforts to find funded work for Doyle.

3. Doyle was laid off after appearing on the trigger list a third time

In May 2014 Doyle appeared on the RIF trigger list a third time, and a RIF request worked its way through high-level LANS management – the Division Leader, Associate Director and Principle Associate Director responsible for Doyle's organization. The Division Leader made the layoff recommendation on June 26, 2014, and the Associate Director and Principle Associate Director formally approved the layoff decision later that day. Doyle was notified of his layoff on July 8. It was effective one month later, on August 7.

4. Meanwhile, the administrative process of denying Doyle's meritless appeals to dismiss his 2013 Part 708 complaint continued

By June 2014, when Doyle's name hit the trigger list a third time, many months had passed since Doyle had filed his November 6, 2013 Part 708 complaint. NNSA dismissed that complaint for

lack of jurisdiction on January 23, 2014. Doyle appealed the dismissal a few weeks later, on February 13. That was the last activity on the complaint prior to LANS management's decision to sever Doyle's employment because there was no funding for him.

Later, the Director of OHA affirmed the decision to dismiss Doyle's Part 708 complaint on June 24. On July 11 Doyle filed a petition for secretarial review of the OHA Director's decision. That petition was denied, and the decision to dismiss the November 2013 complaint was upheld, on September 15.

III. DOYLE'S BURDEN OF PROOF

Part 708 provides the hearing officer with the ability to dismiss a meritless case like this one in 10 C.F.R. Section 708.28, which states:

"The Hearing Officer may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer, or, without good cause, to attend a hearing."

Doyle bears the initial burden of proof:

"The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor."

10 C.F.R. § 708.29.

The term "preponderance of the evidence" refers to "'such evidence as, when weighed against that opposed to it, has the more convincing force' that something is more likely so than not so." *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1204 (D.D.C. 1990) (quoting Standardized Civil Jury Instructions for the District of Columbia § 2-8 (revised ed. 1985)). See also *Carlos M. Castillo*, DOE OHA Case No. VWA-0021 (June 1, 1998) (citing same).

If a complainant does not meet his initial burden, as Doyle cannot do in this case, "he has failed to make a prima facie case and *his claim must therefore be denied.*" *Id.* (emphasis added).

IV. DOYLE CANNOT MEET HIS BURDEN OF SHOWING BY A PREPONDERANCE OF THE EVIDENCE THAT HIS PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR TO HIS LAYOFF

A. There Is No Temporal Proximity Between Doyle's Protected Activity and Layoff

Doyle cannot show temporal proximity between his filing of a Part 708 complaint on November 6, 2013 and his receipt of a notification of his layoff on July 8, 2014. The OHA should consider Doyle's initial protected action of filing the 2013 Part 708 complaint – not subsequent appeals – in analyzing temporal proximity. This is because various LANS managers participated in the decision to sever Doyle's employment for lack of funding, and to the extent that any these decision-makers were aware of Doyle's Part 708 complaint, there is no evidence or reason to believe that they might have cared more about Doyle's appeals of the decision to dismiss the complaint than the dismissed complaint itself. Indeed, the OHA dismissed the complaint right away, as it was clear that Part 708 did not provide Doyle with any basis for relief.² Doyle's subsequent appeals lacked a legal basis. It is not realistic to believe (nor is there any evidence) that LANS management cared so much about these meritless appeals that they decided to terminate Doyle's employment for pursuing them.³

Moreover, any finding of retaliation would be based on mere conjecture, as there is no evidence of causation here. *See Menne v. Celotex Corp.*, 861 F.2d 1453, 1463 (10th Cir. 1988) (“Under a federal test of the sufficiency of circumstantial evidence, an inference must not be based on conjecture, speculation, or mere possibility.”). The adverse action did not occur until eight months after Doyle filed his First 708 complaint. Temporal proximity has not been found in similar cases.

