

August 13, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Clint Olson  
Date of Filing: July 1, 2004  
Case Number: TBU-0027

Clint Olson (the complainant or the employee), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be reversed and the matter should be remanded for further processing to the Manager of the Employee Concerns Program (Manager) at the National Nuclear Security Administration Service Center (NNSA).

I. Background

The complainant is an employee of BWXT Pantex (BWXT), the Management and Operations Contractor at the DOE's Pantex Plant in Amarillo, Texas. He is employed as a counterintelligence (CI) officer at the plant. On March 15, 2004, he filed a complaint of retaliation against BWXT with the NNSA. On June 22, 2004, the Manager dismissed the complaint on the grounds that it "fails to meet the requirements of the Contractor Employee Protection Program." The Manager stated as the basis for this finding that the complainant had failed to identify any adverse action taken against him, and had also "failed to identify the disclosure that [the complainant] personally made that resulted in retaliation." The dismissal indicated that the complaint therefore failed to satisfy the requirements of 10 C.F.R. § 708.12. On July 1, 2004, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18. On July 15, 2004, the Chief Counsel of BWXT submitted a letter supporting the Manager's determination.

## II. Analysis

I agree with the Manager that Section 708.12 requires that a complainant identify the protected disclosure that he made, as well as the retaliation taken against him for making that disclosure. However, after reviewing the facts in this case, I do not believe that dismissal is appropriate at this point.

Section 708.5 sets out the nature of the employee conduct that is protected from employer retaliation. That Section provides:

If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for:

(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, your employer. . . information that you reasonably and in good faith believe 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; . . . .

10 C.F.R. § 708.5.

I reviewed the complaint to assess whether it meets these standards. It is true that in his complaint, the employee addresses matter of policy. He also raises alleged retaliations against others. Generally speaking, these are not appropriate matters for consideration in a Part 708 proceeding. Nevertheless, I find that the complaint, although not fully explicit on all points, certainly alleges that disclosures were made and describes retaliations. However, as discussed below it does require some supplementation.

### A. Protected Disclosures

I see the following possible disclosures in this complaint. First, the complainant states that in February 2002, Pantex CI worked on a case which involved the inaccurate reporting of a cyber security incident to the DOE. According to the complaint, Pantex CI reported to "DOE HQ" that "a piece of highly classified media was and is missing from Pantex." The complaint alleges that BWXT

Security nevertheless stated that it had "evidence of the destruction of the media and that no compromise of classified information took place." The complaint contends that, in fact, there was no evidence of the destruction of the media, and that no evaluation of the extent of the compromise of classified information has been conducted. The complainant states that covering up this incident by Pantex is criminal, and reporting of this incident to the DOE is protected.

These circumstances certainly seem to describe an incident which could be covered under Section 708.5(a)(1). However, the employee has worded his description of the event so that it is impossible to discern whether he was actually involved in the disclosure or whether someone else in his organization was responsible for the disclosure. If the disclosure was not made by the employee, or he was not among the group who made the disclosure, then he would not be conferred protected status under Part 708. It is also not clear to whom the disclosure was made and when it took place. To be protected under Part 708, the disclosure must be made to an individual named in Section 708.5(a).

The complainant should be given the opportunity to state (i) that he made the disclosure or was among those involved in the disclosure; (ii) to whom the disclosure was made; and (iii) when it took place. It was premature to dismiss the complaint without providing the employee an opportunity to furnish an appropriate clarification. The Manager could certainly have asked the complainant to clarify these points.

The complaint also describes the following statement which might qualify as a protected disclosure. The employee contends that during the first week of December 2003 he told "SCIO Broaddus that [he] did not want to remain in the PAP [Personnel Assurance Program] at Pantex due to the inconsistency, the malicious use of the program in retaliation and the lack of formal procedure." The complainant further states that in a meeting of December 11, 2003, with SCIO Broaddus, Larrie Trent, and Mike Mallory, he "detailed the violations of the Privacy Act and HIPPA Privacy Rule which I personally have observed being committed by the Pantex PAP."

This communication does describe the important details, including (i) that it was made by the complainant; (ii) to whom it was made and (iii) the date of the discussion. It therefore satisfies several of the key requirements of Section 708.5. However, the subject of the communication may not necessarily qualify as a disclosure of "[A] substantial violation of a law, rule or

regulation," or as some other type of revelation protected under Section 708.5. For example, the statement does not describe the nature of the alleged violations. It is thus not possible to gauge whether the employee reasonably and in good faith believed he disclosed violations and whether they are substantial. The Manager should offer the employee the opportunity to supply this information. As indicated by the foregoing, I find that summary dismissal for failure to allege a protected disclosure is not appropriate at this point in this proceeding.

