

Case Nos. VBZ-0014 and VBZ-0013

August 23, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Names of Petitioners: Sandia Corporation

Roy F. Weston, Inc.

Dates of Filings: June 22, 1999

July 15, 1999

Case Number: VBZ-0014

VBZ-0013

This determination will consider a Motion to Dismiss that Sandia Corporation (Sandia) completed filing on June 22, 1999 and a request Roy F. Weston, Inc. (Weston) submitted on July 15, 1999. Sandia seeks its dismissal as a party against whom relief may be awarded pursuant to the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708, in the matter concerning Luis Silva. Weston also contends that it is not a proper party in this same matter.

I. Background

On October 2, 1997, Mr. Silva filed a Part 708 complaint with the DOE's Albuquerque Operations Office. Mr. Silva's Part 708 complaint arises from his employment with GTS Duratek. In his complaint, Mr. Silva alleges that in 1997 (1) he reported to the Director of the Occupational Safety and Health Division at the Albuquerque Operations Office six safety/health concerns regarding material handling operations at Sandia's Radioactive Mixed Waste Management Facility (RMWMF); (2) he anonymously submitted two Personnel Safety Concern forms to GTS Duratek management regarding radiation exposure and ramp danger and also reported these concerns to Sandia's Director of Environment, Safety, and Health; and (3) he submitted a Personnel Safety Concern form to GTS Duratek management concerning a lightning danger. Mr. Silva alleges that as a result of his disclosures concerning safety problems, GTS Duratek laid him off from his employment.

A. The Sandia Motion

In its Motion, Sandia asserts that the DOE violated its own rules set forth in 10 C.F.R. Section 708.6(e) (1992) (amended effective April 14, 1999) when it failed to give Sandia timely notice that it was considered a party in the Silva complaint, and that without timely notice, Sandia has been prejudiced because it is unable to provide a complete defense to its position. Sandia contends that it was not notified that it might be considered a party in this matter until the DOE Office of Inspector General issued its Report of Inquiry and Recommendations (OIG Report) on April 27, 1999. The OIG issued its Report more

than 18 months from the date Mr. Silva filed his complaint with the DOE. Sandia argues that between the time that the investigation of Mr. Silva's complaint began and the date of the issuance of the OIG Report, Sandia may have destroyed relevant records in the ordinary course of its business that are necessary to its defense in this matter and that it would not have destroyed these records had Sandia received timely notice from DOE that it considered Sandia a party in this proceeding.

B. The Weston Request

Following the expiration of GTS Duratek's contract with Sandia in March 1998, Weston succeeded GTS Duratek as a subcontractor at Sandia's RMWMF. Weston contends that it is not a party to this action because (1) it has not been named in the proceeding; (2) the regulations apply only to complaints employees file against their employers and Mr. Silva has never been an employee of Weston; and (3) it was never properly notified, as required under the applicable regulations, of the underlying complaint. Finally, Weston contends that even if the governing regulations apply to non-employees of Weston, Mr. Silva has not fulfilled the regulatory prerequisite for proceeding with a claim against Weston: exhaustion of Weston's internal complaint procedures.

II. Analysis

Section 708.6(e) of the Part 708 regulations in effect at the time of the complaint stated,

(e) Within 15 days of receipt of a complaint filed pursuant to paragraph (a) of this section, the Head of Field Element or designee shall notify

- (1) the contractor, person, or persons named in the complaint, and
- (2) the Director, of the filing of the complaint.

A copy of the complaint shall be forwarded to the Director.

