

# Case No. VBU-0077

October 25, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Ronald E. Timm

Date of Filing: September 25, 2001

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Ronald E. Timm (the Complainant), the President of RETA Security, a Department of Energy (DOE) subcontractor, appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On September 10, 2001, the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office dismissed the Complainant's complaint for lack of jurisdiction. As explained below, I uphold the dismissal of the subject complaint.

## I. Background

### A. The DOE Contractor Employee Protection Program

The regulations governing the DOE Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. See 64 Fed. Reg. 12862 (1999) (interim final rule), amended, 64 Fed. Reg. 37396 (1999), amended and finalized, 65 Fed. Reg. 6314 (2000). See also 65 Fed. Reg. 9201 (2000) (technical correction). Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that an employee reasonably and in good faith believes reveals a substantial and specific danger to employees or to the public health or safety. 10 C.F.R. § 708.5 (a)(2). The employee must establish, by a preponderance of evidence, that the employee made a protected disclosure and the disclosure was a contributing factor to any alleged retaliation. 10 C.F.R. § 708.29. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that the contractor would have taken the same action in the absence of the employee's disclosure. *Id.* If the employee prevails, the DOE's Office of Hearings and Appeals (OHA) may order the contractor to provide appropriate relief. 10 C.F.R. § 708.36.

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.

### B. Factual Background

The Complainant is the President of RETA Security, a company that provides technical support services to the DOE's Office of Safeguards and Security (OSS) pursuant to a subcontract with Science Applications International Corporation (SAIC).

Among the tasks assigned to RETA Security beginning in 1997 was the review and verification of the

DOE's "Site Safeguards and Security Planning Process (SSSP)(1) at certain DOE sites. Between 1997 and 1999, the Complainant claims that RETA Security identified serious security issues at various DOE sites as part of its support role associated with evaluating the DOE's SSSP. The Complainant charges that in 1999 he suffered systemic retaliation and retribution by DOE officials for raising those security concerns.

On January 5, 2000, the Complainant sent a letter to a senior DOE official in which he voiced concerns about a number of matters, including his perception that he had been retaliated against for raising security concerns. The senior DOE official immediately forwarded the Complainant's letter to the DOE's Inspector General (IG) for appropriate action. The IG initiated an inspection that spanned nine months and issued a Report in September 2000 (IG Report). The IG Report examined all of the Complainant's allegations in detail, ultimately concluding that there was no evidence that the Complainant had suffered any retaliation from DOE officials.

## **C. Procedural History**

On February 16, 2001, the Complainant filed his Part 708 complaint with the cognizant DOE Employee Concerns Office. The complaint was subsequently transferred in July 2001 to the Albuquerque Operations Office for processing.

On September 10, 2001, the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office dismissed the subject complaint for lack of jurisdiction. In the dismissal letter, the Employee Concerns Program Manager explained that there was no nexus between any retaliation the Complainant may have suffered and any action taken by his employer, SAIC.

On September 25, 2001, the Complainant filed an appeal of the dismissal of his Part 708 complaint. In his appeal, the Complainant clarifies that his Part 708 complaint is filed against the DOE, not SAIC. Appeal at 1. The Complainant subsequently confirmed his position that it was the DOE and not SAIC that retaliated against him. See Record of Telephone Conversation between Ronald E. Timm and Ann S. Augustyn, OHA Attorney (September 27, 2001).

## **II. Analysis**

The threshold issue in this case is a novel one, whether a DOE subcontractor can file a complaint against the DOE under the Contractor Employee Protection Program, 10 C.F.R. Part 708. In deciding this jurisdictional question, I first examine the purpose of the program. I then turn to the plain language of the program's implementing regulations.

The purpose of the Contractor Employee Protection Program is set forth in Part 708 as follows:

This part provides procedures for processing complaints by employees of DOE contractors alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement; for participation in Congressional proceedings; or for refusal to participate in dangerous activities.

10 C.F.R. § 708.1. As a result, the clear focus of the program is upon DOE contractors and their employees.

The regulations also describe the kinds of conduct for which an employee of a contractor may file a Part 708 complaint against his/her employer. 10 C.F.R. § 708.5. While the term "employer" is not defined in the Part 708 regulations, I find that it is reasonable to interpret "employer" as meaning an entity in the contractor chain, not the DOE. Several references in the Part 708 regulations and elsewhere support this interpretation.