#### B. Retaliations

The Manager also stated as a basis for the dismissal of the complaint that the complainant had not identified any adverse action taken against him. I cannot agree. After reviewing the complaint, I note that the complainant alleges that "no promotions were made to personnel of Pantex Counterintelligence" as a result of the complaint regarding the "missing media." The employee has also described the relief he seeks for the purported retaliation: a retroactive promotion and pay raise. An allegation of denial of promotion is an appropriate action for investigation and hearing. Relief is available under 10 C.F.R. § 708.36(a).

The employee also cites an incident in which he alleges that the PAP was used in a retaliatory fashion. He believes that he was required to undergo a fitness for duty psychological interview as a retaliation for his disclosures. He also believes that he was pressured to withdraw from PAP, after reporting that PAP was used in a malicious manner. The appropriate remedy for the employee for this alleged retaliation, were it demonstrated to have occurred, is not apparent. On remand, the employee should be sure to describe the type of relief he seeks for this purported retaliation.

#### C. Submission of BWXT

As noted above, we also received a filing in this case from the BWXT chief counsel. The submission supports the finding of the Manager and requests that I uphold her dismissal determination. Although the Part 708 regulations do not specifically provide for a filing by the contractor in these jurisdictional appeals, I have exercised my discretion to consider the BWXT submission.

Overall, the arguments raised do not persuade me that dismissal is appropriate at this point. For example, BWXT asserts that the description of the protected disclosures is incomplete. As indicated above, I agree with that assessment, but I believe that

the employee should be provided an opportunity to cure the deficiency. BWXT also claims that the stated retaliation, failure to provide promotions to Pantex CI officers as a group, does not constitute retaliation for Part 708 purposes. This issue involves both legal and factual questions which I believe merit further development. It is therefore not appropriate for summary dismissal. In sum, I see nothing in the BWXT submission which convinces me that I should uphold the Manger's determination at this time.

### III. Conclusion

Overall, I believe that the disclosures and retaliations alleged here are far from well-delineated. It is not clear that they will ultimately satisfy Part 708 requirements. However, it was premature to dismiss this case at this point in the proceeding, before any further development could be undertaken. See *Mark J. Chugg*, 28 DOE ¶ 87,030 (2002); *Darryl Shadel*, 27 DOE ¶ 87,561 (2000). I do not believe that the complaint as a whole lacks any sign of merit. It is only natural that facts are thin at the early stages of a Part 708 proceeding. Employees who are not familiar with Part 708 are often unable to draft complaints that satisfy all the procedural and substantive requirements of this Part. See *Gary S. Vander Boegh*, 28 DOE ¶ 87,038 (2003)(*Vander Boegh*). For this reason, I believe that employee concerns managers should take a liberal view when making jurisdictional determinations. Before a complaint is dismissed, the complainant should be given an opportunity to correct deficiencies. See *Vander Boegh*, 28 DOE at 89,266. Managers should err, if they must, on the side of accepting jurisdiction. The OHA may then consider jurisdictional issues more fully as the facts are developed in the investigation and hearing stages. In making jurisdictional determinations, managers should bear in mind that they are making only a preliminary determination as to whether further processing is warranted. They are not charged at this early stage of the proceeding with making a final assessment about the worthiness of the overall complaint.

At this point, there is clearly sufficient substantive information in the record in this case to warrant some further processing of this complaint. I will therefore remand the matter to the Manager for that purpose. 10 C.F.R. § 708.18(d).

During that additional processing, the Manager should give further consideration to some important procedural aspects of this case. Section 708.12 specifies what information an employee must include

in his complaint of retaliation. In addition to a description of the events giving rise to the complaint, the complainant must make the following assertions: state that he is not currently pursuing a remedy under State or other applicable law; state that all of the facts included in the complaint are true and correct to the best of his knowledge and belief; and affirm that he has completed all applicable grievance or arbitration procedures. 10 C.F.R. § 708.12(b),(c), and (d). The copy of the complaint submitted to the OHA as part of this appeal does not set forth any of these statements for the record. Accordingly, the Manager should also make sure that the record in this case is sufficient with respect to the requirements of Section 708.12. *Vander Boegh*, 28 DOE at 89,266-67.

Finally, the employee should, on his own, review all the deficiencies in the complaint, as discussed in the above determination, and correct them. The Manager will allot sufficient time to the employee for this purpose.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Clint Olson (Case No. TBU-0027) is hereby granted and his Part 708 complaint is hereby remanded to the Employee Concerns Program Manager, NNSA Service Center, for further processing as set forth above.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: August 13, 2004