

August 30, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Jeffrey R. Burnette

Date of Filing: August 23, 2007

Case Number: TBU-0071

Jeffrey R. Burnette (Burnette or the complainant), 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. The complaint was dismissed for lack of jurisdiction under Section 708.17. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.¹

I. Background

This complainant's Part 708 history dates from 2001. A brief summary of the relevant facts is set forth below.

A. 2001 Complaint of Retaliation, Request for Investigation and Hearing

As of October 10, 1999, the complainant was an employee with J.A. Jones Construction Company (Jones), a sub-contractor to Bechtel Jacobs Corporation, LLC (BJC), the Management and Operations (M&O) contractor at the DOE's Oak Ridge National Laboratory (ORNL) Y-12 site. On May 21, 2001, Burnette filed a complaint of retaliation with the Manager of the Diversity Programs and Employee Concerns (EC Manager) for the DOE's Oak Ridge Operations Office. Burnette claimed that beginning in October 1999 he began disclosing to his site manager that he was placed in a job for which he was unqualified and that this raised health and safety concerns. He states that he requested training for this position, but that his request was denied. Burnette alleges the following retaliations in

1/ On August 24, 2007, the Acting Director of the Office of Hearings and Appeals authorized me to render a decision on Burnette's complaint.

connection with raising his health and safety concerns. He states that in November 2000 he interviewed for a management position with Jones, but that he was not selected. He also indicates that he received poor performance evaluations. Burnette claims that during April and May 2001, he raised some additional health and safety concerns with his employer regarding asbestos and mold in his work place. In June 2001 he was terminated by Jones.

On September 14, 2001, his May 21 complaint of retaliation was transmitted to the Office of Hearings and Appeals for investigation (OHA Case No. VBI-0076). On November 13, 2001, the complainant's attorney requested that the matter proceed immediately to a hearing under Part 708. Accordingly, the request for investigation was dismissed.

An OHA hearing proceeding was initiated on November 19, 2001 (Case No. VBH-0076). During the pendency of this proceeding, Burnette was offered a position with BWXT LLC Y-12, the new M&O contractor at the Y-12 site, and an agreement was reached with Jones to settle the complaint, and dismiss the OHA hearing proceeding. Accordingly, on March 4, 2002, that proceeding was dismissed.

B. 2002 Complaint of Retaliation

On July 18, 2002, Burnette filed another complaint of retaliation with the EC Manager. In this complaint, he alleged that BJC retaliated against him in the transition process into his new position with BWXT Y-12. The retaliations purportedly include delaying starting date for the new employment, and failure to provide him with compensation for accrued vacation days dating from his termination on June 15, 2001 through February 11, 2002 when he began employment with BWXT. Burnette also contended that BWXT conditioned its employment of him in his new position with the firm on his dismissal of his hearing proceeding with the OHA. Burnette believed that this condition amounts to coercion and suggested that there was collusion between the contractors.

On October 2, 2002, the EC Manager dismissed this complaint. The EC Manager noted that 10 C.F.R. § 708.14(a) required that a complainant must file his complaint by the 90th day after the date he knew or reasonably should have known of the alleged retaliation. The EC Manager stated that since the July 2002 complaint was filed more than 90 days after the February 2002 settlement, it was untimely.

The EC Manager advised Burnette that the dismissal of his complaint could be appealed to the Director of OHA. 10 C.F.R. § 708.18. However, the complainant did not file such an appeal.

C. 2006 Complaint of Retaliation

Burnette filed a third complaint of retaliation in 2006. It is the dismissal of this complaint that is under consideration in the instant case. The record in this case does not present a clear date on which Burnette filed this complaint. However, the record does show that on December 7, 2006, the Whistleblower Program Manager (WP Manager) of the DOE's National Nuclear Security Administration (NNSA) Service Center requested that Burnette provide some additional information regarding an undated new complaint letter, which was forwarded to her by a BWXT Y-12 supervisor. Burnette responded in a letter of February 20, 2007. In that letter, Burnette again asserted that he experienced retaliations by his contractor employers. The retaliations included those he had previously raised: coercion by the contractors to settle his previous Part 708 proceeding; delay of BWXT Y-12 employment; harassment and isolation "beginning early at Y-12;" denial of a pay raise and employment opportunities; loss of seven months salary and two weeks of accrued vacation [during period of unemployment between the Jones position and the BWXT Y-12 position]; and lost reputation.

