

Case No. VBA-0041

March 13, 2000

DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: John L. Gretencord

Date of Filing: November 26, 1999

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This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on November 4, 1999, involving a complaint filed by John L. Gretencord (Gretencord or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Gretencord claims that West Valley Nuclear Services, Inc.(West Valley), a DOE contractor, terminated his employment in retaliation for his making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that West Valley had shown that it would have terminated the complainant for his aggressive and anti-social behavior even in the absence of the protected disclosures. As set forth in this decision, I have determined that Gretencord'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. 12,862 (March 15, 1999). Under the revised regulations, review of an Initial Agency Decision, as requested by Gretencord 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 Gretencord's complaint are fully set forth in [Gretencord v. West Valley Nuclear Services, Inc.](#), 27 DOE ¶ 87,535 (1999)(Gretencord). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In his Complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement. The IG's Report of Investigation (ROI) found that "the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosure." Gretencord, 27 DOE at 89,178. After the issuance of the ROI, Gretencord requested and received a hearing on this matter before an OHA Hearing Officer. Gretencord called 13 witnesses, and West Valley called 11 witnesses. The hearing took five days.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Regulations:

"the employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employer by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure" 10 C.F.R. § 708.29.

Gretencord, 27 DOE at 89,178.

The Hearing Officer noted that West Valley admitted that Gretencord made at least 14 protected disclosures while employed by the firm. The Hearing Officer further determined that a number of negative personnel actions occurred during that period. These actions included several letters of reprimand, poor performance evaluations, a suspension, and finally an involuntary termination. The Hearing Officer found that since both Gretencord's protected disclosures and the negative personnel actions were interspersed throughout his tenure at West Valley, Gretencord had met his initial burdens under § 708.29, thereby shifting the burden to West Valley to prove by clear and convincing evidence that it would have taken the same actions without Gretencord's protected disclosures.

Gretencord, 27 DOE at 89,178.

The Hearing Officer found that Gretencord exhibited an extraordinary number of personality conflicts, engaged in confrontations and arguments with other members of West Valley's workforce, repeatedly failed to control his temper, issued threats to fellow employees and made bizarre and disturbing statements in the presence of other workers. The Hearing Officer also found that, with only one exception, Gretencord did not deny that any of the cited incidents had occurred. The Hearing Officer concluded that Gretencord failed to respond to the firm's attempts to help him modify his behavior, and that these abusive and frightening actions were the basis for West Valley's adverse personnel actions. Gretencord, 27 DOE at 89,179.

To support these conclusions, the Hearing Officer cited 10 events showing the complainant's outbursts and abusive behavior, as well as three memoranda documenting West Valley's instructions to Gretencord to seek help from the firm's Employee Assistance Program in controlling his behavior. This occurred during the period March 14, 1990, through February 17, 1997. Gretencord, 27 DOE at 89,179-80.

The Hearing Officer then described an event that took place on February 27, 1997. I will refer to this occurrence as the “triggering behavior,” because it led to Gretencord’s termination one week later. Since the discharge is the key retaliation in this case, this event is very important in this Appeal. I have therefore cited it in full below, as it was set forth in Gretencord.

On February 20, 1997, the Supervisor of West Valley’s Electrical Department, Bruce Covert, encountered Gretencord engaged in a conversation in the Electrical Department’s offices. Covert asked Gretencord why he was there. Gretencord informed Covert that he was assigned to conduct a surveillance of that department. Gretencord then asked to see some documents. Covert then telephoned Gretencord’s supervisor, who informed Covert that Gretencord had not been assigned to conduct a surveillance of the electrical area. Gretencord then became angry. Covert reported that Gretencord said “ I am coming back to write you up on paperwork issues and I am going to [West Valley] and DOE with this as you must be hiding something.” A co-worker reported that he overheard Gretencord say “I just love doing that sort of thing.” Another co-worker reported that Gretencord made a similar statement the next day.

On February 25, 1997, Gretencord met with Tom Crisler of West Valley’s Human Resources Department. Crisler recounted that, during this meeting, Gretencord expressed his belief that direct, aggressive and disrespectful conduct was acceptable for a Quality Assurance Engineer. At this meeting, Gretencord was informed that he was being suspended pending an investigation into his conduct.

