Case No. VBA-0021

June 27, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugene J. Dreger

Date of Filing: February 28, 2000

Case Number: VBA-0021

On February 28, 2000, Mr. Eugene J. Dreger (hereinafter referred to as the Appellant) 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).(1) In the Initial Agency Decision, the Hearing Officer determined that the complainant has failed to establish the existence of a violation for which he may be accorded relief under DOE's Contractor Employee Protection Program, codified at Part 708 of Title 10 of the Code of Federal Regulations. 10 CFR Part 708. The Hearing Officer found that the Appellant made protected disclosures, as they are defined in Part 708, and that such disclosures were sufficiently close in time to his termination and to other personnel actions adverse to him to be considered contributing factors to those actions. Nevertheless, the Hearing Officer also found that the evidence clearly and convincingly establishes that the Appellant's employer would have taken those actions in the absence of those protected disclosures. As a result of these findings, the Hearing Officer denied relief to the Appellant. *Eugene J. Dreger*, 27 DOE ¶ 87,549, http://www.oha.doe.gov/cases/whistle/vbh0021.htm (2000) (hereinafter cited as *Dreger*).

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, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences [a] violation of any law, rule, or regulation [or] a substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1); *see also Francis M. O'Laughlin*, 24 DOE ¶ 87,505 (1994).

In the present case, Appellant worked as a safety inspector for Reynolds Electrical & Engineering Co., Inc. (REECO) at the Nevada Test Site outside of Las Vegas, Nevada, from 1990 to 1994. At the time, REECO was the management and operating contractor there. In September 1994, Appellant was terminated for poor job performance. Appellant alleges that REECO retaliated against him for raising safety concerns in the course of his routine job duties. As remedies, Appellant seeks to be rehired, to have his performance appraisals corrected, to be awarded back pay and Social Security credits, and to be compensated for emotional stress.

After extensive document submission, a hearing was held on November 15, 1999, at which 12 witnesses testified. As noted above, the Hearing Officer agreed with Appellant and found that he had made protected disclosures that, because of proximity of time, were contributing factors to personnel actions including his termination. However, the Hearing Officer also found that the contractor(2) had shown by clear and convincing evidence that REECO would have taken the termination action it took even in the absence of the protected disclosures. Thus, the Hearing Officer concluded that no relief was appropriate.

In concluding that the contractor had shown by clear and convincing evidence that there was no retaliation when it terminated Appellant, the Hearing Officer found all of Appellant's performance evaluations for 1992 through 1994 referred to three deficiencies. First, his supervisors pointed out that Appellant had never mastered the computer skills that he needed to complete reports and to use the deficiency tracking system. They noted the poor quality of his written reports. In this regard, the Hearing Officer found after a lengthy review that his reports were not always understandable because his written communication skills were poor. Second, the Hearing Officer found that the testimony at the hearing supported the statements in the performance evaluations that Appellant applied standards in an inconsistent manner. Third, the Hearing Officer found that the testimony also supported the statements in the performance evaluations that Appellant's "communications skills, overall judgment and behavior towards employees at the worksite fell short of normal expectations." *Dreger* at 89,255.

In light of continuing difficulties with Appellant, the contractor implemented a performance improvement plan, a vehicle that it had used before and that is a fairly standard procedure in large organizations. The Hearing Officer found that testimony at the hearing demonstrated that the contractor performed the reporting and monitoring functions required by the plan in a careful and serious manner, but that Appellant did not fully appreciate the situation:

Dreger never thought the PIP was worth more than a moment of his time. He never mentioned it in his original whistleblower complaint, and he hardly addressed it at all in his questioning and arguments at the hearing I conducted. In fact, he never presented a serious discussion of it. At one point he called the 62-day evaluation period a "sham," "since they are out to terminate me." November 5 Letter at 42. He continues "they could not assist me since my experiences are beyond theirs." *Id.*

Dreger at 89,256-57. Despite Appellant's contention that the performance evaluation process was a sham, the Hearing Officer concluded that Appellant's work-related deficiencies caused the contractor's adverse actions, including Appellant's termination. *Dreger* at 89,257.

Thus, the Hearing Officer found that the contractor had shown by clear and convincing evidence that it treated Appellant like similarly situated employees and that Appellant's work performance deficiencies, including inadequate computer skills, poor communications and interpersonal relations problems, and inconsistency in application of safety standards, constituted valid reasons for the adverse actions taken by the contractor. Accordingly, the Hearing Officer denied relief to Appellant. *Dreger* at 89,258-59.

