

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Ed Boettcher)
)
Filing Date: April 14, 2014)
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Case No.: WBU-14-0008

Issued: April 28, 2014

Decision and Order

Ed Boettcher (the Appellant) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.¹ As explained below, we will grant the Appeal.

I. Background

The Appellant was employed as a maintenance electrician working for Washington River Protection Solutions (WRPS) at the DOE's Hanford Nuclear Reservation site since October 2008. The Appellant alleges that, while employed at WRPS, he made several protected disclosures concerning worker health and safety and, as a result of these disclosures, he was terminated from his position by WRPS on October 16, 2013.²

The Appellant filed a complaint of retaliation under Part 708 (Complaint) with Roger Gordon, DOE Hanford Site Employee Concerns Manager and Kevin Smith, Manager (ORP Manager), DOE Office of River Protection (ORP). In a letter dated April 2, 2014, the ORP Manager dismissed the Appellant's Complaint for lack of jurisdiction or good cause pursuant to 10 C.F.R. §§ 708.4 and 708.17. Specifically, the ORP Manager found that dismissal was appropriate under 10 C.F.R. § 708.4(b) because the Appellant's termination allegedly resulted from his own willful misconduct in deliberately contaminating a co-worker. April 2, 2014, Dismissal Letter at 1 (Dismissal Letter). Additionally, to further justify his dismissal of the Appellant's Complaint, the

¹ The Office of Hearings and Appeals (OHA) reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. *See* 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why you [the Appellant] think the dismissal was erroneous).

² In response to the Appellant's allegations, WRPS asserts that the Appellant had been terminated for attempting to contaminate a co-worker with powder located on the floor of their workplace. WRPS Response to Appellant's Complaint at 1; October 15, 2013, Disciplinary Review Summary Report.

ORP Manager determined that 10 C.F.R. § 708.17(c)(3) prevented further consideration of the Appellant's Complaint because the Appellant was simultaneously pursuing a union grievance procedure regarding his termination. Dismissal Letter at 1.

II. Analysis

A. Propriety of Dismissal Pursuant to Section 708.4

Section 708.4 states, in relevant part, that an employee may not file a whistleblower complaint involving "misconduct that you, acting without direction from your employer, deliberately caused, or in which you knowingly participated." 10 C.F.R. § 708.4(b).

In his dismissal letter, the ORP Manager cited the fact that WRPS discharged the Appellant based upon WRPS's determination that the Appellant deliberately attempted to contaminate a co-worker with an unknown powder lying on the floor of the site where they were working. Dismissal Letter at 1; February 7, 2014, Letter from Sandra H. Kent, Senior Counsel, WRPS, to Roger Gordon, Manager, DOE Hanford Site Employee Concerns Manager. However, the ORP Manager has misconstrued the meaning of Section 708.4. Section 708.4 bars complaints citing deliberate misconduct *as a protected disclosure or activity*. See 57 Fed. Reg. 7533-02 (March 3, 1992) (prior version of current Section 708.4, designated Section 708.2, stating that "the protections afforded by this part are not applicable to any employee who, acting without direction from his or her employer, deliberately causes, or knowingly participates in the commission of, any misconduct set forth in § 708.5 *that is the subject of the disclosure*"). In the present case, the subject of the Appellant's *disclosure* relates to alleged worker health and safety issues and not the alleged misconduct WRPS has cited as grounds for the Appellant's termination. Consequently, Section 708.4 does not bar consideration of the Appellant's Complaint. Rather than a basis for dismissing the complaint at this juncture, the alleged misconduct cited by WRPS should appropriately be considered in the context of WRPS's burden to show that it had clear and convincing reasons for terminating the Appellant, if the Appellant is initially successful in carrying his burden to show that he made a protected disclosure that was a contributing factor to his termination. See 10 C.F.R. § 708.29.

B. Dismissal Pursuant to Section 708.17(c)(3)

Section 708.17 provides that whistleblowers may not pursue similar whistleblower complaints in multiple forums. Specifically, Section 708.17 states that a complaint may be dismissed for lack of jurisdiction or other good cause if the whistleblower has "filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation [Part 708]." 10 C.F.R. § 708.17(c)(3). The ORP Manager noted that the Appellant was, in addition to his Complaint, simultaneously pursuing a union grievance against WRPS regarding his dismissal. Consequently, the ORP Manager found that under Section 708.17(c)(3), he had sufficient grounds to dismiss the Appellant's Complaint.

In his Appeal, the Appellant asserts that 150 days have expired since he filed his grievance and that no final decision has been issued. Thus, as a result, the Appellant argues that he should be deemed to have exhausted his administrative remedies and his grievance is now terminated. We

agree. Part 708's Section 708.13 specifies that grievance procedures are deemed as completed if 150 days have elapsed and no final decision has been issued on the merits. Consequently, the Appellant's grievance is no longer extant for purposes of Part 708 and thus is no longer a bar to the processing his Complaint under Part 708.

In sum, neither of the regulatory provisions cited by the ORP Manager, Sections 708.4 nor 708.17(c)(3), are applicable to support his dismissal of the Appellant's Complaint. Consequently, we will grant the Appellant's Appeal.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Ed Boettcher, Case No. WBU-14-0008, is hereby granted and his Part 708 complaint is hereby remanded to the Office of River Protection, Hanford, Washington, for further processing as set forth at 10 C.F.R. Part 708 as set forth above.

(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: April 28, 2014