United States Department of Energy
Office of Hearings and Appeals

In the Matter of Erik DeBenedictis	)	
	)	
Filing Date: November 6, 2020	)	Case No.: WBA-20-0003
	)	
_____	)	

Issued: December 16, 2020

_____

Decision and Order

_____

This Decision concerns the appeal (Appeal) by Erik DeBenedictis (Appellant) of an initial agency determination (IAD) by the United States Department of Energy's (DOE) Office of Hearings and Appeals (OHA). The IAD denied Appellant's complaint of retaliation against his former employer, National Technology and Engineering Solutions of Sandia, LLC (NTESS), under DOE's Contractor Employee Protection Program regulations codified at Part 708 of Title 10 of the Code of Federal Regulations (Part 708). Appellant challenges an OHA Administrative Judge's conclusion that he did not make protected disclosures under Part 708. For the reasons set forth below, Appellant's appeal is denied.

I. The DOE Contractor Employee Protection Program

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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 3, 1992). Its primary purpose is 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 Part 708 regulations prohibit DOE contractors from retaliating against an employee because that employee has engaged in protected activity, such as disclosing information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation, a substantial and specific danger to employees or to public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with DOE and are entitled to an investigation by an investigator assigned by the Office of Hearings and Appeals (OHA),

followed by a hearing conducted by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.22, 708.28, 708.32.

An employee who files a complaint has the burden of establishing by the preponderance of the evidence that he or she engaged in protected activity, as described in 10 C.F.R. § 708.5, and that the employee's protected activity was a contributing factor in one or more alleged acts of retaliation by the contractor against the employee. 10 C.F.R. § 708.29. If the employee meets that burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected activity. *Id.*

II. Factual and Procedural Background

Appellant is a computer engineer formerly employed by NTESS. Appeal at 2; NTESS Response at 1. During the course of his employment, Appellant conceived of two quantum computing-related inventions. *Erik DeBenedictis*, OHA Case No. WBH-20-0003 at 2 (2020). Appellant submitted two Technical Advance (TA) notices to NTESS notifying them of his inventions. *Id.* Appellant marked several of his TA notices' supporting documents related to quantum computing as "export controlled." Ex. 7 at 19.[1]

On January 31, 2019, Appellant sent an e-mail to NTESS management personnel requesting an intellectual property (IP) waiver and attached a screenshot of files on his personal computer "showing the relevant document under development." *Id.* at 21. A short time later that same day, Appellant's manager, Mr. John Wagner, sent him an e-mail in which he directed Appellant to "[p]lease call SIMP [Security Incident Management Program] right away and self-report that your management is concerned that you might have sensitive documents at home or on your home computer. This might include OUO [Official Use Only] and/or export controlled information." Ex. S at 2. Appellant responded to Mr. Wagner's e-mail later that day and observed that he did not believe that management understood the situation correctly, and opined that he was "perfectly entitled to have export-controlled information at home," but acknowledged that "OUO depends on the category," and suggested that "[i]f management is concerned but I am not, management should call SIMP." *Id.* at 1.

Mr. Scott Collis, a senior management official, subsequently reported to SIMP that Appellant could have sensitive documents stored on his personal computer. Hearing Transcript (Tr.) at 87. On February 4, 2020, Ms. Jessica Vanderburg, an "Inquiry Official" with SIMP, notified Appellant that SIMP had been informed that he might have "Export Controlled Information [] residing on [his] personal home computing system." Ex. 7 at 14. Ms. Vanderburg subsequently requested that Appellant provide her with copies of the documents shown in the screenshot that led to Mr. Collis' referral. *Id.* at 10. The extent of Appellant's cooperation with SIMP is disputed, but there is no

[1] Appellant argues that he did so at the direction of Mr. John Aidun, a manager and the derivative classifier for the TAs. Appeal at 3–4. During the hearing, Appellant testified that when he marked the supporting documentation as export controlled, he "didn't believe it was export controlled, but I had a reason to be cautious." Tr. at 397.

dispute that Appellant never provided the documents to Ms. Vanderburg. Appeal at 6; Response at 2–3.

