Case No. VBA-0005

July 24, 2000

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Thomas Dwyer

Date of Filing: May 23, 2000

Case Number: VBA-0005

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 2, 2000, involving a complaint filed by Thomas Dwyer (Dwyer or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Dwyer claims that Fluor Daniel Fernald (FDF), a DOE contractor, suspended and then terminated his employment in retaliation for his making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that FDF had shown that it would have terminated the complainant for his misconduct, even in the absence of the protected disclosures. As set forth in this decision, I have determined that Dwyer's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation).

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included fact- finding by the DOE Office of Inspector General, followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12862 (March 15, 1999). Under the revised regulations, review of an Initial Agency Decision, as requested by Dwyer in the present Appeal, is

performed by the OHA Director. 10 C.F.R. § 708.32.

B. Complaint Proceeding

The events leading to the filing of Dwyer's complaint are fully set forth in Thomas Dwyer, 27 DOE ¶ 87,560 (2000)(Dwyer). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Dwyer was employed by FDF as a pipefitter from January 1996 to October 1997. In December 1997, Dwyer filed a complaint under Part 708 with the DOE Office of Inspector General's Office of Inspections. After the completion of an investigation, Dwyer requested and received a hearing on this matter before an OHA Hearing Officer. There were 28 witnesses and the hearing lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Regulations. (1) They are as follows:

> The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation or refusal.

10 C.F.R. § 708.9(d). See Dwyer, 27 DOE at 89,329.

The Hearing Officer analyzed two disclosures and two activities in which the complainant was involved, to determine whether they were protected under Part 708. The Hearing Officer first reviewed an incident in which Dwyer left his work area because liquid came out from a pipe which was being cut. The Hearing Officer referred to this as the April 1996 Refusal to Participate. In finding the refusal to participate was not protected under Part 708, the Hearing Officer noted that Dwyer had not alleged that continuing to work was dangerous or constituted a federal health or safety violation, as required by Section 708.5(a)(3). The Hearing Officer pointed out that Dwyer had also not notified his employer of the danger prior to refusing to work, or within 30 days of the refusal reported the danger or violation to his employer or other appropriate official, as required by Section 708.5(a)(3).

The Hearing Officer next analyzed an incident in which the complainant stopped a walkthrough of a building because of a lack of respirators (August 1996 Job Stop). The Hearing Officer pointed out in his Opinion that the witnesses who testified at the hearing could not recall this incident, and he found them to be more credible than the complainant. The Hearing Officer also noted that this activity, like the refusal to participate discussed above, failed to meet the requirements of Section 708.5. Therefore he found that the job stop did not constitute a protected disclosure or activity.

The Hearing Officer also reviewed a number of internal company grievance notices filed by Dwyer, which involved alleged harassment by employees of FDF's medical department and complaints about the persons assigned to hear the grievances (Internal Company Grievances). The Hearing Officer found these complaints to constitute a minor dispute over the employee's qualification for medical leave and did not rise to the level of a protected disclosure of mismanagement, as that term is used in Part 708. Dwyer, 27 DOE at 89,331.

Finally, the Hearing Officer considered several complaints involving disclosures of alleged safety concerns (September 1997 Disclosures). He rejected Dwyer's claim that laundry bags left on a hallway floor presented a tripping hazard. The Hearing Officer did find that Dwyer's complaint of dust falling from rafters in a plant in which asbestos abatement was taking place to be a protected disclosure of a substantial and specific danger to employee safety. Id. at 89,334.

The Hearing Officer next found that there was temporal proximity between Dwyer's protected disclosure regarding the falling dust and his suspension and termination by FDF less than one month later. He also noted that at least one of the two deciding officials had actual knowledge of the protected disclosure. The Hearing Officer concluded that the disclosure was a contributing factor to his suspension and dismissal by FDF. Accordingly, the Hearing Officer determined that Dwyer had met his initial burdens under § 708.9(d), thereby shifting the burden to FDF to prove by clear and convincing evidence that it would have taken the same actions without Dwyer's protected disclosure. Dwyer, 27 DOE at 89,334.

The Hearing Officer next addressed whether FDF had shown that it would have suspended and terminated Dwyer even in the absence of the protected disclosure. FDF's stated bases for terminating Dwyer were his insubordination and his hampering or interfering with company work. Under FDF company policy, these are considered Category "A" violations of rules of conduct, which may result in immediate discharge.

The insubordination incident involved Dwyer's refusal to accept an assignment. With respect to the charge of interfering with company work, the Hearing Officer pointed to the testimony of an FDF manager, who cited instances in which the individual avoided work by disappearing from the job site, by spending inordinate time in the rest room or by frequently reporting to the medical department just after jobs were assigned. Id. at 89,335. This testimony was supported by FDF workers who also believed that Dwyer avoided work. Id. at 89,336. The Hearing Officer found this testimony to be convincing. He further pointed out that in the five year period ending in 1999, FDF had terminated 15 other employees for Category "A" violations, such as those committed by Dwyer. Id. at 89,337.

