Case No. VBA-0007

December 15, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Salvatore Gionfriddo

Date of Filing: October 13, 1999

Case Number: VBA-0007

On October 13, 1999, Salvatore Gionfriddo ("Appellant" or "Complainant") filed a Notice of Appeal from an Initial Agency Decision by a Hearing Officer from the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). In the Initial Agency Decision, the Hearing Officer dismissed a complaint filed by Mr. Gionfriddo under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Salvatore Gionfriddo, 27 DOE ¶ 87,528 (1999).

I. Background

A. The DOE Contractor Employee Protection Program

The DOE'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, contractor- operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are 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. The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708.

B. Factual Background

The relevant facts in this case as found by the Hearing Officer are not in dispute. Mr. Gionfriddo's former employer, Energy Research Corporation (ERC) ("Respondent"), engages in the research and development of advanced carbonate fuel cells and batteries used to generate and store electric power. Fuel cells convert fuels, such as natural gas, to electricity through an electrochemical reaction. ERC August 2, 1999 Brief at 2. According to the firm, this technology was developed by ERC through funding by many sources, including a series of research and development contracts, grants and cooperative agreements that ERC entered into with federal and state agencies including the DOE, contracts with public utilities, associations and commercial organizations and internally sponsored independent research and development efforts. ERC August 2, 1999 Brief at 1.

The Complainant was employed by ERC in the fuel cell area beginning in March 1982. In September 1998, he was given an assignment to compare a short fuel cell stack with a tall fuel cell stack, and in his report concluded that "unless the trend of cell shrinkage changes drastically, the loss of compressive load

for tall stacks is highly probable." June 23, 1999 Report of Investigation at 4. On October 23, 1998, ERC terminated the Complainant's employment.

C. Procedural Background

Mr. Gionfriddo filed his complaint on December 28, 1998, alleging that he made a protected disclosure under Part 708 and that ERC retaliated against him by terminating his employment. On July 19, 1999, ERC filed a Motion to Dismiss the complaint. The firm claimed that its relationship with the DOE was in the form of a "Cooperative Agreement" that is not covered by Part 708, and that the firm is therefore not obligated to participate in proceedings under this Part. The Complainant filed a Memorandum in Opposition to the Motion on August 3. Thereafter, the Hearing Officer requested that ERC submit a complete copy of its agreement with the DOE, and the firm filed this document on August 5. The Hearing Officer received further briefs on the Motion on September 7 and 14. On September 27, 1999, the Hearing Officer granted the Motion and dismissed Mr. Gionfriddo's complaint. Salvatore Gionfriddo, 27 DOE ¶ 87,528 (1999).

After filing his Notice of Appeal, the Complainant filed a statement identifying the issues he wishes the OHA Director to review on October 27, 1999. 10 C.F.R. § 708.33(a). On November 22, 1999, the Respondent filed its response. Id. The issues identified by the Complainant all relate to the Hearing Officer's conclusion that the Respondent is not subject to the provisions of Part 708.

II. Analysis

The Complainant seeks review of the Hearing Officer's interpretation of the scope of the Part 708 regulations. Unlike a Hearing Officer's findings of fact, which are entitled to deference unless clearly erroneous, Oglesbee v. Westinghouse Hanford Co., 25 DOE ¶ 87,501, 89,001 (1995); O'Laughlin v. Boeing Petroleum Services, Inc., 24 DOE ¶ 87,513, 89,064 (1995), a Hearing Officer's conclusions of law, such as those made by the Hearing Officer in the present case as to the scope of Part 708, are reviewable de novo. See Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."). After considering the issues raised by the Appellant, I agree with the Hearing Officer that the Respondent is not subject to the provisions of Part 708.

The first three issues raised by the Appellant concern (1) whether revisions to Part 708 that took effect on April 14, 1999, when the Appellant's complaint was pending, apply to the present case; (2) whether the Respondent was subject to the regulations prior to the revisions; and (3) whether the Respondent is subject to the revised regulations. The Appellant contends that the revised Part 708 applies to the present case, and that in any event the Respondent is subject to the regulations both as they existed prior to the revisions and in their current form. The Respondent maintains that the prior version of Part 708 applies to this case, but no matter which version is applied, it is not a "contractor" subject to the regulations.

For ease of analysis, we first consider below whether the Respondent is a "contractor" as that term is defined under the regulations prior to their revision. We find that ERC is clearly not a "contractor" under the prior regulations. For this reason, and because the alleged reprisal in this case occurred prior to the revision of the regulations, we need not consider whether the Respondent is a "contractor" under the revised regulations. As we explain below, even if the Respondent met the definition of "contractor" under the revised regulations, to retroactively apply the regulations would clearly prejudice the Respondent, and therefore the revised regulations could not be applied to the present case.