On February 27, 1997, Gretencord again met with Crisler. Crisler informed Gretencord that his employment with West Valley was being terminated because of his lack of respect for his co-workers. During this meeting, Crisler alleges, Gretencord held out his left arm. Allegedly, Gretencord noted that his arm was very steady and that enabled him to be good at aiming a gun. Crisler further alleged that Gretencord then said he needed to think about becoming a whistleblower.

Gretencord, 27 DOE at 89,180-81.

The Hearing Officer also described the following testimony at the hearing, supporting West Valley’s position that Gretencord’s behavior was unacceptable:

A number of Gretencord’s co-workers testified that they or other co-workers personally feared him. Transcript at 359, 603, 671-672, 818-19, 825-26, 830, 951, 1422-24, 1435. Moreover, a number of Gretencord’s co-workers testified that they witnessed Gretencord engaged in disturbing behaviors. Thomas J. Holden testified that he had witnessed Gretencord engaged in loud and threatening confrontations on a few occasions. [Transcript of Hearing, hereinafter Tr.] Tr. at 65-66, 80-81. Vitto Riggi testified that he witnessed Gretencord have violent outbursts on at least two occasions. Tr. at 201-04. Linda Baker testified that she saw Gretencord in a local mall. When Baker asked why he was at the mall he indicated that he was there to bump into little kids or to trip them. Tr. at 362, 424, 432. Baker also testified that she witnessed Gretencord get mad at people and yell and scream at them. Tr. at 423. Jerome E. Hager recounted an incident where Gretencord provoked a fellow employee to slap him by refusing to stop singing a song about that employee. (This song was sung by Gretencord to the tune of the Gilligan’s Island theme song). Tr. at 470. Jack Gerber testified that Gretencord joked about stepping on little children’s toes in the mall. Tr. at 652. Phil O’Brien testified that Gretencord had told him that he had a vendetta against Bruce Covert. Tr. at 781. Dave Crouthamel testified that Gretencord had talked about poisoning and shooting “little Halloween kids.” Tr. at 1150, 1214-15, 1240-42.

Gretencord, 27 DOE at 89,181.

Noting that Gretencord did not even attempt to rebut the veracity of most of these allegations regarding his behavior, the Hearing Officer concluded that the complainant’s unacceptable behavior interfered with West Valley’s business operations. Accordingly, the Hearing Office determined that the firm had proven by clear and convincing evidence that it would have discharged Gretencord absent the protected disclosures.

II. The Gretencord Appeal

In connection with his Appeal, Gretencord 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 failed to properly credit the key protected disclosures; (ii) the Hearing Officer overlooked the importance of the timing of discharges versus key disclosures; (iii) the Hearing Officer failed to issue a subpoena for a key witness; (iv) the Hearing Officer failed to allow Gretencord access to the West Valley site; (v) the Hearing Officer failed to credit competent rebuttal evidence and (vi) the Hearing Officer failed to give credit to evidence that the complainant had a right to be in the electrical shop at the time of the triggering behavior. (1)

As discussed below, I do not find any merit to the matters raised for my review, and consequently I will not reverse the Hearing Officer's determination.

1. Failure to Acknowledge Key Protected Disclosures

The Statement first alleges that the Hearing Officer failed to properly credit all of the key protected disclosures. On May 12, 1999, the Hearing Officer issued a Decision and Order limiting Gretencord's protected disclosures to 15 protected disclosures. [West Valley Nuclear Services Co. Inc.](#), 27 DOE ¶ 87,511 (1999)(WVNS). The Statement sets forth six disclosures in particular that it contends should also been included in the list of protected disclosures.

This objection is unavailing. The Hearing Officer specifically enumerated 15 protected disclosures. [WVNS](#), 27 DOE at 89,080-81. This exceeds the number of disclosures necessary to find that the complainant has made the required regulatory showing on this point. I see no error in the Hearing Officer's determination, or his decision to limit the number of protected disclosures deemed relevant in this case. It was not only proper for the Hearing Officer to limit and define the issues that would be considered in this proceeding, it was imperative for an orderly proceeding for him to do so. See 10 C.F.R. § 708.28(b)(4). It is a vital part of the role of the Hearing Officer in any case brought under Part 708 to refine and structure the issues presented for resolution.

