Case No. VBU-0050

June 15, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Decision of the Director

Name of Case: Darryl H. Shadel

Date of Filing: May 30, 2000

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Darryl H. Shadel (the complainant) appeals the dismissal of his whistleblower complaint under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. As explained below, I have determined that the complaint was improperly dismissed, and that further processing should be accorded.

I. Background

A. The DOE Contractor Employee Protection Program

Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial and specific danger to employees (a protected disclosure). If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish by a preponderance of the evidence that he made a protected disclosure, and the disclosure was a contributing factor to the alleged retaliation. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's disclosure. If the employee prevails, the Office of Hearings and Appeals (OHA) may order employment-related relief such as reinstatement and back pay. 10 C.F.R. § 708.29.

Under Part 708, the DOE office initially receiving the complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18

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B. Factual Background

The complainant was an employee of Comforce Technical Services, Inc. (Comforce). Comforce, in turn, was a subcontractor to the University of California, the managing and operating contractor for the DOE's Los Alamos National Laboratory (LANL).

The complainant was assigned by Comforce to the Los Alamos Neutron Scattering Center (LANSCE) from May 1, 1995 until December 10, 1999, when his assignment was terminated. LANSCE is a division of LANL.

The complainant states that he disclosed safety concerns in November 1999. These concerns related to the allegedly improper performance of work done on a high energy electrical device with a high initial hazard rating. The complainant maintains that he was fired on December 10, 1999, on the pretense that he had threatened another employee in the workplace.

C. Procedural History

On February 8, 2000, the complainant filed his Part 708 complaint with the cognizant DOE employee concerns office (the DOE Office). He seeks the following relief: (i) back pay since his termination; (ii) return of his licensing badge; (iii) compensation for long distance telephone calls that he made to DOE offices in connection with the reprisal; (iv) a letter of apology from those who claimed that he made threats to other employees; (v) a hearing concerning the reprisal and the "circumstances existing in LANSCE since December 1998;" (vi) compensatory damages resulting from mental distress, loss of professional reputation, exclusion from work- related meetings and other similar circumstances. (1)

On May 16, 2000, the DOE Office dismissed the complaint, based on lack of jurisdiction. The DOE Office gave the following reasons for this action: (i) the complainant filed his complaint of retaliation against LANSCE, rather than against Comforce, his actual employer (Section 708.5); (ii) the complainant failed to demonstrate a connection between the protected disclosure and the alleged retaliation (Section 708.29); (iii) the complainant failed to ask Comforce to correct the violation prior to filing the complaint (Section 708.7); and (iv) the complainant failed to exhaust all applicable grievance-arbitration procedures (Section 708.13).

On May 30, 2000, the complainant filed the instant appeal of that dismissal. Comforce and LANL filed comments supporting the determination of the DOE Office. Comforce maintains that the complainant failed to comply with Section 708.7, by neglecting to ask it for assistance in correcting the alleged LANSCE safety violation. Comforce also contends that it should be dismissed from this proceeding because it is not a required party, it had no knowledge of the protected disclosure, and it had no involvement in the termination. Finally, Comforce states that because the complainant did not invoke the firm's appeal process, he failed to exhaust all applicable grievance-arbitration procedures. In its comments, LANL supports the dismissal on the grounds that the complainant failed to exhaust his employer's appeal process. LANL further states that complainant was terminated as a result of his own willful misconduct. In this regard, LANL cites Section 708.4(b), which provides in relevant part that an employee may not file a complaint against his employer if "[t]he complaint involves misconduct that [the complainant] acting without direction from [his] employer deliberately caused, or in which [he] knowingly participated."

II. Analysis

Part 708 enunciates the circumstances under which a DOE Head of Field Element or Employee Concerns (EC) Director may dismiss a complaint of retaliation. 10 C.F.R. §§ 708.13(b); 708.15(d) and 708.17(c). These sections set forth several procedural bases for dismissal. For example, a complaint may be dismissed if a complainant fails to show that he has exhausted all applicable grievance or arbitration procedures. 10 C.F.R. § 708.13(b). He may also face dismissal if he files his complaint in an untimely manner. 10 C.F.R. § 708.17(c)(1). Part 708 also permits dismissal on substantive grounds, including the filing of a frivolous complaint, or a complaint that is substantially resolved. 10 C.F.R. § 708.17(c)(4),(5).