A. Whether the Respondent is Subject to the Prior Version of Part 708

Before its April 14, 1999 revision, Part 708 was "applicable to employees (defined in § 708.4) of

contractors (defined in § 708.4) performing work on-site at DOE-owned or -leased facilities, . . .” 57 Fed. Reg. at 7541. Under those regulations, “contractor” was defined as

a seller of goods or services who is a party to a procurement contract as follows:

(1) A Management and Operating Contract;

(2) Other types of procurement contracts; but this part shall apply to such contracts only with respect to work performed on-site at a DOE-owned or -leased facility; or

(3) Subcontracts under paragraphs (1) or (2) of this definition; but this part shall apply to such subcontracts only with respect to work performed on-site at a DOE-owned or -leased facility.

Id.

The Respondent contends that its cooperative agreement with the DOE is not a “procurement contract” and therefore the firm is not a “contractor” as defined in the previous version of Part 708. Response at 12. On this point, we agree with the Respondent and the Hearing Officer, who found in her opinion “persuasive evidence” that procurement contracts and cooperative agreements “are distinct and different devices, and that these differences are not just technicalities.” Salvatore Gionfriddo, 27 DOE ¶ 87,528 at 89,147. The Hearing Officer pointed out that the DOE entered into its cooperative agreement with ERC under the authority of Federal Grant and Cooperative Agreement Act, the provisions of which specifically distinguish “cooperative agreements” from “procurement contracts.” Id; 31 U.S.C. § 6303 (1999) (purpose of procurement contracts); id. at § 6305 (purpose of cooperative agreements).

The Appellant does not contend that the cooperative agreement in question is a “procurement contract,” but argues that the “respondent’s emphasis on the term ‘procurement contracts’ is misplaced.” Appeal at 5. The Appellant cites provisions of the Federal Acquisition Regulations (FAR) that mandate the insertion into federal contracts of a clause requiring compliance with Part 708, noting that the FAR provisions refer to “contracts” rather than “procurement contracts.” Id. (citing 48 C.F.R. § 922.7100). What the Appellant fails to note however, is that the FAR specifically states that “[c]ontracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301 et seq.” 48 C.F.R. 2.101 (definition of contract).

The Appellant further argues,

To find that Mr. Gionfriddo cannot bring the instant complaint under the Contractor Employee Protection Program defeats the purpose of the program for Mr. Gionfriddo and DOE. It discourages the free flow of information and leaves an employee with no recourse from a contractor’s attempts to silence said employee through termination or other discipline. OHA, therefore, should exercise jurisdiction over this complaint.

Appeal at 5-6. While we share the Appellant’s concern for carrying out the important purpose of Part 708, the primary source to which we must turn to discern that purpose is the plain language of the regulations. As the Appellant admits, “it is whether the respondent is a contractor under 10 C.F.R. section 708.4" that determines jurisdiction under Part 708. Id. at 4. Simply put, if the Respondent does not meet the regulation’s definition of “contractor” by virtue of its cooperative agreement with DOE, then we cannot find that the DOE intended the scope of the Part 708 regulations to reach the Respondent’s actions.

As stated above, we are convinced by the same “persuasive evidence” cited by the Hearing Officer that the cooperative agreement between DOE and ERC is not a “procurement contract” as that term is used in the definition of “contractor” in Part 708. In addition, there is no contention that the relevant agreement is either a “Management and Operating Contract” or a “subcontract” under the contractor definition. Thus, because the Respondent is not a “contractor” under the version of Part 708 in effect prior to April 14, 1999, it is not subject to those regulations.(1)

The Appellant argues in the alternative that, if "OHA determines that cooperative agreements are not covered by the DOE Contractor Employee Protection Program, it must still find that it has jurisdiction over this complaint." Appeal at 16. According to the Appellant, the Motion to Dismiss

must be denied unless the Hearing Officer examines all of the agreements between DOE and respondent and determines that none of them allow for DOE to assert jurisdiction over this complaint. Additionally, even if the Hearing Officer rules that only the agreement(s) to which Mr. Gionfriddo's time was billed apply, respondent must prove that Mr. Gionfriddo only worked on the cooperative agreement in question.

This argument ignores section 708.9(d) of the regulations, which states that 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," which section describes the protected activities in response to which a "DOE contractor covered by this part" may not engage in retaliation. In other words, the complainant has the burden of establishing that his activities were protected under section 708.5, and the activities described in section 708.5 are protected only against retaliation by a "DOE contractor covered by this part." Thus, it is the complainant, not the respondent, who bears the burden of proving that the respondent is "covered by this part.(2) Here, the complainant offers no evidence to dispute the Hearing Officer's finding that "the Complainant's protected disclosure related solely to fuel cell matters covered by the Cooperative Agreement," Salvatore Gionfriddo, 27 DOE ¶ 87,528 at 89,148, and points to no other agreement between DOE and ERC through which the DOE could assert jurisdiction over the present complaint. Clearly, the complainant has not met his burden.

