Case No. VBI-0045

June 22, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision and Order

Name of Case: Joseph P. Carson

Date of Filing: March 14, 2000

Case Number: VBI-0045

On March 14, 2000, Joseph P. Carson (Carson) filed a "Whistleblower Reprisal Complaint per section 3164 of the NNSA Authorization Act for FY 2000." Carson is employed by the Department of Energy (DOE) as a Safety Engineer, nominally assigned to the Office of Oversight, Planning and Analysis, Office of the Deputy Assistant Secretary for Oversight, Office of Assistant Secretary for Environment, Safety and Health (EH), but he is currently stationed in Oak Ridge, Tennessee. In the March 14, 2000 complaint, Carson alleges that in 1999 he made a number of protected disclosures about Glenn Podonsky, a senior National Nuclear Security Administration (NNSA) official, to the DOE Office of Inspector General (IG) and Congress, "related to Podonsky's five year long campaign of reprisal against me." Carson alleges that Podonsky and "his subordinate managers" retaliated against him by not offering Carson a position in DOE's Oak Ridge Operations Office (DOE/OR) after the Department eliminated the EH Office of Site Residents Program. Carson had worked for that program in Oak Ridge before his "directed reassignment" to the EH Office of Oversight, located at DOE Headquarters (DOE/HQ) in Germantown, Maryland.

Background

The statute which Carson cites in his complaint is section 3164 of the National Defense Authorization Act for Fiscal Year 2000 (the Act). The present complaint is the first of its type to be filed with the DOE Office of Hearings and Appeals (OHA). Carson seeks remedies afforded under the "Whistleblower Protection Program" mandated by section 3164. According to the Conference Report on the Act, section 3164 has a very narrow purpose: it requires the Secretary of Energy to establish a program to protect covered individuals from reprisal for disclosing "information relating to the protection of classified information" which the employee reasonably believes to provide direct and specific evidence of a violation of federal law or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a false statement to Congress on an issue of material fact. H.R. Rep. No. 301, 106th Cong., 1st Sess. at 919-20 (1999) (emphasis added). Reprisals based on anything else are not covered by section 3164. "Covered individuals" are defined in section 3164(b) as DOE employees and contractor employees who are "engaged in the defense activities of the Department." Sections 3164(f) and (g) establish special procedures to safeguard the security of the information disclosed, and to restrict the disclosure of that information to persons and governmental entities who are authorized to receive it. In other words, the statute not only provides protection for specific employees but also established approved mechanisms which those employees must use in order to make disclosures which are entitled to protection. Section 3164(l), entitled "Relationship To Other Laws," states that "The protections provided by this section are independent of, and not subject to any limitations that may be provided in, the Whistleblower Protection Act of 1989 (Public Law 101-512) or any other law that may provide protection for disclosures of

information by employees of the Department of Energy or of a contractor of the Department."

Section 3164(i) states that a covered individual who believes he has been discriminated against as a reprisal "for making a protected disclosure under this section" may submit a complaint to the OHA Director. (Emphasis added.) Under section 3164(j)(1), the OHA Director must first determine whether the complaint is frivolous. If the OHA Director determines the complaint is not frivolous, he will conduct an investigation of the complaint. For the reasons explained below, I have determined that (i) the present complaint is "frivolous" because it fails to state a claim for relief under section 3164, (ii) no investigation is warranted, and (iii) the complaint should be dismissed.

Analysis

Carson's three-page complaint does not mention the protection of classified information or refer to classified information in any way. Carson submitted 41 separate attachments in support of the complaint. OHA's review of the lengthy compilation of attachments to Carson's complaint confirmed the impression gleaned from the complaint itself that neither the alleged protected disclosures nor the alleged retaliation appear to have any connection to the disclosure of classified or other information relating to the protection of classified information. We also found that none of the information Carson allegedly disclosed requires the type of special security protection prescribed in section 3164. Quite to the contrary, the attachments contain statements like "I hold a ?Q' security clearance, but my work has almost never involved classified information," (June 7, 1999 letter from Carson addressed to U.S. Congressional Committee Chairmen Sensenbrenner, Burton & Bliley), and "I cannot point to a specific danger to the safeguards and security of America's nuclear stockpile" (May 11, 1997 letter from Carson addressed to President Clinton).