The dismissal in the present case is based on both procedural and substantive grounds. As discussed below, I find the reasoning set forth in the DOE Office's determination to be unconvincing and ultimately without merit. The comments filed by LANSCE and Comforce are similarly unpersuasive and indicate a misunderstanding of the relevant regulations.

A. The Complainant Failed to Name his Employer

Section 708.5 provides that an employee of a DOE contractor (including a DOE subcontractor) may file a complaint against his employer alleging retaliation. In this case, the complainant named only LANSCE as the entity that subjected him to retaliation. Given the complainant's failure to name his actual employer, Comforce, the complaint as originally filed was deficient. However, the complainant states in his appeal that in addition to LANSCE, he now also names Comforce as the subject of his complaint. This amendment is sufficient to correct the deficiency. Furthermore, allowing this correction at this point in the proceeding creates no particular burden on Comforce, since it has been well aware of this complaint of retaliation and has participated in this proceeding from the outset. See Darryl Shadel (Case No. VBI-0048)(dismissed on other grounds, April 28, 2000). Even though the firm was not named in the original complaint, it was afforded an opportunity to comment on the complaint, and in fact did so in Case No. VBI-0048. As stated above, it has also filed comments in the instant proceeding. Accordingly, I find that this filing requirement has been satisfied, and there is no basis for dismissal on the grounds of failure to name the proper respondent.

In its response filed in connection with this appeal, Comforce states that it is not a proper party to this proceeding, and that it had no knowledge of the complainant's protected disclosures or of the reasons for LANL's termination of the complainant. Comforce therefore maintains that it should be dismissed from the proceeding. I will not make a determination on this issue at this point. This is an issue that should be fully considered after an investigation and hearing. It would be premature to dismiss Comforce at this early stage.

B. Failure to Demonstrate a Connection Between the Protected Disclosure and the Alleged Retaliation

According to Section 708.29, an employee who files a complaint of retaliation has the burden of establishing that he made a protected disclosure and that such act was a contributing factor in an act of retaliation by his contractor employer. In its determination, the DOE Office states that LANL indicates that it terminated the complainant because he posed a threat of physical violence and not because of a protected disclosure. The DOE Office therefore concluded that the complainant had failed to demonstrate that the protected disclosure contributed to the retaliation.

This determination precipitously reaches an issue which is at the heart of this case. In deciding this issue adversely to the complainant, the DOE Office dismissal prematurely ends this entire proceeding. That determination may not stand. The complainant has never been afforded an opportunity to present evidence on a pivotal issue in this case, or rebut LANSCE's claims. The complainant contends he was terminated because of the disclosure. The reason for the termination is therefore key in this proceeding, and is still in dispute. In fact, this is the very type of issue that the OHA is charged with investigating under Section 708.22 and considering through the hearing process described at Section 708.28. As a rule, a DOE Office may not dismiss a case by reaching this type of substantive determination under the provisions of Section 708.17, unless the facts do not present issues for which relief can be granted under Part 708, or the complaint is frivolous on its face. 10 C.F.R. § 708.17(c)(2) and (4). I find that the claims raised here present issues for which relief can be granted and which are not frivolous. Accordingly, I find that this determination by the DOE Office was incorrect.

In this regard, I believe a response to LANL's reference to Section 708.4(b) is warranted at this point. As stated above, that Section precludes an employee from filing a complaint "involving" his own deliberate misconduct. I find LANL's reference to Section 708.4(b) in this regard to be inapt. This Section was designed to prevent an employee who intentionally engages in misconduct from shielding himself by reporting that very same misconduct under the guise of a protected disclosure. For example, if an employee intentionally created a safety hazard, and then reported the hazard as a safety concern, his disclosure would not be protected under Part 708, because he deliberately engaged in the conduct that created the concern. In the instant case, the complainant's disclosure admittedly involved some safety concerns. However, the misconduct for which he was purportedly fired involved his allegedly violent

behavior towards other employees in the workplace. This is clearly unrelated to the protected disclosure at issue here. His complaint does not "involve" his own deliberate misconduct within the meaning of Section 708.4(b).

C. The Complainant's Failure to Request that his Employer Correct the Violation

Part 708 provides protection to an employee who refuses to participate in an activity if he reasonably believes that participation would be in violation of a federal health or safety law or cause him or others serious injury. 10 C.F.R. § 708.5(c). This protection is accorded only if the complainant has, prior to the refusal to participate, asked his employer to correct the violation or remove the danger, and the employer has refused to do so. 10 C.F.R. § 708.7. However, this section does not apply to a complainant who discloses a health or safety danger, but does not refuse to participate in an activity based on the perceived fear of injury or violation of law.