For example, in *Carlos M. Castillo*, DOE OHA Case No. VWA-0021 (June 1, 1998), the OHA found no temporal proximity for a complaint raised 6-7 months prior to the complainant's termination, in spite of the employee raising the issue again closer in time to adverse action. That is akin to Doyle filing his initial complaint and continuing to raise the issue through his appeals of the complaint's dismissal.

Similarly, in *Janet K. Benson*, DOE OHA Case No. VWA-0044 (May 22, 2002), the OHA declined to find temporal proximity in a case involving six months between the complainant's letter

² As noted in the Investigative Report, “the DOE has already determined that the expression of opinion on policy matters and the dispute that gave rise to the 2013 Complaint did not constitute protected activity under Part 708.” *James Doyle* DOE OHA Case No. WBU-0002 (June 24, 2014).

³ LANS is not suggesting that an appeal under Part 708 is not protected activity; rather, in the context of *this case*, it doesn't make sense that any purported retaliation would have occurred so many months after a belatedly-filed, dismissed complaint whose appeals were obviously going to fail.

to the Energy Secretary and the termination of her employment because it was “unreasonable [] to infer a nexus between any of the Complainant’s protected disclosures and any [claimed] act of reprisal.” Likewise, it is unreasonable to infer a nexus here between Doyle’s Part 708 activity and his layoff for a long-term lack of funding predating the protected activity.

B. There Is No Evidence of Discriminatory Animus

Even if the OHA considers the temporal proximity between the denial of Doyle’s final appeal on his First Part 708 claim and the notice of his layoff, Doyle still cannot meet his burden of proof because there were other reasons for the layoff, and those reasons destroy temporal proximity.

In *Jean G. Rouse*, DOE OHA Case No. VBH-0056 (March 6, 2001), the OHA deemed that a complainant had not met her initial burden because the employer had started taking the action that ultimately resulted in her reclassification long before she engaged in any protected activity. Similarly, in *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337 (1991), the court found no evidence of discrimination in spite of the temporal proximity of the protected activity and subsequent adverse action one month later because there were other reasons for the adverse action. See also *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 852 (8th Cir. 2005) (intervening events eroded causal connection); *Twymon v. Wells Fargo & Co.*, 403 F. Supp. 2d 921, 950 (S.D. Iowa 2005) (no temporal proximity for two months between protected activity and adverse action due to intervening events).

As discussed above, Doyle had significant funding issues for several years before he filed his first Part 708 Complaint in November 2013. The problem got worse, and it became clear that there was no end in sight because Doyle’s skills simply were not a match for the work performed at the Laboratory and Doyle was unable to bring in work that matched his skills. The Laboratory, having been pressured by NNSA to stop letting scientists like Doyle work unfunded for lengthy periods, had to take action. The appearance of Doyle’s name on the RIF trigger list for a third time was the intervening event that prompted the layoff.

There is no evidence of discriminatory animus other than potential knowledge on the part of one or more Laboratory managers involved in the decision to end Doyle’s employment. Any such knowledge does not suffice to meet the initial burden of proof in light of the intervening events (e.g. Doyle’s continuing failures to get funding and third appearance on the RIF trigger list). See *Hinojos v. Honeywell FM&T*, 233 Fed. Appx. 812, 814 (10th Cir. 2007) (cannot meet burden of proof with mere temporal proximity of adverse action to decision on discrimination claim and pending Part 708 complaint; need causation). See also *Addis v. Dept. of Labor*, 575 F.3d 688 (7th Cir. 2009) (no evidence of discrimination in spite of temporal proximity of protected activity and adverse action when there is neutral explanation for the adverse action); *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 655-656 (5th Cir. 2004) (temporal proximity between protected action and RIF not proof of retaliation in absence of evidence that decision-maker relied on impermissible considerations); *Hysten v. Burlington N. and Santa Fe Ry. Co.*, 296 F.3d 1177, 1183-84 (10th Cir. 2002) (cannot

establish causation with only evidence of temporal proximity of events occurring three months apart); *Comstock v. Consumers Markets, Inc.*, 953 F. Supp. 1096, 1104 (W.D. Mo. 1996) (inference of causation based solely on temporal proximity would be “rank speculation”); *Menne*, 861 F.2d at 1463 (inference based on circumstantial evidence cannot be mere conjecture).

