

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Wendy L. Warren)		
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Filing Date: June 15, 2012)	Case No.:	WBA-12-0001
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Issued: December 20, 2012

Decision and Order

This Decision considers an Appeal of a Dismissal issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on May 31, 2012, of a Complaint filed by Wendy L. Warren (the Appellant or Ms. Warren) against her former employers, MS Technology, Inc. (MS), and B&W Y-12, L.L.C. (B&W) under the DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, the Appellant alleges that MS and B&W terminated her employment after she reported fraud, gross mismanagement, gross waste of funds, and abuse of authority. As set forth in this Decision, I have determined that the Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE’s Contractor Employee Protection Program was established to safeguard “public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse” at DOE’s government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). Its primary purpose is 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.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including “disclosing to a DOE official, . . . any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any high tier contractor, information that [the

employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.” 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a “statement specifically describing the alleged retaliation” and “the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation.” 10 C.F.R. § 708.12.

B. Factual Background

In 2006, the Appellant began working for MS providing video services to B&W at the DOE’s Y-12 facility in Oak Ridge, Tennessee. Complaint Timeline Attachment at 1. In July 2010, she began questioning the timekeeping practices of her supervisor, John Buck. *Id.* Sometime during the week of July 19, 2010, the Appellant alleges that she told a co-worker,^{1/} Casey Guinan, “he is never here,” referring to John Buck. *Id.* On July 22, 2010, the Appellant received an email from John Buck stating that the office was going to begin cross-training her and another employee on various responsibilities. *Id.* The Appellant asserts that she subsequently met with Michael Shepherd, John Buck’s supervisor, sometime during the week of July 26, 2010, to let Mr. Shepherd know she could no longer work with John Buck. *Id.* The Appellant does not allege in her Complaint that she told Mr. Shepherd on July 26, 2010, about her concerns regarding Mr. Buck’s timekeeping practices. *Id.* Mr. Shepherd purportedly told Ms. Warren of his belief that her working relationship with Mr. Buck could be repaired. *Id.*

On August 15, 2010, the Appellant applied for three positions with B&W. *Id.* at 2. These three positions all reported to John Buck. On August 31, 2010, she requested to be transferred to a new supervisor so she would not be working for Mr. Buck. *Id.* The Appellant claims that on August 31, 2010, and again on September 8, 2010, Mr. Buck asked her if she still wished to apply for the three B&W positions knowing that he would be the supervisor for all these positions. *Id.* at 2, 3. On September 8, 2010, Ms. Warren told Mr. Buck that she believed that she could work with him. *Id.* at 3. Also on that date, Ms. Warren met with the manager of the Y-12 Office of Employee Concerns (OEC) regarding “the intimidating situation,” but provided no specific details about the matter to OEC. *Id.* at 3. Michael Shepherd, John Buck, Casey Guinan, and John Ridley^{2/} interviewed the Appellant for all the vacant positions at B&W on September 20, 2010. *Id.* at 3. She was not selected for any of the positions.

At some point in early 2011, the Appellant began working for Casey Guinan. *Id.* at 4. According to the Appellant, Casey Guinan and Michael Shepherd began questioning her hours in

^{1/} In the dismissal, the Investigator refers to Mr. Guinan as a B&W supervisor. Dismissal Letter dated May 31, 2012, from Richard A. Cronin, Investigator, OHA, to Appellant. In the Complaint, the Appellant refers to him as a co-worker. Complaint at 4.

^{2/} Mr. Ridley is referred to as Mr. Buck’s supervisor in a number of places.

February 2011. *Id.* at 4. During March 2011, the Appellant was assigned only minimal work and her work hours were reduced. *Id.* at 4.