In addition, it appears that Carson is not raising a new reprisal claim under section 3164, but merely referencing other complaints he previously filed against DOE in other fora before the effective date of section 3164, seeking enforcement of prior rulings in those cases, or a "global" settlement of all his claims against DOE. For this reason as well, section 3164 does not appear to be germane to his present complaint. Nor did any of those previous complaints relate to the specific subject matter jurisdiction of section 3164. For example, his disclosures in the pending Office of Special Counsel (OSC) complaint proceeding before the Merit Systems Protection Board (MSPB) mentioned below concern the alleged abuse of the DOE security clearance process to suspend Carson's "Q" clearance. According to Carson, a "Q" clearance is a qualification for his job because it enables him to enter secure facilities. Carson's clearance was restored, and he is now claiming that it was questioned in retaliation against his prior "whistleblowing activities." Although they relate to Carson's security clearance, these alleged disclosures do not involve classified or other information relating to the protection of classified information, and thus do not fall within the narrow scope of section 3164.

Other parts of his complaint are likewise unrelated to disclosures relating to the protection of classified information. Carson's complaint further states that "this matter. . . is also being considered by OSC" and that he anticipates "filing another petition for enforcement with MSPB in the next week as it has not responded to my previous one." March 14, 2000 Complaint, page 2 (citations omitted). An excerpt from an Office of Personnel Management (OPM) background investigation report Carson filed with the OSC states that "His work as a safety inspector is not classified work. Safety is public information. He did not appear to have violated security regulations or to have divulged any classified information." (Exhibit 6 to August 25, 1999 OSC Complaint, at page 39.) On April 1, 2000, Carson sent OHA an e-mail message which included a copy of a new filing he made on March 31, 2000 with the MSPB, styled as a "Motion for Initiation of an Addendum Proceeding to Determine Consequential Damages." This appears to be the petition he refers to above. While it mentions section 3164, that motion does not refer to the disclosure of classified or other information relating to the protection of classified information.

Based on the review and conclusions described above, an OHA Deputy Director wrote a letter to Carson on April 28, 2000, advising him that OHA had tentatively determined the complaint was frivolous:

your complaint does not appear to involve reprisals by the DOE against you for the disclosure of "classified or other information relating to the protection of classified information," which the Congress intended to cover in section 3164. It therefore appears that your present complaint is frivolous under section 3164(j)(1), and does not warrant an investigation. However, on behalf of the OHA Director I will give you an opportunity to show cause why your present complaint should not be dismissed as frivolous for failure to state a claim that falls within the purview of section 3164. Your written statement showing cause why your present complaint should not be dismissed for the reasons explained in this letter should be received by the OHA by May 19, 2000.

April 18, 2000 "show cause" letter from Thomas O. Mann to Carson at 2.

Carson took full advantage of the opportunity offered in the April 18, 2000 "show cause" letter. On May 11, 2000, at Carson's request, the OHA Deputy Director held a telephone conference with Carson and his attorney, during which they discussed DOE's interpretation of the statute based on the Conference Report. They also discussed the reasons why Carson believes his disclosures and the alleged retaliatory acts by Podonsky fall within the purview of the statute, specifically regarding their connection to the "protection of classified information." Following the telephone conference, OHA faxed the relevant portion of the Conference Report to Carson and to his attorney. Memorandum of Telephone Call between Mann, Carson and Michael Kator, Attorney for Carson (May 11, 2000). Finally, on May 17, 2000, Carson submitted a four-page letter, responding to OHA's April 18, 2000 "show cause" letter. We next consider Carson's arguments that good cause exists why his complaint should not be dismissed as frivolous within the meaning of section 3164.

As noted above, Carson's March 14, 2000 complaint under section 3164 alleges that Podonsky and "his subordinate managers" retaliated against Carson by not offering him a new position in Oak Ridge after the Department eliminated the EH Office of Site Residents Program for which Carson had worked in Oak Ridge before his "directed reassignment." In his May 17, 2000 response to OHA's "show cause" letter, Carson alleges specifically that DOE/OR failed to allow him to compete for two positions in late 1999, and one in early 2000, and that DOE/OR's failure to select (and promote) Carson for one of those positions constitutes a reprisal within the meaning of section 3164(a). In addition, Carson asserts that he could be considered a "covered employee" under section 3164(b) because he holds a DOE "Q" security clearance. For purposes of this analysis, I will assume that Carson's present complaint satisfies the requirements of sections 3164(a) and (b).

However, for the reasons explained below, I have determined that Carson's present complaint, even as augmented by his May 17, 2000 response to OHA's "show cause" letter, fails to show that he has made a "protected disclosure" as that term is defined in section 3164(c). In his response, Carson cites section 3164(c):

PROTECTED DISCLOSURES.—For purposes of this section, a

protected disclosure is a disclosure—

(1) made by a covered individual who takes appropriate

steps to protect the security of the information in accordance

with guidance provided under this section;

(2) made to a person or entity specified in subsection (d); and

(3) of classified or other information that the covered individual

reasonably believes to provide direct and specific evidence

of any of the following:

(A) A violation of law or Federal regulation.