C. Doyle’s Filing of a Part 708 Complaint Does Not Insulate Him From Employment Decisions That Had Been in Progress For Some Time

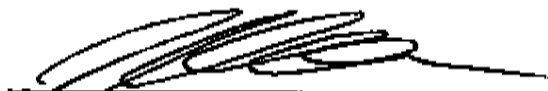
Doyle appears to be taking the position that filing a Part 708 Complaint insulates him from layoff or any other adverse action. That is not so. LANS was not required to cease expecting Doyle to meet the Scientist 3 job requirements and management’s expectations when Doyle filed a Part 708 complaint. *Carlos M. Castillo*, DOE OHA Case No. VWA-0021 (June 1, 1998); *S.R. Davis*, DOE OHA Case No. VBH-0083 (April 21, 2004). See also *Zhuang v. Datacard Corp.*, 414 F.3d 849 (8th Cir. 2005) (employee cannot insulate self from adverse action by filing a complaint). The OHA should not permit Doyle to use the Part 708 process in this way.

V. CONCLUSION

There is no need for a hearing to establish that Doyle cannot meet his initial burden of proof here. LANS therefore asks the OHA to dismiss his complaint.

Dated: August 25, 2015

Respectfully submitted,



Julia Lapis
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Exhibit 1

Job Description for Scientist 3

LANS 0002-0003



Job Description

Job Code: LAB-0R5123

Title: Scientist 3

FLSA: EX

Function: Scientist

Family: Science&Engineering

Category: Research&Development

Salary Min: \$86,400

Salary Mid: \$116,200

Salary Max: \$148,200

Summary

The scientist 3 is responsible for leading a broad set of activities across several scientific disciplines in support of research and development (R&D) science, which is defined as the application of scientific principles under the scientific method to address technical problems; or to develop novel techniques or principles; or to analyze data or outcomes from experiments (in the real world or in the computational domain) or from observational procedures in the context of the underlying scientific principles or models. Capable professional with expertise in several relevant disciplines or in a narrow, specialized field.

Job Duties

1. Safety and security are primary responsibilities for all Laboratory employees. Maintains required safety and security training and assures compliance; makes safety and security an integral part of every task. Takes steps to stop work if unsafe conditions exist or security is compromised.
2. Adheres to scientific policies, programs, procedures and practices.
3. Promotes a mutually respectful work environment that is free from discrimination and harassment and that supports cooperation, teamwork, and resource sharing.
4. Follows the generally-accepted procedure of the Scientific Method, namely: (1) observation of specific phenomena, (2) construction of an hypothesis or hypotheses to explain these phenomena, (3) testing of the hypothesis or hypotheses by experiment or other measurable, empirical techniques, and (4) dissemination of ideas, models, tests, data, and hypotheses to the peer community and beyond.
5. Applies, on a broad basis, scientific principles, techniques, methods and tools to provide solutions for an extensive and diverse range of complex and/or ambiguous problems where analysis of situations or data requires in-depth evaluation of variable factors.
6. Leads the research, design, testing, analysis, verification, and validation of cross-disciplinary, or highly and/or narrowly specialized, novel scientific and technological solutions in support of R&D initiatives.
7. Develops innovative advanced concepts, theories, methods, techniques and approaches to address specialized problems. May contribute to the development of technical standards. Develops new technical capabilities and creates opportunities to extend existing science through the expansion of existing efforts.
8. Leads the development of technical products such as journal papers, reports, presentations, and concept papers. Develops intellectual property leading to publications, copyrights, and/or patents. May contribute to technology transfer.
9. Influences organizational, project, and program strategies and directions. Leads technical decision-making at task level within a project. Makes decisions and/or recommendations that influence the achievement of key programmatic objectives.
10. Uses project assignments to further organizational goals. Develops and implements project management plans, including scope, schedule, and budget, for small to moderate projects and/or major project tasks. Defines deliverables at project or major task level.
11. Actively participates in professional societies, complex interactions, special assignments, and/or external collaborations. Participates in external working groups and/or assists in organizing meetings and colloquia.
12. Leads peer review of the work of others within own organization and participates in peer review across organizations or disciplines.
13. Enhances technical and professional expertise of junior staff through active mentoring and training.
14. Develops ideas for new proposals and business development opportunities. Leads development of technical section of small to

LANS 0002

moderate proposals.