Moreover, there is clearly no prejudice to Gretencord arising from the fact that there may have been other protected disclosures that the Hearing Officer did not consider. Once a finding is made that there was a protected disclosure that was a contributing factor to a retaliation, it is irrelevant if there were additional disclosures. The inclusion of additional protected disclosures in this case would not alter the result in the Initial Agency Decision or in any other manner work to Gretencord's advantage. Nor does their exclusion create a disadvantage for Gretencord. I find that the inclusion of additional protected disclosures would make no difference in this case whatsoever.

2. The Timing of the Discharge

The Statement claims that the Hearing Officer overlooked the importance of the timing of the discharge vis-a-vis the key disclosures in this case. The so-called "key disclosures" to which the Statement alludes involve Gretencord's disclosures regarding his compliance investigation of Report 93-N-117 (Report #93) and other quality problems that he found in West Valley's electrical shop. See Complaint, Vol. 1 at 4-17. (2) The Statement alleges that the Hearing Officer did not give adequate consideration to the fact that Gretencord's termination occurred at "exactly the same time as these key protected disclosures."

As discussed above, under Part 708, the complainant has the burden of establishing by a preponderance of the evidence that a 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. E.g., [Don W. Beckwith](#), 27 DOE ¶ 87,534 (1999).

The Hearing Officer followed that precedent in the instant case. Specifically, he found that the protected disclosures were “interspersed throughout his [Gretencord’s] tenure at West Valley, as were the negative personnel actions taken against him.” [Gretencord](#), 27 DOE at 89,178-79. Based on this finding, the Hearing Officer determined that Gretencord’s showing with respect to the “contributing factor” element had been satisfied, and that the burden had shifted to West Valley to show “by clear and convincing evidence that it would have taken the same actions without Gretencord’s protected disclosures.” *Id.* at 89,179.

The Statement seems to allege, however, that there is some error in the fact that the Hearing Officer found that the burden was met through this “interspersed” of protected disclosures and alleged retaliations, rather than by specifically pointing to closeness in time between Report #93 and the subsequent termination. I do not agree. There is no prejudice to the complainant arising from the Hearing Officer’s finding. Since, as the Statement itself admits, the Hearing Officer shifted the burden of proof, I fail to see how his “interspersed” analysis makes any real difference to Gretencord.

The Statement implies, however, that the Hearing Officer should in some way have given some extra weight to the fact that the complainant’s termination occurred “at exactly the same time as the key protected disclosures and a conflict with a Respondent agent over quality concerns.” I believe that the Hearing Officer accorded the proper weight to these facts by shifting the burden of proof to the contractor. I cannot discern in what way the facts referred to by the Statement could have been accorded more weight, so as to change the outcome in this case.

3. Failure to Issue Subpoena for Key Witness

The Statement next contends that the Hearing Officer erred in failing to issue a subpoena for a key witness. According to the Statement, this potential witness is a former co-worker of Gretencord who purportedly has critical information regarding Gretencord’s actions in February 1997, when he investigated and disclosed to West Valley non-compliance with respect to Report #93. The Statement alleges that the Hearing Officer orally told Gretencord that he would not issue a subpoena for this witness.

The Statement points to no request by Gretencord for a subpoena for this individual. I see no reference to this matter anywhere in the record. There is thus no basis for me to conclude that the Hearing Officer actually refused to issue a subpoena for this witness. Moreover, I have some doubt that he did refuse. I note that the Hearing Officer readily allowed testimony from 13 witnesses offered by the complainant. The record indicates that he issued a subpoena for each of them. The Statement offers no reason why the Hearing Officer would have refused to issue a subpoena for this particular witness. After reviewing the record, I cannot see any reason that the Hearing Officer would have refused such a request, if it were made. Consequently, the assertion in the Statement of Issues that Gretencord made a request for a subpoena that the Hearing Officer then orally denied seems implausible to me.

In any event, the Statement fails to elucidate the nature of the “key information,” other than to state that the individual has direct knowledge of West Valley’s threat to terminate Gretencord. The record already reflects that the firm had disciplined Gretencord on several occasions. There is no doubt that West Valley terminated Gretencord from his position with the firm. The existence of information about additional “threats” on the issue of discipline in and of itself would not be surprising or necessarily useful in this case. Accordingly, I find that the Statement has not shown any error with respect to this issue.