Based on the above considerations, the Hearing Officer determined that FDF had clearly and convincingly demonstrated that it would have terminated Dwyer even in the absence of the protected disclosure.

II. The Dwyer Appeal

In connection with his Appeal, Dwyer filed a statement identifying the issues on which he wished the Director of the Office of Hearings and Appeals to focus in this phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33. The Statement presents the following issues for my review: (i) the Hearing Officer improperly failed to recognize all the relevant actions/disclosures as protected under Part 708; (ii) the Hearing Officer overlooked the importance of the timing of the Dwyer discharge versus the protected activities/disclosures; (iii) the Hearing Officer improperly found that Dwyer was insubordinate and hampered work; and (iv) the Hearing Officer erred in finding Dwyer less credible than FDF witnesses.(2) As discussed below, I do not find any merit to the matters raised for my review. Consequently, I will not reverse the Hearing Officer's determination.

1. Failure to Acknowledge All Cited Activity as Protected

The Statement alleges that the Hearing Officer erred in determining that only one of Dwyer's several activities/disclosures was considered protected under Part 708. Dwyer argues that the Refusal to Participate, the Job Stop, and the disclosure that laundry posed a tripping hazard should all be deemed protected by Part 708. This contention lacks merit.

As an initial matter, after reviewing the record, I see no error in the Hearing Officer's findings with respect to Dwyer's unprotected activities/disclosures. However, an in depth discussion of each of those determinations would be superfluous here. As stated above, the Hearing Officer did find one of Dwyer's

disclosures to be protected. Dwyer, 27 DOE at 89,334. Therefore, he concluded that Dwyer made the required regulatory showing on this point. I see no prejudice to the complainant arising from the fact that there may have been other protected disclosures that the Hearing Officer did not consider to be protected. Once a finding is made that there was a protected activity or disclosure that was a contributing factor to a retaliation, it is irrelevant in a Part 708 proceeding if there were additional protected activities. The inclusion of additional protected activities or disclosures in this case would not alter the result in the Initial Agency Decision or in any other manner work to Dwyer's advantage. Nor does their exclusion create a disadvantage for Dwyer. (3) I find that the inclusion of additional protected disclosures would make no difference in this case whatsoever. John Gretencord, 27 DOE ¶ 87,552 (2000).

2. The Timing of the Discharge

The Statement claims that the Hearing Officer overlooked the importance of the timing of Dwyer's discharge vis-a-vis the disclosure in this case. He implies that the coincidence of the disclosure and his termination is suspicious.

As discussed above, under Part 708, the complainant has the burden of establishing by a preponderance of the evidence that a protected disclosure that he made was a contributing factor to a retaliation by his employer. In our cases, we have repeatedly indicated that the "contributing factor" showing can be made by time proximity, that is, by establishing that the retaliation took place shortly after the protected disclosure was made, and by showing that the official taking the action has actual or constructive knowledge of the disclosure. E.g., Don W. Beckwith, 27 DOE ¶ 87,534 (1999).

The Hearing Officer followed that precedent in the instant case. Specifically, he found that "there is fairly clear temporal proximity between Mr. Dwyer's protected disclosure in Plant 6 on September 23, 1997, and his subsequent suspension on October 6, 1997, and termination on October 16, 1997." Dwyer, 27 DOE at 89,334. He also found that at least one of the managers responsible for the termination knew of the protected disclosure. Based on these findings, the Hearing Officer determined that Dwyer's showing with respect to the "contributing factor" element had been satisfied, and that the burden had shifted to FDF to show by clear and convincing evidence that it would have taken the same actions without Dwyer's protected disclosures. Id.

The Statement suggests, however, that the Hearing Officer should in some way have given extra consideration or additional weight to the coincidence of the disclosure and the termination. The complainant even seems to imply that the Hearing Officer's finding that the disclosure was a factor contributing to the termination is in and of itself sufficient to warrant a reversal of the outcome in this case.

Part 708 clearly provides otherwise, and the complainant is therefore incorrect. By shifting the burden of proof to the contractor, the Hearing Officer accorded the proper weight to timing of the termination vis-a-vis the disclosure. I cannot discern in what way the facts referred to by the Statement could have been properly accorded more weight, so as to change the outcome in this case. John Gretencord, 27 DOE at 89,284. Part 708 certainly does not provide that a complainant may prevail simply by establishing that a protected activity contributed to a retaliation. The regulations plainly afford the contractor the opportunity to establish by clear and convincing evidence that it would have taken the same action even absent the protected activity. 10 C.F.R. § 708.9(d).

3. Dwyer's Insubordination and Work Hampering

As indicated above, the Hearing Officer reached the overall conclusion that FDF had clearly and convincingly demonstrated that it would have terminated Dwyer even in the absence of the protected disclosure. According to the Hearing Officer, FDF made this showing by bringing forth persuasive testimony substantiating that Dwyer refused an assignment, and furthermore, avoided work by frequently reporting to the medical department, spending excessive time in the rest room, refusing to obtain training

necessary for job performance and failing to fully perform assigned tasks when at a work site. Dwyer, 27 DOE at 89,335-37. Thus, the Hearing Officer set forth quite clearly the bases for his determination that FDF had satisfied its burden of proof in this case.

