

Case No. VBH-0036

September 23, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Complainant: XXXXXXXX

Date of Filing: August 24, 1999

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XXXXXXX (the complainant) filed a complaint against his employer, Fluor Daniel, Inc. (FDI), and two other DOE contractors, Duke Engineering & Services (DE&S) and TRW Environmental Safety Systems (TRW), pursuant to the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. In that complaint, the complainant alleges that he suffered reprisals because he had made a disclosure that is protected by Part 708.

I. Background

The Contractor Employee Protection Program was established to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. DOE may order remedial action if a DOE contractor takes adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee made a protected disclosure. The complainant under Part 708 has the burden of establishing by a preponderance of the evidence that he or she made a protected disclosure, and that such act was a contributing factor to one or more acts of retaliation. If the complainant makes such a showing, the contractor can avoid liability by proving by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F. R. § 708.29.

The complainant moved from FDI's XXXXXXXX office to XXXXXXXX in August 1992 to become FDI's XXXXXXXX of the Multi-Purpose Canister System (MPC) project. The XXXXXXXX office was closed on October 1, 1994. Some personnel were transferred to TRW's facility in XXXXXXXX. However, the complainant was not selected for the XXXXXXXX office and returned to XXXXXXXX in July 1995. The complainant alleges that he made a number of protected disclosures while employed on the MPC project and that it was because of these disclosures that he was not selected for transfer to XXXXXXXX. As a result, he had the expense of maintaining two households and lost a 5% locality pay differential upon moving to XXXXXXXX. He also complains that he was not reimbursed for certain moving expenses and that his company credit card was canceled.

The Office of Inspector General investigated the complaint and issued a Report of Inquiry and Recommendations (Report). The Report assumed for the purpose of its analysis that the

complainant had made protected disclosures and that they contributed to the alleged adverse action that was taken against him. Even with these assumptions, the Report concluded that the contractors would have taken the same action even in the absence of the assumed protected disclosures. Accordingly, the Report

found that the complaint was not meritorious.

The OHA Director appointed me the hearing officer in this case. As neither party requested a hearing, I have conducted an independent analysis and issue this initial agency decision based upon the Report and other materials in the investigative file. I shall not repeat the detailed analysis contained in the Report which is hereby incorporated by reference.

II. Analysis

The Report did not make any finding on whether the complainant had made disclosures that were protected by Part 708. I have reviewed the matter, and I find that certain disclosures do fall within the scope of Part 708. These disclosures include allegations that DE&S charged the MPC project for moving expenses and salaries for work that was not attributable to that project and that it allegedly double billed for some work. Other disclosures, however, do not appear to come within the scope of Part 708. These include allegations that certain "value engineering" should have been conducted to control costs and that the review by a supervisor of an employee's work on a procurement package constituted a conflict of interest. These are primarily management issues that are committed to management discretion. They do not the type of mismanagement necessary to bring them within the scope of Part 708.

The Report also did not make any finding on whether the protected disclosures contributed to the adverse action that was allegedly taken against the complainant. I find nothing in the record to suggest that the disclosures played any role in the matter. Moreover, as set forth in detail in the Report, and as summarized below, FDI had good reasons for the action that it took. Consequently, the complainant has not shown by a preponderance of the evidence that the disclosures contributed to the allegedly adverse actions.

Finally, the Report found that even assuming that the disclosures contributed to the adverse actions, the contractors had convincingly shown that they would have taken the same action in the absence of the disclosures. With respect to not being selected for transfer to the XXXXXXXX office, the record indicates there was intense competition for the few slots available in the XXXXXXXX office, and that only one FDI employee was among the nine employees to be transferred. There is substantial evidence in the record that the complainant's skills and experience did not fit the skills needed for the XXXXXXXX project as well as those of other employees. I agree with the Report's conclusions in this regard. Consequently, the contractors have demonstrated that they would not have transferred the complainant to XXXXXXXX even without the disclosures. Since there is no merit to the complainant's claim that he was retaliated against in not being selected for the XXXXXXXX office, there is also no merit to his claim for the cost he voluntarily incurred in maintaining two households or for the loss of the pay differential.

The Report also found no merit to the complainant's claim that cancellation of his corporate credit card and non-payment of certain moving expenses (\$395) constituted retaliation. The record shows that the credit card was canceled by American Express because he was delinquent in his payments. The disallowed moving expenses were beyond the \$1,500 allowance under company policy for miscellaneous expenses. I agree with the Report's conclusion that FDI has shown by clear and convincing evidence that it would have taken these actions even if the complainant had not made the disclosures.

In sum, the complainant has not shown that the protected disclosures that he made contributed to any of the adverse actions that he claims were taken against him. The contractors have shown by clear and convincing evidence that they would have taken the same actions even if there had been no disclosures. Accordingly, Mr. XXXXXXXX's the request for relief under Part 708 should be denied.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by XXXXXXXX, OHA Case No. VBH-0036, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Bryan F. MacPherson

Assistant Director

Office of Hearings and Appeals

Date: September 23, 1999