On March 29, 2011, the Appellant contacted the National Nuclear Security Administration's (NNSA) Whistleblower Complaint Officer in Albuquerque, New Mexico, to "get clarification on the paperwork" needed to file a Part 708 Complaint. *Id.* at 6. According to Ms. Warren, the NNSA Whistleblower Complaint Officer told her to print the information regarding any retaliation and take it home with her. *Id.* at 6. On March 30, 2011, the Appellant and her sister, also employed at B&W, entered the Y-12 site at night after hours and printed out emails they needed to support the Appellant's Complaint. *Id.* at 6. On March 31, 2011, the Appellant received a call from MS stating that security at Y-12 urgently wished to meet with her. *Id.* at 6. At that meeting, MS terminated her, citing her unauthorized entry onto the facility on March 30, 2011, as the reason for the action. Subsequently, MS sent her a letter stating she was being terminated for lack of work. *Id.* at 6. On April 14, 2011, the Appellant filed a Complaint of retaliation under Part 708 with the NNSA. *Id.* at 6.

C. Procedural Background

1. Complaint

In her Complaint, the Appellant asserted that she made a protected disclosure by raising Mr. Buck's mismanagement, fraud, and abuse of funds with Mr. Shepherd. Complaint at 1. She also claims that she brought Mr. Shepherd's mismanagement to the attention of the Y-12 OEC. *Id.* at 1. To support her claim with regard to Mr. Buck, she is alleged to have told Casey Guinan that John Buck, "is never here." Complaint Attachment at 3. The Appellant asserted that John Buck retaliated against her by reducing her hours, intimidating her, slandering her name, threatening her career and "discriminated against [her] health." Complaint at 1. She also claims that Mr. Shepherd intimidated her, threatened her career, and abused his authority to end her career on March 31, 2011. *Id.* Finally, she declares that she has "been denied one of three positions at B&W Y-12, one of which I was the only person on site that was qualified for that position." *Id.*

2. Dismissal

In a letter dated May 31, 2012, the OHA Investigator assigned to investigate Ms. Warren's Complaint dismissed the Part 708 action. The Investigator found that the Appellant's Complaint and her subsequent Response only alleged that she complained that Mr. Buck was never at work. The Investigator found this was not a protected disclosure as described in section 708.5(a) because it was too vague to meet the regulatory requirements. The Investigator stated, "[o]n its face, the disclosure could just as easily mean that Mr. Buck was not at the same location as [the Appellant] or that Mr. Buck was taking a significant amount of accumulated leave." Dismissal Letter dated May 31, 2012, from Richard A. Cronin, Investigator, to Appellant. He further explained that the Appellant's "current explanation of her belief, as recorded in her Response, illustrates this: she states her belief that Mr. Buck was apparently logging hours for time not worked." *Id.* The Investigator concluded that this disclosure was too vague and unsupported to come within the ambit of Part 708 protection. *Id.* Investigators have the authority to dismiss

cases where a Complainant's alleged disclosure does not rise to the level of a whistleblower protected disclosure. 10 C.F.R. § 708.5. Cf. Dismissal Letter dated December 20, 2010, Case No. TBI-0109.

II. Appeal

On June 15, 2012, an attorney filed an Appeal of the Dismissal on behalf of the Appellant. Appeal Letter dated June 14, 2012, from Wynne du M. Caffey, Ramsey, Elmore, Stone & Caffey, PLLC, attorney for Appellant, to Poli A. Marmolejos, Director, OHA (Appeal Letter). On June 20, 2012, OHA acknowledged receipt of the Appeal and informed Ms. Warren's attorney that she had 15 days in which to file a Statement of Issues. Acknowledgement Letter dated June 20, 2012, from Janet R. H. Fishman, Attorney-Examiner, OHA, to Wynne du M. Caffey, Attorney. On July 5, 2012, after not receiving the Statement of Issues from the attorney, OHA contacted her by e-mail to determine if she would be filing additional information. E-mail dated July 5, 2012, from Janet Fishman, to Wynne Caffey. On July 23, 2012, the Appellant contacted OHA directly and indicated that she was ending the relationship with her counsel and would be representing herself. E-mail dated July 23, 2012, from Wendy Warren to Janet Fishman. In that e-mail, she asked for additional time in which to submit her Statement of Issues. *Id.* She was granted an extension until August 7, 2012, which she then asked to extend to August 10, 2012. E-mail dated August 6, 2012, from Wendy Warren to Janet Fishman.

