

Case No. VBD-0059

June 8, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Case: Janet L. Westbrook

Date of Filing: June 5, 2001

Case Number: VBD-0059

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by UT—Battelle, LLC, the company that manages the Oak Ridge National Laboratory. The Motion relates to a hearing soon to be held on a complaint that Janet L. Westbrook filed under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). For the reasons stated below, the motion is denied.

Ms. Westbrook worked at the Oak Ridge National Laboratory as a radiological engineer. She claims that she has persistently disclosed various safety-related concerns and as a result experienced hostility and negative treatment that ultimately resulted in her discharge on December 1, 2000. On March 20, 2001, a DOE investigator issued a Report of Investigation on Ms. Westbrook's retaliation complaint. The report found that Ms. Westbrook made protected disclosures in June 2000 and that those disclosures were a contributing factor to her discharge because of the temporal proximity between the disclosures and the decision to discharge Ms. Westbrook, which the investigator found occurred in August 2000, just two months after the disclosures. The investigator also concluded that at the time she had not uncovered sufficient evidence to conclude that UT-Battelle would have discharged Ms. Westbrook even in the absence of the protected disclosures.

In the present Motion, UT-Battelle requests that I order DOE's Oak Ridge Operations Office to disclose documents that it believes deal with concerns that Ms. Westbrook filed with the Operations Office. UT-Battelle states that it is aware that DOE's Oak Ridge Operations has hired an outside firm to investigate and report on the safety concerns underlying Ms. Westbrook's complaint. UT-Battelle states that it has requested from the Oak Ridge Operations Office all documents relating to that investigation, including a "separate report" on her employee concern, and a contract between the Operations Office and a contractor to investigate the employee concern. However, the Operations Office has denied UT-Battelle's request for the documents. UT-Battelle now seeks those documents through discovery in this proceeding and justifies its request by maintaining that the retaliation complaint that Ms. Westbrook filed should be addressed as an employee concern and that "due process considerations mandate the production of these agency documents that directly relate to the instant case."

The Part 708 regulations state that the "Hearing Officer may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1). UT-Battelle has made no showing that any of the documents it seeks contains information relevant to a Part 708 proceeding. In deciding whether an employee has made a disclosure protected by Part 708, one need conclude only that the employee disclosed information that he or she **reasonably believed** reveals a

substantial violation of law, a substantial danger to health or safety, or waste, fraud, or abuse. 10 C.F.R. § 708.5. After interviewing a number of supervisory personnel at UT-Battelle, the DOE investigator in this matter concluded that it was reasonable for Ms. Westbrook to have believed that some of the disclosures she made in June 2000 revealed substantial rules violations or danger. Whether the underlying actions **in fact** led to a dangerous situation or violated rules is not at issue here in this case. UT-Battelle has made no argument that all of the concerns that Ms. Westbrook raised in June 2000 were unreasonable and therefore not protected under the Contractor Employee Protection Program. Thus, the requested discovery would not lead to evidence that is relevant to Ms. Westbrook's retaliation complaint under Part 708. Nor is the requested discovery likely to assist UT-Battelle in preparing its defense to the complaint. The Motion for Discovery should accordingly be denied.

It Is Therefore Ordered That:

- (1) The Motion for Discovery filed by UT-Battelle, Case No. VBD-0059, is hereby denied.
- (2) This is an interlocutory order of the Department of Energy. This order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: June 8, 2001