15. Acquires internal/external funding for self and others.

16. Contributes to developments in discipline, and develops new skills consistent with state-of-the-art. May attain additional certifications, qualifications, and/or professional recognitions.

Job Knowledge

- Thorough knowledge and experience in one or more technical research and development disciplines.
- Thorough understanding of principles of scientific integrity.
- Thorough knowledge and experience in developing and implementing technical research and development projects, including the formulation and testing of hypotheses, investigation of alternative solutions, and recommendation of solutions to technical problems.
- Thorough knowledge and experience in formulating and presenting results to technical audiences and readerships.
- Thorough knowledge and experience of appropriate safe practices for technical work.

Education

- Typical educational requirement is an advanced degree in science from an accredited college or university.

Direction

A. Supervision Received

- Receives nominal supervision on all except the most complex problems and solutions.

B. Supervision Exercised

- Coordinates and monitors the work of junior staff and peers. Provides technical direction to multiple teams for organizational initiatives.

C. Contacts

- Position typically requires ability to build effective multi-disciplinary teams and to interact with directorate-wide networks. Represents the Laboratory to external agencies in limited and defined capacities. Interacts routinely with Laboratory middle- and senior-level management.

This description is not intended to be a complete statement of every aspect of the position, but rather to act as a guide to the essential functions to be performed. Assigned functions of this job may vary, and other duties and responsibilities may be assigned or changed at the discretion of management.

Exhibit 2

Performance Review Period 7/1/09 – 9/30/10

LANS 0020-0025

Inside

Los Alamos National Laboratory

Perform

We recommend you save your work periodically, every 30-60 minutes.

Review Period: 7/1/2009 - 9/30/2010 **Organization:** N-4
Employee Z#: 148422 **Employee Name:** James Edward Doyle **Employee Title:** Scientist 3
Manager Z#: 093198 **Manager Name:** Richard Kent Wallace **Manager Title:** R&D Manager 4

Job Duties (available guidance)

This description is not intended to be a complete statement of every aspect of the position, but rather to act as a guide to the essential functions to be performed. Assigned functions of this job may vary, and other duties and responsibilities may be assigned or changed at the discretion of management.

1. Safety and security are primary responsibilities for all Laboratory employees. Maintains required safety and security training and assures compliance; makes safety and security an integral part of every task. Takes steps to stop work if unsafe conditions exist or security is compromised.
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4. Follows the generally-accepted procedure of the Scientific Method, namely: (1) observation of specific phenomena, (2) construction of an hypothesis or hypotheses to explain these phenomena, (3) testing of the hypothesis or hypotheses by experiment or other measurable, empirical techniques, and (4) dissemination of ideas, models, tests, data, and hypotheses to the peer community and beyond.
5. Applies, on a broad basis, scientific principles, techniques, methods and tools to provide solutions for an extensive and diverse range of complex and/or ambiguous problems where analysis of situations or data requires in-depth evaluation of variable factors.
6. Leads the research, design, testing, analysis, verification, and validation of cross-disciplinary, or highly and/or narrowly specialized, novel scientific and technological solutions in support of R&D initiatives.
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14. Develops ideas for new proposals and business development opportunities. Leads development of technical section of small to moderate proposals.
15. Acquires internal/external funding for self and others.
16. Contributes to developments in discipline, and develops new skills consistent with state-of-the-art. May attain additional certifications, qualifications, and/or professional recognitions.

