

March 8, 2011

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Motion for Reconsideration

Name of Case: Ricky Ladd
Date of Filing: February 7, 2011
Case Number: TBR-0112

In a letter dated January 18, 2011, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) dismissed the appeal of Ricky Ladd (hereinafter Mr. Ladd or the complainant) from the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program (Case No. TBU-0112). After reconsidering Mr. Ladd's appeal in light of additional arguments and information provided by Mr. Ladd, we find that our January 18, 2011, dismissal was appropriate, and that the additional information provided by Mr. Ladd does not provide a basis for reversing that determination.

I. Background

A. Mr. Ladd's Part 708 Complaint

Mr. Ladd states that during the period June 2005 until May 2010, he was an employee of Uranium Disposition Services (UDS), which is a DOE contractor located at the DOE's Portsmouth/Paducah Project Office (PPPO) of the Paducah Gaseous Diffusion Plant in Paducah, Kentucky. In June 2010, Mr. Ladd filed a complaint of retaliation under Part 708 (the Part 708 Complaint) with the Whistleblower Program Manager of the DOE's National Nuclear Security Service Center (the WP Manager). In August 2010, the WP Manager provided Mr. Ladd's Part 708 Complaint to the Employee Concerns Manager of the DOE's Portsmouth/Paducah Project Office (the PPPO EC Manager) for review and processing. In his Part 708 Complaint, Mr. Ladd alleges that due to his protected disclosures to the DOE's Office of Inspector General (the DOE OIG) in October 2009, his employment at UDS was terminated in May 2010. Mr. Ladd seeks reinstatement to his former position at UDS, and relief for the expenses that he incurred as a result of his termination. Ladd Part 708 Complaint at 1-2.

B. The PPPO EC Manager's Determination and Mr. Ladd's Appeal

On December 8, 2010, the PPPO EC Manager informed Mr. Ladd that DOE was dismissing his Part 708 Complaint because it was "frivolous". Specifically, the PPPO EC Manager found that

Mr. Ladd's May 6, 2010, termination by UDS was based on his alleged misconduct on April 28, 2010, and not on Mr. Ladd's communication of alleged concerns to the DOE OIG in October 2009.

In a submission received by the OHA on December 20, 2010, Mr. Ladd appealed the PPPO EC Manager's determination dismissing his Part 708 Complaint. In his Appeal, Mr. Ladd argued that UDS was aware of his October 2009 disclosures to the DOE OIG concerning an alleged gross waste of funds by UDS arising from its practice of offering substantial amounts of overtime pay to some of its employees. He further contended that this knowledge by UDS was a contributing factor to his May 6, 2010, termination.

C. The OHA's Dismissal of Mr. Ladd's Appeal

On the basis of information contained in Mr. Ladd's Appeal, the OHA concluded that it would be inappropriate for it to conduct an analysis of the substance of the PPPO EC Manager's findings and the contentions made by Mr. Ladd in his Appeal. With his Appeal, Mr. Ladd provided a copy of a November 30, 2010, Order of Region 26 of the National Labor Relations Board (NLRB), which indicates that in August 2010, Mr. Ladd filed charges with the NLRB concerning alleged misconduct by both UDS and his union. This Order consolidates these charges and establishes a hearing date of February 22, 2011. In his Appeal, Mr. Ladd acknowledged that the charges made to the NLRB involve the same facts as his Complaint of Retaliation. Appeal at 4.

In its January 18, 2011, letter to Mr. Ladd, the OHA concluded that Mr. Ladd's action before the NLRB Region 26 barred the DOE from considering his Part 708 Complaint. In this regard, the OHA found that 10 C.F.R. § 708.15(d) provides that if a complainant files a complaint under State or other applicable law after filing a complaint under Part 708, the Part 708 complaint will be dismissed under § 708.17(c)(3). Accordingly, the OHA dismissed Mr. Ladd's Appeal of the PPPO EC Manager's December 8, 2010, dismissal of his Part 708 Complaint.

II. Mr. Ladd's February 2011 Submission and OHA's Reconsideration

On February 4, 2011, the OHA received a submission from Mr. Ladd requesting that the Secretary of Energy review the decision by the OHA to dismiss his Part 708 Appeal. Because the OHA had dismissed the Appeal by letter based on lack of jurisdiction, the OHA has chosen to issue the instant decision and order providing a procedural and substantive history of the DOE's processing of Mr. Ladd's Part 708 Complaint and considering additional arguments made by Mr. Ladd in his February 2011 submission. The OHA therefore has treated Mr. Ladd's submission as a Motion for Reconsideration.¹