On August 10, 2012, the Appellant filed her Statement of Issues pursuant to 10 C.F.R. § 708.33. In the Statement, the Appellant claims that she met with the OEC manager on September 8, 2010, and told him "that there was fraud, specifically time card fraud,^{3/} being committed by B&W Y-12 employee John Buck." Statement at 1. The Appellant also claims that she had notified Michael Shepherd of the alleged fraud in July 2010. *Id.* at 2. She argues that B&W's claim that no one knew she was reporting fraud until March 9, 2011, does not disprove that she was retaliated against or John Buck was committing time card fraud, but it does prove that Michael Shepherd was negligent in addressing the time card fraud matter. *Id.* at 2.

In her Statement, the Appellant accuses Casey Guinan of telling John Buck that she was questioning his timekeeping. *Id.* at 2. She stated that it was at this point that John Buck began retaliating against her.^{4/} *Id.* She contends that Michael Shepherd's flexible supervision of John Buck allowed Mr. Buck to commit time card fraud. *Id.* The Appellant claims that Mr. Buck was catering and attending to family issues instead of working his assigned hours. *Id.* She claims that after July 2010, when she brought the issue to Michael Shepherd's attention, he "acted as

^{3/} The Appeal is the first time she referred to the issue she reported as "time card fraud." Appeal at 1. In response to the Complaint, B&W referred to the issue as time card fraud. Response Letter dated June 8, 2011, from Darrel P. Kohlhorst, President General Manager, B&W, to Michelle Rodriguez de Varela, Whistleblower Program Manager, NNSA/SC. However, Ms. Warren did not allege time card fraud in her Complaint.

^{4/} The Appellant also claims that her sister, who worked at B&W, may have been subjected to sexual harassment. Appeal at 2. This is not the proper forum for such a claim made on behalf of another individual.

though to protect his own career, dismissing my claims and terminating my employment.” *Id.* Nowhere in the Statement does she explain the basis for her accusation against Mr. Shepherd, or provide information that would suggest she had a reasonable belief for her allegations.

The Appellant maintains that B&W’s excuse for terminating her employment, *i.e.*, that she entered the Y-12 site without authorization after hours, is unfounded. She claims that “[a]t no point during my employment at B&W was I told not to enter the site.” Statement at 2-3. She claims that the OEC manager had previously advised her to gather documents relevant to her Complaint. *Id.* at 3. Therefore, she could not be guilty of “removal of government property.” *Id.*

Further, the Appellant states that Michael Shepard, Casey Guinan, John Buck, and John Ridley, all of whom were responsible for hiring for the permanent position for which she had applied, were aware that she had reported fraud about Mr. Buck’s alleged timekeeping irregularities. Statement at 3. She does not dispute B&W’s claim, however, that the company hired applicants more qualified than her. *Id.*

Finally, the Appellant concludes that the Investigator’s dismissal of her Complaint was erroneous. Statement at 3. She continues that “I have first-hand knowledge of Mr. Buck’s whereabouts and he was indeed spending time, for which he was being paid, pursuing his own personal interests. The respondents have not proven otherwise.” *Id.* She stated that she reported the fraud to supervisory personnel and was subsequently terminated. *Id.* She alleges that B&W has done nothing more than deny the allegations. *Id.*

III. B&W’s Response to the Appeal

On August 30, 2012, we received B&W response to the Statement of Issues. E-mail dated August 30, 2012, from Kristi McKinney, Stogsdill, B&W, to Janet Fishman, OHA. In that response, B&W contends that the Appellant’s

continued insistence that she be allowed to prove that John Buck misrepresented the time he worked misses the point of Part 708. Part 708 protects employees against retaliation after those employees expose specific, defined abuses. [The Appellant’s] bemoaning that Mr. Buck was not available, that she didn’t like him, and that she couldn’t work with him are not protected disclosures.