4. Failure to Allow Access to West Valley Site

The Statement points out that Gretencord requested access to the West Valley site as part of discovery in this proceeding. See 10 C.F.R. § 708.28(b)(2). The Statement claims that the Hearing Officer improperly refused to “grant Gretencord this right, which could have revealed evidence which rebutted Respondent’s

[West Valley's] position that 'Gretencord had not been assigned to conduct a surveillance of the electrical area' and/or evidence illustrating the propriety of Mr. Gretencord's investigation of the electrical area."

This allegation, too, is without merit. As an initial matter, in his April 15, 1999 letter regarding discovery, Gretencord asked permission to enter the West Valley site to inspect electrical and mechanical equipment and documents including surveillance and non-conformance reports. This suggests that his motives for this discovery were to substantiate the legitimacy of his claim that there were irregularities at the site. As the Hearing Officer noted, the validity of Gretencord's claims of safety deficiencies is not a relevant issue in this case, and thus there was no reason to allow him on site for that purpose. Letter of Hearing Officer dated June 3, 1999.

Moreover, ordering discovery in a proceeding under Part 708, is a matter within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). Considerable latitude must be afforded a hearing officer in order to allow proper regulation of a whistleblower proceeding. I see no abuse of that discretion here. One purpose of the discovery on the West Valley site as now indicated in the Statement, is newly propounded. The Statement suggests that if Gretencord were allowed to inspect the site, he might have been able to locate evidence that he was assigned to the electrical area. This information would rebut the contractor's stated position that Gretencord was not authorized to be in that area.

The discovery Gretencord seeks would be irrelevant in this case. Even if the complainant could establish that he was authorized to be in the electrical area, the issue in this case is, in part, his behavior when he was told to leave. I find that his behavior towards Bruce Covert on this occasion could not be condoned even if Gretencord had in fact been assigned to the electrical area. See Tr. at 949.

Accordingly, I must reject this claim of error made in the Statement.

5. Failure to Credit Competent Rebuttal Evidence

The Statement cites the testimony at the hearing in this matter of ten witnesses presented by Gretencord, and claims that the Hearing Officer ignored their favorable testimony. I have reviewed this testimony, and find that it is certainly true that this testimony was favorable to the individual. Nevertheless, given the massive amount of testimony in this case, it is obvious that the Hearing Officer could not have reasonably set forth in his decision his views on all the assertions made at the hearing. Of necessity, he could only refer to the key testimony in his Initial Agency Decision.

Overall, however, the one-paragraph of analysis of the testimony of all of the witnesses in this case does appear rather brief, in view of the fact that the hearing lasted five days and the transcript was more than 1,400 pages. The Hearing Officer did not analyze testimony that was favorable to the complainant. He did not specifically weigh and balance the testimony that was favorable and unfavorable to Gretencord. I would have preferred to see a more developed analysis of all of the hearing testimony.

While in some cases such a failure might result in a remand with a direction that the Hearing Officer fully consider the evidence, I will not take that step here. The Hearing Officer's own assessment of the weight of the favorable evidence in this case seems less critical, given the solid and abundant testimony that was adverse to the complainant. That evidence in its totality was compelling, in comparison with the relatively scant evidence that was in Gretencord's favor. Since the vast weight of the evidence in this case supports West Valley's position, and even many of the complainant's own witnesses indicate that he had serious behavioral problems, I am able to make a determination from the record itself that there was no error in the result reached by the Hearing Officer. My detailed analysis is set out below.

I have specifically reviewed the testimony of those witnesses which Gretencord now contends should have been accorded explicit consideration. Although the Statement alleges that there was key favorable evidence to support the complainant, I find that the Statement fails to cite any testimony that supports in any meaningful way Gretencord's position that his termination was improper.

A. The Statement notes that several of the witnesses testified that the complainant's job performance was good. E.g., Tr. at 34, 97-98, 111-112. However, Gretencord's actual performance of his duties is not at issue here. The issue here is whether West Valley has shown by clear and convincing evidence that he was unable to get along with his co-workers and so confrontational that other employees were fearful of him or were unable to work with him. Some of the same employees who gave Gretencord good marks for his overall performance confirmed that he dealt poorly with other employees. E.g., Tr. at 34, 142. The testimony about his good job performance should have been noted, but I do not believe it would have affected the Hearing Officer's ultimate conclusion, nor do I believe it should have.