In the instant case I see no allegation by the contractors or any other evidence that the complainant ever refused to participate in any work-related activity based on his belief that it constituted a safety or health threat. The record suggests that the complainant simply alerted LANSCE to the existence of a hazard. I note in this regard that LANSCE's basis for terminating the complainant was his alleged threatening behavior, and not that he refused to perform his responsibilities. Thus, Section 708.7 does not appear applicable in this case. Accordingly, the DOE Office erred in dismissing this complaint on the grounds that the complainant failed to request that his employer correct the violation.

D. The Complainant's Failure to Show Exhaustion of Grievance- Arbitration Procedures

Section 708.13 generally requires that a complainant exhaust all "applicable grievance-arbitration" procedures prior to filing a complaint. The complainant must affirm in his complaint that he has completed all applicable grievance or arbitration procedures. 10 C.F.R. § 708.12(d). If he does not do so, his complaint may be dismissed for lack of jurisdiction. 10 C.F.R. § 708.13(d).

In the instant case, the complainant has admittedly failed to pursue an appeal process that Comforce has set out in its Employee Handbook. The relevant portion of the Handbook provides:

EMPLOYEE APPEAL

Employees who believe that they have been disciplined unfairly, too harshly, or inappropriately, may appeal the discipline within 10 working days by filing a written complaint with their COMFORCE TECHNICAL SERVICES, INC. supervisor or organizational manager.

Employee Handbook at 17.

In their filings with the DOE Office, both Comforce and LANL argue that the grievance-arbitration procedures referred to in Section 708.13 include the Comforce appeal process, and that since the complainant failed to use this appeal process, he is barred from filing a Part 708 complaint. The DOE Office adopted this reasoning in dismissing the complaint. Comforce and LANL continue to press this position in the current appeal phase of this case. I do not agree with the Comforce and LANL reasoning or the DOE Office's determination.

The term "applicable grievance-arbitration procedure" is not defined in Part 708. However, the expansive reading that the DOE Office has given this term is in my view unjustified. A more limited reading is called for. As stated in the 1998 Notice of Proposed Rulemaking, it was the intent of the DOE to continue a policy that bargaining unit employees must use available negotiated procedures to resolve their complaints of retaliation. 63 Fed. Reg. 373, 378 (January 5, 1998). I believe that in the context of the Part 708 rules,

“applicable grievance-arbitration procedure” is intended to cover negotiated grievance procedures available to bargaining unit employees, and similar procedures leading to determinations under binding arbitration pursuant to a bargaining unit agreement. This requirement was included in order to ensure that the remedies offered by Part 708 did not permit or encourage employees to bypass procedures set forth in negotiated labor agreements. The Comforce “Employee Appeal” procedure is obviously very different. It is more akin to a reconsideration procedure. I do not find that it is covered by Section 708.13.

I therefore conclude that the term “grievance-arbitration procedure” used in the context of Part 708 has a specialized meaning related to procedures negotiated by employees and management. It should thus not be considered to include every unilaterally-created appeal process offered by an employer. Accordingly, I will not sustain the determination of the DOE Office on this point.

III. Conclusion

As indicated by the foregoing, I find that the DOE Office incorrectly dismissed the complaint filed by Darryl Shadel. Accordingly, the complaint should be accepted for further consideration.

It Is Therefore Ordered That:

The Appeal filed by Darryl Shadel (Case No. VBU-0050) is hereby granted and his Part 708 complaint is hereby remanded to the DOE Employee Concerns Program Office located in Albuquerque, New Mexico, for further processing as set forth at 10 C.F.R. § 708.21.

George B. Breznay

Director

Office of Hearings and Appeals

Date: June 15, 2000

(1) Even if the complainant is successful overall, he is not likely to prevail on his request for compensatory damages for emotional distress or on his claim for an apology, since these are beyond the scope of Part 708. Edward J. Seawalt, 27 DOE ¶ 87,558 (1999)(Case No. VBU-0039)(Part 708 does not allow damages for emotional distress). Since the dismissal at issue here will be overruled, the complainant is entitled to have a hearing regarding the circumstances of his own termination, but he is not entitled to have a hearing concerning the overall work environment at LANL. This is a matter between LANL and the DOE, and no relevant remedy is permitted under Part 708.