Dwyer specifically alleges error regarding one finding from among these many important conclusions of fact and law. The complainant refers to the finding that he was insubordinate because he refused to accept an assignment as a porter when he returned to work after medical leave. (4) Dwyer claims that medical restrictions did not permit him to perform any job that required him to be on his feet. Dwyer believes that he had a legitimate excuse for refusing the assignment and was therefore not insubordinate.

There is nothing in the record to support such an assertion. As the Hearing Officer indicated, a note from Dwyer's doctor stated only that he was not to climb or lift any weight of over ten pounds. An FDF manager testified that the porter's job involved no climbing, and that Dwyer would be able to control how much weight he lifted in the porter assignment. Accordingly, when Dwyer refused that assignment, she found it appropriate to suspend him for insubordination. Dwyer, 27 DOE at 89,335.

Dwyer claims in his Statement of Issues that he could not walk at all. He states that had a verbal agreement with his physician to the effect that if his ankle continued to hurt him that he should return to the physician. He also states that after his suspension by FDF, he saw two doctors who each gave him written excuses that would have kept him off his feet for an extended period. He maintains that because he has these medical excuses he could not have been insubordinate.

These contentions are baseless. I have reviewed the doctor's note regarding Dwyer's medical condition at the time of this incident. The note states that Dwyer is prohibited from climbing and from lifting weights of over 10 pounds. There is no restriction on his ability to walk. Further, there is absolutely no support for Dwyer's claim that he had a verbal agreement with his doctor that overrode anything in the note. In fact, Dwyer admits in his Statement that the verbal agreement only urged him to return to his doctor if his ankle continued to hurt him. Furthermore, the later notes from other physicians that Dwyer alludes to are irrelevant, since they were not in effect at the time of the insubordination. It is abundantly clear that Dwyer had no support whatsoever for his claim of a medical excuse for refusing the porter's assignment. Thus, I am in agreement with the Hearing Officer that the FDF managers rightfully found Dwyer to be insubordinate for failing to accept the porter's assignment.

Dwyer also offers a rather perfunctory denial of hampering or interfering with any FDF work activity. He provides no new evidence on this point, and after reviewing the record I find ample testimony to support the Hearing Officer's conclusion that this complainant routinely engaged in work avoidance tactics that amounted to hampering or interfering with FDF's mission. I therefore see no error by the Hearing Officer on this issue.

Finally, based on my examination of the entire record in this case, I am fully persuaded that FDF would have terminated Dwyer for insubordination and hampering work, even absent the protected disclosure. I therefore believe that the Hearing Officer correctly determined that FDF satisfied its burden of proof in this proceeding.

4. Objections to the Hearing Officer's Finding Regarding Credibility

Lastly, the Complainant raises some very general objections to the Hearing Officer's overall finding that his credibility is not as good as that of the other witnesses in this case. Dwyer insists that he has told the truth, and that he has passed a lie detector test as part of his application for a position with a county sheriff's department. I am not persuaded by his insistence. His lie detector tests are irrelevant here. Furthermore, Dwyer has shown absolutely no reason for me to question the soundness of the determinations as to credibility by the Hearing Officer, who is expected to make this very type of judgment in Part 708 cases. Dwyer understandably disagrees with the result in this proceeding. This does not mean, however, that there is any error at all in the IAD.

III. Conclusion

On the basis of the foregoing, I conclude that Dwyer has failed to show in his Appeal that the determination reached in the Initial Agency Decision is erroneous as a matter of fact or law. I concur with the determination that FDF has shown by clear and convincing evidence that it would have terminated Dwyer even in the absence of the protected disclosures. Accordingly, Dwyer's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas Dwyer on May 23, 2000, of the Initial Agency Decision issued on May 2, 2000, is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Thomas Dwyer on under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is denied.

(2) This Appeal 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. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 24, 2000

(1)With respect to the burden of proof, the Hearing Officer cited to the prior version of Part 708. In connection with my review of the burden of proof, I shall therefore also refer to that earlier version. 57 Fed. Reg. 7533 (March 3, 1992). However, the procedures applicable to this appeal proceeding are set forth in the current version of Part 708, effective April 14, 1999. 64 Fed. Reg. 12862 (March 15, 1999). I shall cite to the current regulations in all matters not related to the burden of proof.

(2)FDF filed a response to the Statement of Issues, contending that the Hearing Officer's determination should be sustained.

(3)This is particularly so in view of the fact that FDF does not challenge the Hearing Officer's determination that Dwyer made one disclosure that is protected under Part 708. There is thus no risk that the Hearing Officer's finding that the disclosure regarding falling dust is protected will be reversed on appeal, leaving Dwyer with no protected disclosure in this case.

(4)A porter performs routine cleaning duties.