¹ The DOE Part 708 regulations do not explicitly provide for reconsideration by OHA of its determination concerning an appeal from the jurisdictional dismissal of a Part 708 Complaint. See 10 C.F.R. § 708.18. However, in other appeal proceedings, we have used our discretion to

In his Motion for Reconsideration, Mr. Ladd first contends that because the PPPO EC Manager knew of his NLRB action against UDS but did not raise it as a bar to the processing of his Part 708 Complaint, the OHA has no authority to raise the issue of his NLRB action in the context of his jurisdictional appeal of the PPPO Manager's dismissal of his Part 708 Complaint on other grounds. He concludes that the OHA acted outside of its "authority in the appeal process outlined in CFR 708" when it dismissed his jurisdictional appeal due to his NLRB action. Motion for Reconsideration at 1.

We reject this argument. The provisions of Part 708 provide that anyone who pursues a remedy on the same facts under State or other applicable law, "may not file a complaint under this part". 10 C.F.R. § 708.15(a). They further provide that if anyone files a Part 708 complaint and then files a complaint under State or other applicable law on the same facts, their Part 708 complaint "will be dismissed". 10 C.F.R. § 708.15(d). Thus, Section 708.15 of the regulations clearly bars anyone who is pursuing an action in another forum from simultaneously pursuing one on the same facts under Part 708. *See Charles Montano*, Case No. TBU-0067 (2007). While it appears that the PPPO EC Manager was aware of Mr. Ladd's NLRB action and overlooked this ground for dismissing Mr. Ladd's Part 708 Complaint, her oversight has no effect on the requirements of 10 C.F.R. § 708.15. It is not outside of OHA's authority to take the action necessary to enforce this requirement of Part 708 and dismiss Mr. Ladd's appeal. Indeed, in light of Mr. Ladd's NLRB action, it would have been outside of the OHA's authority to consider the merits of Mr. Ladd's appeal from the PPPO EC Manager's findings on the merits of his Part 708 Complaint.

Mr. Ladd also contends that the DOE should provide him with relief under Part 708 despite his NLRB action because the DOE's failure to protect his rights as a contractor employee forced him to go to the NLRB. He states that on June 16, 2010, he e-mailed the PPPO EC Manager, complained that he had been terminated by UDS without "due process", and asked her to inform him of his rights as a terminated employee under the DOE's Employee Concerns Program. In her July 13, 2010, response, the PPPO EC Manager stated that her review of the matter led her to conclude that he had been afforded an opportunity to make a statement to the DOE about his termination, that he had been terminated for cause by UDS, and that "the DOE inquiry into this matter is closed." July 13, 2010, e-mail from the PPPO EC Manager to Mr. Ladd. Mr. Ladd also contends that the PPPO EC Manager's December 2010 dismissal of his Part 708 Complaint on the grounds that it was "frivolous" is further evidence of the PPPO's failure to protect DOE contractor employees through the Employee Concerns Program and Part 708, and that this failure forced him to go to the NLRB to get the issues surrounding his termination properly investigated. He therefore requests that the DOE order UDS to make him whole within the provisions of Part 708. Motion for Reconsideration at 4.

issue decisions reconsidering our holdings where circumstances warrant. *See, e.g., Citizen Action New Mexico*, Case No. TFA-0215 (2007).

We find no merit in these contentions. Even if the DOE had the authority to waive the bar created by Mr. Ladd's NLRB action under 10 C.F.R. § 708.15, there is no basis for his assertion that he was forced to pursue the NLRB action by the DOE's alleged failure to protect his rights. Whatever deficiencies may have occurred in the response of the PPPO EC Manager to Mr. Ladd's initial inquiries, Mr. Ladd acknowledges in his Appeal submission that he was able to solicit advice and assistance from another DOE employee concerns official, and to submit a timely Part 708 complaint with the WP Manager in June 2010. Mr. Ladd's December 12, 2010, Appeal at 1. Mr. Ladd filed his action with NLRB Region 26 in August 2010, months before the PPPO EC Manager's dismissal of his Part 708 Complaint. Had Mr. Ladd not filed with the NLRB, he could have appealed the PPPO EC Manager's dismissal to the OHA for a full review on the merits. We therefore see no equitable basis for the DOE to provide Mr. Ladd with Part 708 relief despite his decision to pursue an action with the NLRB.

We therefore find that the additional arguments presented by Mr. Ladd lack merit, and our January 18, 2011, dismissal of his Appeal of the PPPO EC Manager's dismissal of his Part 708 Complaint was appropriate.

IT IS THEREFORE ORDERED THAT:

- (1) The Motion for Reconsideration (Case No. TBR-0112) of our dismissal of the Appeal filed by Ricky Ladd (Case No. TBU-0112) is hereby denied.
- (2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 8, 2011