Response Letter dated August 30, 2012, from Kristi McKinney Stogsdill, B&W, to Poli A. Marmolejos, Director, OHA. B&W states that no one at B&W was aware of the Appellant’s September 8, 2010, meeting with the OEC manager or the personal information regarding Mr. Buck’s whereabouts when he was supposed to be working at Y-12. *Id.* at 1-2. B&W finds it “both puzzling and telling” that the Appellant did not provide this information in her Complaint. *Id.* at 1-2.

IV. Analysis

Using the standards set forth in our other Part 708 appeal cases, the standard of review for appeals is well-established. Conclusions of law are reviewed *de novo*. See *Curtis Hall*, Case No. TBA-0002 at 5 (2008). Findings of fact, however, are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of the witness. *Id.*; *Salvatore Gianfriddo*, Case No. VBA-0007 (1999).

In her Appeal, the Appellant states that she met with the OEC manager at Y-12 about “time card fraud.” Yet in her initial Complaint, she states that she met with the OEC manager in reference to an unspecified “intimidating situation” and that, at that time, she stated her concern that she would not get a fair job interview based on the fact that three of the four people interviewing her were John Buck, Michael Shepherd, and Casey Guinan. Complaint Submission Timeline at 3; Complaint at 11. Nowhere in her Complaint or the record, prior to the Statement of Issues submitted to support this Appeal, did the Appellant claim that she had told the OEC manager about “time card fraud.”^{5/} It appears that she is attempting to recharacterize her meeting with the OEC manager to more fully support her Part 708 Complaint.

In her Appeal, the Appellant claims that she brought time card fraud directly to Michael Shepherd’s attention in July 2010. Statement at 1. In the Complaint, the Appellant stated that “I said to Mike Shepherd ‘I cannot work with John Buck.’ I said this because I wanted away from John Buck but I was too afraid to tell him *what really was happening*.” Complaint at 5 (emphasis added). She cannot now claim in this Appeal, that she told Mr. Shepherd about Mr. Buck’s alleged time card fraud in July 2010, having already admitted that she failed to disclose the reason for her request not to work with Mr. Buck. Statement at 1. As with the meeting with the OEC manager, there is nothing in the file to support this claim. We find that this is only an attempt to recharacterize information in an attempt to strengthen her Appeal.

We have reviewed the entire record in this case. As the Investigator indicated in the Dismissal, the Appellant’s Complaint and her subsequent response “allege only that [the Appellant] complained that her supervisor was never at work.” Dismissal Letter at 1. The Investigator found this allegation to be too vague to trigger Part 708 protection. *Id.* at 2. In her Appeal, the Appellant attempts to strengthen her claim by using the words “time card fraud.” In addition, she claims that she told the OEC manager of the “time card fraud” in September 2010 and Mr. Shepherd in July 2010. We find that the Investigator correctly relied on the information before him in dismissing the Complaint. The Appellant cannot now re-plead her case to make it fit within the regulatory scheme.

In the end, we find that the Appellant has not presented any evidence to show that the Investigator made a clearly erroneous factual error or erred in his legal conclusion. Based on the foregoing, we affirm the Investigator’s May 31, 2012, finding that the Appellant did not clearly articulate a protected disclosure, and therefore, the claims raised in the Appellant’s Complaint

^{5/} The Appellant states that she raised questions about Mr. Buck’s timekeeping practices with a co-worker, Casey Guinan, in July 2010. Mr. Guinan did not become the Appellant’s supervisor until February 2011. Her disclosure in July 2010 to a co-worker would not be covered under Part 708.

are too vague and unsupported, as a matter of law, to support Part 708 protection. Accordingly, we must deny the instant Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Wendy L. Warren (Case No. WBA-12-0001) is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 20, 2012