B. Whether the Revised Part 708 Regulations May be Applied to the Respondent

While under the prior version of Part 708 a "contractor" was defined as a party to "procurement contracts," the revised Part 708 regulations define "contractor" as a party to "contracts." 10 C.F.R. § 708.2 (1999). However, the history of the revision of Part 708 indicates that the drafters did not remove the word "procurement" to alter the meaning of "contractor." The revision of the definition of "contractor" first proposed in a January 1998 Notice of Proposed Rulemaking (NOPR) contained the substantive change found in the April 1999 revisions, "eliminating the requirement that . . . contractors perform[] their work on sites owned or leased by DOE," but still defined "contractor" as a party to "procurement contracts." 63 Fed. Reg. 374 (January 5, 1998). Thus, the change in the definition from the January 1998 proposed revision ("procurement contracts") to the April 1999 revision ("contracts") was largely stylistic, due to the fact that "[s]ince publishing the NOPR, DOE ha[d] rewritten Part 708 in 'plain language' style, consistent with the 'Memorandum on Plain Language in Government Writing' which the President issued on June 1, 1998." 64 Fed. Reg. 12862 (March 15, 1999). It is unlikely, therefore, that the Respondent would meet the definition of "contractor" under the revised regulations.

In any event, having found no basis for asserting jurisdiction over the present complaint under the prior version of Part 708, we need not decide the issue of whether the Respondent meets the definition of "contractor" under the revised regulations. The current regulations do state that the "procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part," 10 C.F.R. § 708.8, and there is no dispute that Mr. Gionfriddo's complaint was pending on April 14, 1999, when the revisions took effect. However, as the preamble to the revisions explains,

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE will apply the revised procedures to pending cases consistent with the case law.

64 Fed. Reg. 12862, 12865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994); Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

Thus, the intent of the drafters of the Part 708 revisions is quite clear that the revised regulations apply to

pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." Because we find above that ERC is not a "contractor" under the prior version of Part 708, and thus was not subject to those regulations, the revised Part 708 cannot retroactively bring within its scope personnel actions taken by ERC prior to those revisions. By subjecting it to a regulatory regime to which it was not previously subject, such a retroactive application would clearly prejudice ERC, contrary to the clear intent of the revisions to the regulations.

For the reasons set forth above, we will deny the Appeal filed by Mr. Gionfriddo and uphold the decision of the Hearing Officer.

It Is Therefore Ordered That:

(1) The Appeal filed by Salvatore Gionfriddo on October 13, 1999, of the Initial Agency Decision issued on September 27, 1999 (Case No. VBH-0007), is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Salvatore Gionfriddo on December 28, 1998, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is dismissed.

(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: December 15, 1999

(1)The Appellant's attempt to find alternative bases for jurisdiction in the regulations is equally unavailing. The Appellant references 10 C.F.R. § 708.2(a), which limits the scope of Part 708 to cases where the "underlying procurement contract" contains one of two clauses that require contractor compliance with Part 708, Appeal at 6-9, and also cites portions of sections 708.2(b) and 708.4 stating that the regulations apply to "contracts" or "contractors" only with respect to work performed "on-site at a DOE-owned or -leased" facility. The Appellant asserts that any of these provisions provide a separate basis for jurisdiction. Appeal at 10-12, 13-16. Thus, according to the Appellant, the Respondent may be subject to Part 708 either by virtue of section 708.2(a) (because of certain clauses in the cooperative agreement) or alternatively via the cited language in sections 708.2(b) or 708.4 (because the respondent may "perform work on behalf of DOE, directly related to activities at a DOE-owned or -leased site"). We do not agree. First, the sections cited by the Appellant each refer either to "contractors (defined in § 708.4)" or "procurement contracts," and we have already found that the cooperative agreement in question is not a "procurement contract" and that the Respondent does not meet the definition of a "contractor" under section 708.4. Second, the language the Appellant refers to clearly is not intended to provide an alternative method of attaching jurisdiction to parties that do not otherwise meet the regulations' definition of "contractor." Rather, the clear intent of these provisions is to provide additional criteria that must be met before a contractor, as defined in section 708.4, is subject to Part 708.

(2)" To place the burden of proof regarding questions of jurisdiction on the complainant is consistent with the principles applied in the federal courts. C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §§ 1350, 1351 (2d ed. 1990 & Supp. 1999) (once a defense of lack of personal or subject matter jurisdiction has been raised, the party asserting jurisdiction bears the burden of proving that jurisdiction exists).