Additional Job Duties

Workforce Capabilities

To aid in the discussion for planning, managers and employees can review the employee's current knowledge, skills, and abilities maintained in the Workforce Capabilities Interface (WCI). Managers and employees should consider the full utilization of the employee's knowledge, skills, and abilities, and any developmental opportunities. Click on the WCI Profile button provided below to view this employee's profile.

Work Achievement Goals (available guidance)

Goal: Work through NA-24 and cooperate with other labs and partners to successfully complete and expand NGSI Internship program and safeguards course, extend interaction with universities for safeguards **Impact:** High

LANS 0020

training.

Desired Results:

retain LANL NGSi Interns in the safeguards field

develop an advanced technical safeguards course for summer 2010

Mentor Elizabeth Meek and Chantell Murphy

Hold faculty workshops in summer 2009 and 2010 to increase university interactions

submit proposal for mobile safeguards demonstration lab

Mid-Year Comments:

Results/status: NGSi Interns retained as advanced graduate students, postdocs and staff include: Karen Miller, Charles Streeper, Melissa Schear, Adrienne LeFleur, Vladimir Mozin, Louise Evans, Nathan Sandoval, Elizabeth Meek, Jianwei Hu, Mary Elfman, Cory Freeman, Michael Fensin, Blake Nolen and a couple others. Several of these are already staff members are several more will likely convert over the next few years. **Objective:** develop an advanced technical safeguards course for summer 2010

Results/status: Planning for this course is underway. We have identified a team of instructors, course content, laboratory facilities and the dates for the course.

Objective: Mentor Elizabeth Meek and Chantell Murphy

Results/status: Betsy has worked on NGSi university collaboration, traveling to INMM events to report on NGSi activities and summarizing those activities in briefings. Both Betsy and Chantell traveled to U. of MO. to participate in NGSi workshop. I have involved both students in arms control verification research and research of the Thorium fuel cycle and Indian reactors. Betsy and Chantell have launched a LANL nonproliferation newsletter and Betsy has presented a paper on FMCT which I assisted.

Year-End Results:

Performance: Fully Meets Expectations

The NGSi program has successfully retained the following who have converted to staff

Karen Miller, N-1

Mike Fensin, N-1

Charles Streeper, N-3

Melissa Schear, N-4

Corey Freeman, N-1

Eric Rauch, N-4

Elizabeth Meek, ESH

James Miller, C-1

Jeremy Conlin (expected 9/10)

We completed 3 new advanced measurement NGSi training modules in 2010

Holdup, gamma, calorimetric assay

Overall, NGSi programs was success in 2010, good university engagement, feedback from students and participation in INMM

Chantell Murphy is exceeding expectations and fully involved in group project work

We are working on offer package for Sara Kutchesfahani to support NGSi in 2011.

Goal: Continue Leading Initiative for nuclear security dialogue with India for NA-21 and NA-25. **Impact:** High

Desired Results:

LANS 0021

Travel to India to meet with nuclear laboratory leadership

Become established as a technical advisor to NA-20 India focus group

develop proposals for technical exchanges with BARC, IGCAR and other Indian research institutes.

Objective: Become established as a technical advisor to NA-20 India focus group

Result/status: I have attended several meetings of the technical focus group and briefed Maegon Barlow and Brad Hammit (NNSA) on the results of my trips and submitted several point papers on next steps for India engagement. I am also briefing other members of the technical focus team on impressions of the Indian nuclear facilities.

Objective: develop proposals for technical exchanges with BARC, IGCAR and other Indian research institutes.

I have contributed to technical proposals to both BARC and IGAR for workshops on NDA and advanced safeguards techniques. As of March 2010 the Indians have not agreed to technical exchanges.

Mid-Year Comments:

Result/status: I traveled to India in September and November of 2009.