10 C.F.R. Section 708.6(e) (1992) (amended effective April 14, 1999). Although neither Sandia nor Weston received notification of the Silva complaint at the time it was filed, neither party has sufficiently demonstrated that it has been prejudiced by not receiving notification of the complaint until the time of the issuance of the OIG Report. As stated above, Sandia contends that between the time when the investigation of Mr. Silva's complaint began and the date of the issuance of the OIG Report, Sandia, in the normal course of its business operations, destroyed records. These destroyed records were in the files of an employee named Barbara Boyle (then Barbara Botsford) and included calendars, E-mail files, periodic status reports, correspondence regarding discussions with GTS Duratek management, notes from staff and contractors regarding safety concerns, copies of presentations discussing safety responsibility issues and policies, and handwritten notes relating to discussions with GTS Duratek management on personnel matters. Sandia contends that these destroyed records may have included items necessary to its defense in this matter. Furthermore, Sandia states that it would not have destroyed these records had Sandia received timely notice from DOE that it considered Sandia a party in this proceeding. However, Sandia states in its Motion that the records it destroyed are only "potentially" relevant to this proceeding.

Sandia has not pointed to any particular document or documents it destroyed that it claims are necessary to a proper defense in this matter. While it would have been ideal for Sandia to have received earlier notification of the complaint, Sandia's arguments are too speculative to find prejudice. Without further evidence detailing how specific documents are relevant and germane to this proceeding and an explanation showing how Sandia has been prejudiced through the loss of these documents, I find that Sandia's arguments that it has been prejudiced are conjectural and premature. Accordingly, I do not find that there is good cause to dismiss Sandia as a party in this proceeding. However, Sandia may submit additional evidence prior to the hearing that specifically demonstrates how the loss of certain documents has

prejudiced it. Similarly, Weston has also failed to show how its formal notification of the filing of the complaint at the completion of the investigative phase of this proceeding is prejudicial to it.(1)

As stated above, Weston also contends that it has not been named as a proper party to this proceeding and that the regulations only apply to complaints employees file against their employers. I do not agree with these arguments. The applicable regulations apply to succeeding contractors, such as Weston, in cases involving a complainant who worked for a previous contractor (in this case GTS Duratek) when the complainant alleges that the succeeding contractor would have hired him but for an act of retaliation. Furthermore, where reinstatement of an employee is necessary to restore the employee to the position that he or she would have occupied absent the acts of reprisal, the DOE clearly possesses authority under Part 708 to order such reinstatement by a succeeding contractor, even where the succeeding contractor did not participate in any way in the acts of reprisal. [Daniel L. Holsinger](#), 25 DOE ¶ 87,503 at 89,015 (1996).(2) In this case, the OIG Report found by a preponderance of the available evidence that the complainant's prior employment termination and protected disclosures contributed to Weston not hiring him and that this constituted an act of reprisal. Under these circumstances, I do not find that good cause exists to remove Weston as a party in this proceeding.(3) Finally, I note that since Mr. Silva was never an employee of Weston, the regulations do not require that Mr. Silva exhaust Weston's internal complaint procedures. See 10 C.F.R. Section 708.6 (1992) (amended effective April 14, 1999). However, even at this juncture in time, nothing precludes Weston from attempting to resolve issues between Weston and Mr. Silva using internal company grievance procedures.

It Is Therefore Ordered That:

- (1) The Motion to Dismiss Sandia Corporation filed on June 22, 1999 is hereby denied.
- (2) The request Roy F. Weston, Inc. filed on July 15, 1999 to remove it as a party in this proceeding is hereby denied.
- (3) 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.

Leonard M. Tao

Hearing Officer

Office of Hearings and Appeals

Date: August 23, 1999

(1) Weston had informal notice of the complaint. In fact, Weston's employees cooperated with the DOE during the investigation. Thus, I believe it is safe to assume that Weston's management had notice of the complaint.

(2) For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the preamble to this version of Part 708 states that the goal of the DOE regulations is to restore the employee to the position to which he or she would otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. 57 Fed. Reg. at 7539; see, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851; Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b)(4)(B). Section 708.10(c)(3) (1992) (amended effective April 14, 1999) of this version of the regulations provides that the Initial Agency Decision may contain an order for interim relief, "including but not limited to reinstatement, pending the outcome of any request for review."

(3) My findings in this case would not be any different if I had considered the issues both parties raised under the regulations that went into effect in April 1999.