(B) Gross mismanagement, a gross waste of funds,

or abuse of authority.

(C) A false statement to Congress on an issue of material

fact.

According to Carson, his disclosures about "the suitability of Podonsky to hold a security clearance and/or hold the key position he does for the protection for all classified information and material in DOE" should be protected under section 3164, even though they are not themselves classified. Carson's May 17, 2000 response at 2. Carson reasons that DOE's personnel security program is part of the agency's overall program for the safeguards and security of classified information and materials. Based on that premise, Carson argues that a protected disclosure "that otherwise meets the statutory definition" can be about the suitability of an individual holding a security clearance and having access to classified information and/or materials. He further asserts that "it seems clear to me that the intent of Congress in passing this law includes offering protection from reprisal to people who report evidence of spying or other information relating to the suitability of an individual to hold a clearance in DOE." Id. Carson's argument on this critical point concludes with the claim that his protected disclosures "are reasonable and based on direct and specific evidence that Glenn Podonsky violated a law or Federal regulation; is blameworthy for gross mismanagement, a gross waste of funds, or abuse of authority; or made a false statement to Congress on an issue of material fact." Id.

It is clear from the facts alleged in this case, from the statutory language itself, and from the legislative history in the Conference Report, that the disclosures forming the basis for Carson's March 14, 2000 complaint were not made under section 3164(c), and they do not qualify for the protection of the statute. None of them was made by an individual "who takes appropriate steps to protect the security of the information in accordance with guidance provided under this section," as specified in section 3164(c). Carson's disclosures about Podonsky's alleged role in Carson's 1997 directed reassignment were made before the effective date of the statute. They concern actions occurring before the effective date of the statute, and they did not involve classified or other information "relating to the protection of classified information" as specified in the Conference Report. The logic of Carson's reasoning in his May 17, 2000 response, about why his alleged disclosures relate to the protection of classified information, is strained and unconvincing. The mere fact that Podonsky holds a DOE security clearance and some of his official duties involve the oversight of security functions within the Department does not mean that Carson's allegations about Podonsky's "fitness" for his job necessarily relate to the protection of classified information. In fact, there is no apparent connection between Carson's alleged disclosures about Podonsky and the protection of classified information. Carson's attempt to analogize his allegations about Podonsky to a covered employee who reports "evidence of spying" is both inappropriate and incredible. Moreover, there is no basis for Carson's allegation that Podonsky "perjured himself" about his role in ordering the Carson reassignment. No perjury charges have ever been brought against Podonsky, nor is there any evidence to support Carson's serious accusations against Podonsky. Finally, there is no connection between Podonsky's alleged involvement in an attempt to revoke Carson's security clearance and "the protection of classified information" within the meaning of the Act. This alleged reprisal also took place years before the enactment of section 3164 so it could not have possibly concerned "protected disclosures" under the statute.

Carson's May 17, 2000 response next claims that he made his alleged protected disclosures to persons and entities enumerated in section 3164(d), including members of Congress, employees of Congress, and the OSC. According to Carson, his disclosure to the OSC is, in effect, a disclosure to the DOE Inspector General (IG), another one of the persons listed in section 3164(d). Carson claims he also made disclosures

directly to the DOE IG. In view of my finding above that Carson's disclosures were not made under section 3164, and thus fail to qualify for protected status under the Act, it makes no difference that they were made to persons and entities enumerated in section 3164(d). Likewise, it is irrelevant for purposes of the present analysis whether the disclosures alleged in Carson's March 14, 2000 complaint under section 3164 were a contributing factor to any alleged reprisals, since Carson has failed to meet the jurisdictional requirements of the statute.

For the reasons set forth above, I have concluded that Carson's present complaint is frivolous for purposes of section 3164(j), and that no investigation is warranted. It should be noted, however, that this determination does not mean Carson is left without a remedy for the alleged reprisals mentioned in his March 14, 2000 complaint. As stated in section 3164(l), the whistleblower protections provided by section 3164 are meant to be independent of Carson's rights under the Whistleblower Protection Act of 1989 (WPA) or any other laws that may provide protection for disclosures of information by DOE employees. Carson is already pursuing the same claims under the WPA. Section 3164 is a very specific statute, designed to deal with a specific type of disclosure. In this determination I simply conclude that Carson has failed to show that his alleged disclosures were made under the statute, and thus, he has failed to show they qualify for protection under section 3164. Carson's March 14, 2000 complaint under section 3164 will therefore be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The March 14, 2000 complaint filed by Joseph P. Carson under section 3164 of the National Defense Authorization Act for Fiscal Year 2000 is hereby dismissed.

(2) This is a final order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 22, 2000