

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Dr. Paul M. Cole, Ph.D)

Filing Date: October 21, 2013)

Case No.: WBU-14-0011

Issued: November 3, 2014

Decision and Order

Dr. Paul M. Cole, Ph.D (Dr. Cole), a former Oak Ridge Institute for Science Education (ORISE) fellow at the Department of Defense's (DOD) Joint POW/MIA Accounting Command (JPAC) at Hickam Air Force Base, Hawaii, appeals the dismissal of a whistleblower complaint that he filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The DOE Oak Ridge Office's (ORO) Diversity Programs and Employee Concerns Manager dismissed his complaint on September 30, 2014. As explained below, ORO's dismissal of the Complaint is upheld, and the Appeal is denied.

I. Background

The DOE's Contractor Employee Protection Program (CEPP) 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 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the CEPP are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a 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. In reviewing cases such as this, we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist, OHA Case No. TBZ-0080*, at 5 n. 13 (May 7, 2009) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

Dr. Cole served as a research participant with the Research Participation Program (RPP) for the DOD's JPAC. The RPP was managed by the Oak Ridge Associated Universities (ORAU), a private non-profit DOE contractor. Notice of Dismissal at 1. On July 15, 2014, Dr. Cole filed an 18-page complaint (the Complaint) with ORO's Diversity Programs and Employee Concerns Manager.

On September 30, 2014, ORO dismissed the Complaint, finding that it did not have jurisdiction to consider the Complaint under 10 C.F.R. Part 710, because Dr. Cole was not a contractor employee, as set forth in 10 C.F.R. Part 708.2. Notice of Dismissal at 1. Dr. Cole filed the present Appeal on October 21, 2014.

II. Analysis

The CEPP regulations provide that ORO's Diversity Programs and Employee Concerns Manager *may* dismiss a complaint for "lack of jurisdiction or for other good cause . . ." 10 C.F.R. § 708.17. The CEPP regulations specifically provide: "Employee means a person *employed by a contractor*, and any person *previously employed by a contractor* if that person's complaint alleges that employment was terminated ..." 10 C.F.R. § 708.2 (emphasis supplied). The CEPP regulations define "contractor" as "a seller of goods or services who is a party to: (1) A management and operating contract or other type of contract with DOE to perform work *directly related to activities at DOE-owned or -leased facilities*, or (2) A subcontract under a contract of the type described in paragraph (1) of this definition, *but only with respect to work related to activities at DOE-owned or -leased facilities*." 10 C.F.R. § 708.2 (emphasis supplied).¹ DOE's intention to limit Part 708 protection to employees conducting work at DOE-owned or DOE-leased facilities is further corroborated by the text of 10 C.F.R. § 708.3, which is entitled: "What employee complaints are covered?" That regulation states: "This regulation applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation, or refusal described in § 708.5." 10 C.F.R. § 708.3. The record shows that Dr. Cole was clearly not employed at, or working on "work related to activities at DOE-owned or DOE-leased facilities," but rather was deployed at a DOD facility, where he worked on DOD activities. DOE has explicitly and unambiguously limited jurisdiction under the CEPP regulations to "employees" conducting work directly related to activities at DOE-owned or DOE-leased facilities. Accordingly, we find that Dr. Cole is not covered by the Part 708 regulations. Therefore DOE has no jurisdiction over his Complaint. For this reason, we must deny his Appeal.

III. Conclusion

As stated above, Dr. Cole is not an "employee" as defined in 10 C.F.R. § 708.2. DOE therefore lacks jurisdiction over Dr. Cole's Complaint and must therefore deny the Appeal.

¹ In 1999, DOE modified the employee coverage in §§ 708.2 and 708.3 by eliminating the requirement that to be eligible for protection under this rule, complainants must be employed by contractors performing work on sites that DOE owns or leases. The amended regulations cover employees of contractors performing work directly related to activities at DOE-owned or -leased sites, even if the contractor is located, or the work is performed, offsite. 64 FR 12863, 12865-12866 (March 15, 1999).

It Is Therefore Ordered That:

(1) The Appeal filed by Dr. Paul M. Cole, Ph.D (Case No. WBU-14-0011) 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: November 3, 2014