The WP Manager indicated two grounds for her dismissal of this complaint. First, she found that retaliations associated with the 2001 and 2002 complaints are now time barred. She also found that the requirement that Burnette dismiss his Part 708 hearing in connection with the BWXT Y-12 job offer was not a retaliation. The WP Manager found that Burnette had agreed to that condition as part of his settlement. Based on these determinations, the WP Manager dismissed the 2006 complaint, citing 10 C.F.R. § 708.17.

On August 23, 2007, the complainant filed the instant appeal of the dismissal by the WP Manager. I have reviewed that appeal, and as discussed below, I find that the dismissal should be sustained and the appeal denied.

II. Analysis

A. Whether Burnette Engaged in Protected Activity

Section 708.5, provides in relevant part that the following conduct is protected from retaliation by an employer:

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation;

As is clear from history of this case outlined above, during 2001-2002, Burnette participated in proceedings under Part 708, by filing complaints of retaliation and requesting an investigation and a hearing. He has also filed the 2006 complaint of retaliation. Accordingly, he has engaged in protected activity, and his employer may not retaliate against him for this activity. I must next consider what, if any, retaliations occurred.

B. Alleged Retaliations

In the instant proceeding, virtually all of the retaliations alleged by Burnette are associated with the 2002 settlement agreement and the initial conditions of his employment with BWXT Y-12. This includes the allegations of collusion, the delayed start time for his position with BWXT Y-12, denial of compensation due to lack of employment for seven months, denial of compensation for two weeks of paid vacation, and denial of a pay raise at the outset of his BWXT Y-12 employment. He also complains of harassment, isolation, and lost reputation.

C. Whether the Complaint Is Timely Filed

Section 708.17(a) provides that a complaint of retaliation may be dismissed for lack of jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [he] may have for not filing within that period and the [appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing."

A complainant is expected to file a complaint within 90 days of the date he knew or reasonably should have known of the alleged retaliation. 10 C.F.R. §708.14(a). In this case the alleged retaliations took place during the period surrounding the 2002 settlement agreement. Therefore the instant 2006 complaint is filed well beyond the 90 day period. Burnette has provided no reason why he could not file his complaint on these matters in a timely manner. Further, Burnette has alleged no specific retaliation that has taken

place within the 90 days preceding the filing of the 2006 complaint. Accordingly, the complaint is time barred.

Moreover, even if his complaint were timely filed, I see no merit to Burnette's other claims.

D. Alleged Collusion by DOE Contractors

I summarily reject Burnette's assertion that the DOE contractors involved in this case acted improperly in expecting him to drop his Part 708 request for a hearing in exchange for offering him new employment. I do not believe this constitutes collusion or retaliation. Rather, I have concluded that this was simply part of ordinary settlement negotiations and conditions that Burnette was free to reject or accept. He could certainly have decided to proceed with his Part 708 hearing, but instead decided to accept the job offer, and agree to the dismissal of his request for a Part 708 hearing. I see nothing wrong with this type of negotiation. In fact, in Part 708, settlement agreements virtually always result in the dismissal of the Part 708 proceeding before OHA. There is nothing improper here at all.

E. Other Claims of Retaliation

Burnette's other claims of retaliation including isolation, harassment and lost reputation are quickly disposed of. They are too vague to warrant consideration here. In any event, there is no relief under Part 708 for lost reputation or non-specific claims of "isolation."

III. Conclusion

For the reasons set forth above, I find that the complainant has not shown that good cause exists for his failure to file his Part 708 complaint in a timely manner. I further find that his complaint should be dismissed because he has not shown any recent retaliation that is cognizable under Part 708. Accordingly, the WP Manager's determination was correct, and the instant Part 708 complaint should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Jeffrey R. Burnette (Case No. TBU-0071) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.19.

Thomas L. Wieker
Deputy Director
Office of Hearings and Appeals

Date: August 30, 2007