In Sept. I met the directors of IGCAR and TIFR (Technical Institute of Fundamental research). This was at the International conference on peaceful uses of nuclear energy in Delhi. In Nov. I visited TIFR, IGCAR and BARC, the Indian national nuclear laboratories as part of a people to people delegation. We had incredible access to the facilities and leaderships of BARC, IGCAR and TIFR. These trips helped establish me as a technical advisor to NNSA on India

Year-End Results:

Performance: Fully Meets Expectations

Although dialogue with Indian partners has not been active, I have continued to increase my understanding of the Indian fuel cycle and research programs through work on the NA-24 Thorium tasks. These have been very successful and Chantell Murphy is excelling at this task.

Goal: Continue to build reputation as a international subject-matter expert on nuclear arms reductions, policy and safeguards through publications and presentations

Impact: Medium

Desired Results:

Invite subject matter experts to lab for guest presentations

prepare presentations for INMM, Carnegie Endowment and CISAC

complete at least one article for publication in a peer-reviewed journal

Begin planning next edition of "nuclear safeguards, Security and Nonproliferation,"

Mid-Year Comments:

Result/status: I have arranged two guest lecturers: James Acton from Carnegie Endowment Nonproliferation Program and Sara Kutchesfahani from University College London and the RAND corp.

Year-End Results:

Performance: Exceeds Expectations

This project really took off in the second half of FY2010. I have made presentations on verification tech. to INMM, NSTech and N-3. I have been invited to brief at Princeton.

I am leading the strategic planning (with Sharon Deland of SNL) of NSTech's NA-22 work in this area. I am on the subject matter experts group planning a 3-year \$24 million R&D effort at nuclear warhead dismantlement verification technologies. I am also collaborating with a senior researcher at the Institute for Defense Analysis to plan and implement a workshop on this topic sponsored by DTRA and STATE.

LANS 0022

Goal: Continue to promote the need for development and testing of arms control verification technology as related to warhead dismantlement and transparency
Desired Results:
 Become active in projects for NA-24, 22 or other US agencies in this area.
Mid-Year Comments:
 Result/status: I have been interacting with subject matter experts, writing feedback to op-ed and professional correspondence. Brought a guest speaker on the subject and submitted proposals to NA-242 for work in this area. My INMM paper will also promote this work
Year-End Results:
 see above
 It appears that I am poised to move into supporting this area nearly full time in FY2011. We have completed technical roadmaps and life-cycle plans needed to receive major NA-22 funding beginning in Oct-Nov. 2010

Impact: Medium

Performance: Fully Meets Expectations

Behavioral Competencies (available guidance)

APPLICATION OF KNOWLEDGE AND CONTINUOUS LEARNING

- Effectively applies current knowledge and skills.
- Keeps abreast of new knowledge and developments in own area of expertise.
- Engages in continuous learning opportunities to further develop skills and capabilities in technical and functional areas

Note: When going through the performance planning process, all managers and employees must verify that the employee's training plan requirements are correct and must ensure that all valid requirements are completed throughout the year.

Mid-Year Comments:

B. Boyer

Jim needs to follow his project funding as the PI to insure he does not overrun the budget.

Jim needs to insure his students get enough attention.

No new budget crises in the second half of performance period.

Performance Comments:

Jim is someone who always is expanding his knowledge base and trying to push himself to excel. Jim does still need to be more on top of his projects as the PI and make sure the funding is adequately appropriated and spent. He needs to make sure that time is spent with students. By taking on students we take on a sacred trust that we will nurture and mentor them and take responsibility for their career growth and even personal safety.

Performance: Fully Meets Expectations

COMMUNICATION

- Clearly and concisely articulates information and ideas to team members, customers, and management.
- Listens attentively and provides appropriate feedback.
- Delivers clear, convincing, and well-organized presentations or briefings.

Mid-Year Comments:

Jim needs to make sure that we know his funding situation.

Performance Comments:

Jim has excellent rapport and contacts with a wide variety of professionals in the field of

Performance: Fully Meets

LANS 0023

arms control and nonproliferation. With regard to individual projects, Jim could learn to better anticipate issues that might arise and communicate problems and concerns to managers and others who might be affected before a crisis arises. It would also be helpful if he would take time to more diligently communicate his work schedule, travel, and other off-site activities to management and group office staff. As a more senior staff member he needs to take charge of situations more forcefully and dynamically and ensure that team and project management can react to assist him with problems that might arise in a timely manner.