B. The Statement also claims that the Hearing Officer did not specifically weigh testimony of witnesses who said that they did not see Gretencord ever enter into an altercation with anyone. The fact that a particular employee never actually saw Gretencord involved in an altercation does not discredit the testimony of those who did see such actions. In fact, the very witnesses who testified on this point stated that Gretencord was difficult to get along with and interfered with daily work. Tr. at 232-33, 491. I therefore see no prejudice to the complainant on this issue.

C. The Statement also cites the testimony of one witness who indicated that employees "holler at each other quite often." Tr. at 206. The Statement contends that more weight should have been accorded this testimony, alleging that it shows that Gretencord's actions were not unusual. I do not agree with this assertion. Taken in context, I find this testimony refers only to normal give and take between employees on the job. It does not refer to the type of altercation that Gretencord engaged in, which tended to be much more threatening and confrontational. The evidence on this score remains unaffected by the testimony to which the Statement refers.

In this same vein, the Statement further refers to the testimony of a witness who indicated that there were regular "confrontations" between other West Valley employees. Tr. at 522. The rather passing reference to confrontations made by this witness in no way supports the complainant's position. This witness did not refer to any specific confrontation or actually describe any confrontation at all. Thus, I cannot conclude that this individual witnessed any confrontation that in any way resembled Gretencord's angry, threatening behavior.

The Statement further contends that Bruce Covert, who was directly involved in the incident leading to the triggering behavior, testified that he did not recall Gretencord ever using "vulgar" language. This assertion does not even begin to rebut the ample evidence of the abusive and threatening nature of Gretencord's confrontations with other employees. The fact that one witness claimed that no outright vulgarity was involved hardly absolves Gretencord or rebuts the clear and convincing showing of Gretencord's severe behavioral difficulties made by West Valley.

D. The Statement asserts that the Hearing Officer did not give credit to evidence that Gretencord was authorized to be in the electrical area at the time of the triggering incident. As stated above, this is simply irrelevant. Whether and the extent to which Gretencord's behavior was unacceptable is the key issue here, not whether he was authorized to be in that area.

E. The Statement finally argues that the Hearing Officer failed to give sufficient weight to the fact that there was a 14-month period prior to the triggering behavior during which no behavioral complaints were lodged against Gretencord. Initially, I note that the lack of any complaints for this period, if true, in no way confirms that Gretencord had modified his unacceptable behavior. More importantly, I fail to see how this allegation, if true, provides any meaningful rebuttal to the compelling case of Gretencord's totally inexcusable behavior offered by West Valley. As the record here makes clear, the complainant had a long history of behavioral problems dating from 1990. There was a long period in 1994 when there were no complaints about Gretencord. Nevertheless, there is ample evidence that Gretencord resumed his poor behavior in 1995, and he was terminated from his position at West Valley in 1997. Thus, the existence of a period during which no complaints were made, followed by a resumption of unacceptable behavior, is not unprecedented for Gretencord. From the firm's point of view, the triggering behavior was clearly the final

straw after a long period of difficulty with Gretencord, and repeated warnings to him. Accordingly, I do not see that the 14-month hiatus referred to by the Statement establishes that the determination of the Hearing Officer was erroneous, or should be altered in any way.

After reviewing West Valley's overall showing, I do find it meets the clear and convincing standard set forth at Section 708.29. Nevertheless, I would have preferred the firm to have provided evidence on whether other West Valley employees exhibited behavioral problems, the nature of those problems, and how the firm resolved them.

III. Conclusion

On the basis of the foregoing, I conclude that Gretencord 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 West Valley has shown by clear and convincing evidence that it would have terminated Gretencord even in the absence of the protected disclosures. Accordingly, Gretencord's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by John L. Gretencord on November 26, 1999, of the Initial Agency Decision issued on November 4, 1999, is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by John L. Gretencord on March 27, 1997, 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: March 13, 2000

(1) West Valley filed a Response to the Statement. 10 C.F.R. § 708.33.

(2) Report #93 dealt with the labeling of junction boxes within radiation areas. Gretencord believed that no inspection of the labeling had been done, even though the Report indicated that the inspection had been performed.