First, the term "retaliation" is defined, in relevant part, as "an action (including intimidation, threats,

restraint, coercion or similar action) taken by a *contractor* against an employee with respect to employment . . . as a result of the employee's disclosure of information . . ." 10 C.F.R. § 708.2 (emphasis added). Second, in describing the burden of proof ascribed to each party, Part 708 states that "[o]nce 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, participation, or refusal" (emphasis added). 10 C.F.R. § 708.29. Third, with regard to remedies for retaliation, Part 708 states that if an initial agency decision contains a determination that an act of retaliation occurred, the decision may order the *contractor* to provide [the employee] with appropriate interim relief. See 10 C.F.R. §708.36(b). Further, in the section of the regulations addressing the issue of how a final agency decision is implemented, Part 708 indicates that the DOE element having jurisdiction over the contract under which the employee is employed will forward the decision to the *contractor, or subcontractor* involved. See 10 C.F.R. § 708.38(a). Finally, Part 708 states that "[a] *contractor's failure* or refusal to comply with a final agency decision and order under this regulation may result in a contracting officer's decision to disallow certain costs or terminate the contract for default." (emphasis added) 10 C.F.R. § 708.38(b).

In addition, the preamble to Part 708 indicates that retaliation against contractor employees may also lead to the imposition of penalties under the Price Anderson Amendments Act of 1988 (Pub. L. 110-49)(August 20, 1988), implemented under 10 C.F.R. Part 820. 64 Fed. Reg. 12862 (March 15, 1999). That preamble also states that an act of *retaliation by a DOE contractor* may be subject to the investigatory and adjudicatory procedures of both Part 820 and Part 708(emphasis added). Id.

The DOE has consistently articulated the scope of Part 708 as including actions by DOE contractors only. The agency's treatment over time of issues arising under Part 708 is entirely consistent with the foregoing interpretation. When the DOE issued its Notice of Proposed Rulemaking in connection with Part 820 in 1992, the DOE addressed the relationship between 10 C.F.R. Part 708 and 820, stating in relevant part as follows: "Part 708 deals with *reprisals by DOE contractors* against contractor employees. . ." 57 Fed. Reg. 20796, 20797 (May 15, 1992)(emphasis added). "To the extent a *reprisal by a DOE contractor* results from an employee's involvement in matters of nuclear safety in connection with a DOE Nuclear Safety activity, the reprisal would constitute a violation of a DOE Nuclear Safety Requirement if proposed part 820 is adopted as a final rule." (emphasis added). Id.

Moreover, nowhere in Part 708, its history, or its preamble is the DOE mentioned as a potential litigant. In fact, were OHA to allow this proceeding to go forward with the DOE as a party and were OHA to find in favor of the complainant, OHA would lack the authority to order the DOE to do anything with regard to remedy in this case.

For all the reasons set forth above, I find that OHA is not the proper forum to consider the Complainant's allegations. Simply put, OHA lacks jurisdiction under 10 C.F.R. Part 708 to proceed further with the processing of the Complainant's complaint. Accordingly, I must affirm the decision made by the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office to dismiss the subject complaint.

### **III. Conclusion**

As indicated above, I have determined that the plain language of the Part 708 regulations precludes OHA from accepting jurisdiction in this matter. For this reason, I uphold the decision made by the Employee Concerns Program Manager at the DOE's Albuquerque Operations Office to dismiss the Complainant's Part 708 complaint.

It Is Therefore Ordered That:

(1) The appeal filed by Ronald E. Timm on September 25, 2001, Case No. VBU-0077, be and hereby is denied and his Part 708 complaint is dismissed.

(2) Within 30 days after his receipt of this Decision, the Complainant may file a petition for Secretarial Review with the Office of Hearings and Appeals.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 25, 2001

(1) The SSSP is “the primary instrument that the DOE Operations Office Managers use to certify to the Secretary of Energy the accuracy of risk and the measures used to assure that the public, employees, environment, and national assets are adequately protected.” See Appendix B to Unclassified Summary Report of the DOE Inspector General on “Allegations Concerning the DOE’s Site Safeguards and Security Planning Process” (September 2000).