In his appeal, Appellant challenges each of the findings that the Hearing Officer made. After a brief personal attack on one witness, he has submitted 21 pages of what appear to be his notes reflecting comments on the testimony at the November 15, 1999 hearing. The filing is generally organized by name of the individual testifying together with what appear to be transcript page and line references. However, it is not organized in any systematic way to address the findings and conclusions that the Hearing Officer made. Comments on testimony range from a fragment of a sentence to 15 pages of critique of the testimony of Frank Spenia, Appellant's former supervisor. In general, Appellant argues that Mr. Spenia and Steve Jones, Mr. Spenia's supervisor, testified untruthfully at the hearing.

As noted above, the contractor claims that the adverse personnel actions it took against Appellant were caused by three performance deficiencies: (1) lack of mastery of necessary computer skills, (2) poor written communications skills and inconsistent application of safety standards, and (3) poor communication skills with employees at the work sites he inspected. In response to his former supervisor's

testimony that Appellant had more trouble than other inspectors learning to use a new computer-based tracking system, Appellant claims:

Another ridicule. What does Frank Spenia, Steve Jones know about "having more trouble adjusting." I have been in two wars, and retired from the Naval Reserves; and both of them claim to state I have trouble adjusting. . . . I have been in combat action, most a dozen times that I can remember, and I am considered to be cool & conservative. Their accusations are demeaning when evaluating me. Many in their respective offices lost respect in them both; how long will it take for management to realize their blunder. Is my message loud and clear?

Appeal at 12-13. The above excerpt is typical of the comments in the Appeal. I have reviewed them carefully, and conclude that there is no evidence in the record that would support Appellant's assertions or form the basis for concluding that Appellant did not have serious deficiencies in using the computer-based systems.

The Hearing Officer also found that the evidence supported the contractor's claim that Appellant had poor communications and interrelation skills. In this regard, his supervisors testified, and the Hearing Officer found, that contractor employees who were responsible for making corrections complained that they could not understand the reports that Appellant wrote. There was also testimony that Appellant antagonized line employees, not by finding safety violations (which was his job responsibility), but by the manner in which he went about his inspections.

Appellant also maintains that he was not inconsistent in applying safety codes to work situations that he inspected. In his appeal, Appellant maintains that people had trouble understanding his reports because "some can't read correctly, and some are not capable to understand." Appeal at 11. However, there is no evidence in the record, either written evidence or testimony at the hearing, which would support Appellant's position. He also claims that he and the other three inspectors had to teach his supervisor the safety codes that they applied because "he had no idea what we were doing and why they were applied." Appeal at 9.

It is well settled that factual findings are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *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). *Compare Pullman Standard v. Swint*, 456 U.S. 273 (1982), with *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Federal Rule of Civil Procedure 52(a)).

In the present case, the Hearing Officer's findings are not clearly erroneous. In fact, there is substantial evidence in the record that Appellant had considerable problems with the computer-based tracking program that the contractor maintained. Indeed, other than his statements that his computer skills were superior, Appellant did not provide any evidence on that issue. There is substantial evidence that the quality of his written reports was poor and that there were complaints that the Appellant's inspections did not apply the same standards consistently. My review of the Appeal as well as the record confirms that Appellant's written submissions are inarticulate and difficult to understand. Finally, there is substantial evidence in the record that employees complained about the manner in which Appellant conducted inspections and the way he treated them. For these reasons, all of the findings of the Hearing Officer are supported by substantial evidence and are not clearly erroneous. The appeal that Mr. Dreger filed must therefore be denied.

It Is Therefore Ordered That:

(1)The Appeal filed by Eugene J. Dreger on February 28, 2000, of the Initial Agency Decision issued on February 7, 2000 (Case No. VBH-0021) is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Eugene J. Dreger on February 28, 1995, 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.

Roger Klurfeld

Assistant Director

Office of Hearings and Appeals

Date: une 27, 2000

(1) The Director of the Office of Hearings and Appeals served as the Hearing Officer in this matter. As a result, when Mr. Dreger filed an appeal, the OHA Director recused himself and delegated to me the authority to act as the OHA Director in deciding this appeal.

(2) Beginning January 1, 1996, Bechtel Nevada, Inc. assumed general responsibility for the Nevada Test Site, and it has also assumed responsibility for litigation relating to the prior period, including defending this action.