PERSONAL LEADERSHIP

- Continuously takes self-motivated steps toward achieving organizational goals.
- Takes actions and/or recommends actions to increase quality or productivity of work for self and others.
- Models high standards of honesty, integrity, trust, openness, and respect for individuals by applying these values daily.

Mid-Year Comments:

Performance Comments:

Jim has shown initiative and drive to search out tasks in arms control policy. He is seen by colleagues outside the lab as a leader and has their respect. However, he needs to better use his students and make sure they have work and funds and especially attention.

Performance:

Exceeds
Expectations

TEAMWORK

- Cooperates with others to accomplish common goals.
- Works with employees within and across work groups to achieve shared goals.
- Shows respect for others by actively seeking out different viewpoints, demonstrating respect for the diversity of ideas and people, and leveraging the benefits of different perspectives.

Mid-Year Comments:

Performance Comments:

Jim has worked hard on the human capital development task. He has worked with N-1 to make sure the courses come off every year. In the future, he could expand these efforts at LANL and in the universities we engage with such as Texas A&M and UNM.

Performance:

Fully Meets
Expectations

SAFETY, SECURITY, AND ENVIRONMENTAL RESPONSIBILITY

- Demonstrates personal responsibility and accountability for safe and secure work practices.
- Works to minimize waste and environmental impacts.

Mid-Year Comments:

Performance Comments:

Jim is satisfactory in this area.

Performance:

Fully Meets Expectations

PERFORMANCE MANAGEMENT AND DEVELOPMENT

(For Managers/Supervisors Only)

- Impacts the organization by setting the goals and direction for direct reports.
- Provides regular feedback and coaching in support of continuous development and performance improvement.

Mid-Year Comments:

Performance Comments:

Performance:

Not Available

OBSERVATION AND KNOWLEDGE SHARING

(For Managers/Supervisors Only)

LANS 0024

- Observes and discerns what is working and what is not in the employees' approaches to safe, effective work practices.
- Enhances the capabilities and practices of the organization by openly and effectively engaging employees in discussions regarding their work, sharing his/her subject matter expertise, and guiding sound work practices.

Mid-Year Comments:

Performance Comments:

Performance:

Not Available

Focus Areas for Development

Note: Mid-Year Review and Year-End performance comments for each focus area for development should be addressed in the comments field for the associated behavioral competency.

Focus Area	Resources and/or Development Needed
Increase reputation as subject matter expert on nuclear arms reduction and the goal of elimination of nuclear weapons	Institutional support in the form of funds to attend conferences, roundtables and present papers.
Improve my reputation with NA-243 as a team player	more frequent communication and coordination between me, team leader and sponsor

Additional Achievements:

Performance Summary & Rating (available guidance)

Jim has an outstanding grasp of arms control issues and nonproliferation goals. His work on my projects has been positive and he has delivered excellent reports to NA-241 on the human capital development work. He has worked hard on the Indian contacts to build a program up in that area. Jim still does not always following through on his efforts fully. We have worked on improving his performance in this area this year. Jim has made some progress but needs to continue to focus on discipline and organization to complete tasks and projects so as to maintain funding and reputation to build our programs.

Performance Rating:
Meets Expectations

We need Jim to take the lead on arms control programs and lead them as a PI. He needs to take responsibility for his students. At present, he is mentoring Chantell Murphy and will mentor incoming Post-Doc Sara Kutchesfahani. He must take responsibility for these staff and make sure that they are properly mentored and funded. He needs to remember to make sure that the group management knows his schedule, funding issues, and project needs to meet deadlines in a timely fashion.

Signatures

Approver Name:	Michelle E Silva	Date:	10/14/2010
Employee Name:	James Edward Doyle	Date:	10/17/2010
Mid-year Review Completed By:	Brian David Boyer	Date:	3/26/2010
Year-End Discussion Completed By:	Michelle E Silva	Date:	10/14/2010