On February 25, 2019, Appellant sent an e-mail to NTESS Vice President Susan Seestrom in which he alleged that Mr. Collis had submitted a "false SIMP report against me, tied to a false derivative classification . . . ." *Erik DeBenedictis*, OHA Case No. WBH-20-0003 at 4 (2020).[2] Appellant further alleged that he had "an ongoing issue or disagreement with [] management related to IP ownership . . . [and] management is re framing [sic] the IP issue by turning SIMP and derivative classification into tools of intimidation against me to achieve goals unrelated to the government's purposes for those programs." *Id*. According to Mr. Collis, he recognized from the screenshot some files associated with the TA notices Appellant submitted to NTESS, and inferred from the names of other files revealed in the screenshot that they concerned quantum computing. Tr. at 34–35. Mr. Collis believed that there was a high probability that Appellant's personal computer contained sensitive information "because some versions of these files contained information that was regarded by the quantum information systems and sciences program at Sandia to be sensitive." *Id.* at 35.[3]

NTESS terminated Appellant's employment on July 24, 2019, and indicated that Appellant's refusal to cooperate with the SIMP review was one of the bases for his termination. *Id*. Appellant subsequently filed a Part 708 complaint alleging that NTESS's decision to terminate his employment was retaliation for his disclosing gross mismanagement and an abuse of authority by NTESS management. Following an investigation by an OHA investigator, this matter was assigned to an OHA Administrative Judge. On May 18, 2020, the Administrative Judge issued an order granting NTESS summary judgment with respect to Appellant's alleged disclosure of gross mismanagement. *Erik DeBenedictis*, OHA Case No. WBZ-20-0003 (2020).[4]

On October 22, 2020, the Administrative Judge issued the IAD denying Appellant's complaint. In the IAD, the Administrative Judge found that Appellant's disclosure to Ms. Seestrom was not the

[2] Appellant alleges that hand-written annotations on a memorandum issued to him by Mr. Wagner, which Appellant returned to Mr. Wagner in March 2019, "become a second part of the protected disclosure." Appeal at 13. Appellant cited the memorandum in his complaint as evidence of management's intentions, but did not identify the annotations as a protected disclosure. Complaint at 3. As Appellant did not allege this disclosure in his complaint, nor is there any discussion of this allegation in the IAD, I will not consider it in this decision.

[3] The Administrative Judge characterized Mr. Collis' testimony as indicating that he believed that Appellant's personal computer contained "sensitive NTESS information." *Erik DeBenedictis*, OHA Case No. WBH-20-0003 at 3 (2020). Appellant points out in his Appeal that Mr. Collis' testimony actually concerned "U.S. government property" and asserts that this error was "key to the issue addressed in this part of the decision." Appeal at 3. While the Administrative Judge's characterization of Mr. Collis' testimony was inaccurate, I see no indication that the error significantly affected the Administrative Judge's analysis of Mr. Collis' knowledge and motives when he referred Appellant to SIMP. Thus, I find that the mischaracterization was not a reversible error.

[4] Gross mismanagement is "a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Fred B. Hua*, OHA Case No. TBU-0078 at 2 (2008) (quoting *Roger Hardwick*, OHA Case No. VBA-0032, 27 DOE P 87,539 (1999)). Appellant's Appeal does not address how, if at all, NTESS's actions could adversely impact DOE's ability to accomplish its mission, and accordingly I need not address the Administrative Judge's findings in the summary judgment order.

disclosure of an abuse of authority under Part 708 because Appellant failed to prove that he reasonably believed NTESS acted arbitrarily or capriciously when it referred him to SIMP or that the referral adversely affected his rights or resulted in personal gain or advantage to another. *Erik DeBenedictis*, OHA Case No. WBH-20-0003 at 5–8 (2020).

On November 6, 2020, Appellant filed a notice indicating that he wished to appeal the IAD. On November 23, 2020, Appellant submitted his appeal. On December 11, 2020, NTESS filed its response in which it requested that OHA deny Appellant's appeal.

III. Analysis

On an appeal of an initial agency determination under the Part 708 regulations, the underlying conclusions of law are reviewed *de novo* and the underlying conclusions of fact are only reversed if they are clearly erroneous. *See Denise Hunter*, OHA Case No. WBA-12-0004 at 6 (2014) (citing *Curtis Hall*, OHA Case No. TBA-0042 at 5 (2008)). However, the appellant initiating the appeal is responsible for identifying the issues that it wishes the OHA Director to review. 10 C.F.R. 708.33(a).

In order to show that he or she has disclosed an abuse of authority, an employee must show that they reasonably believed that they disclosed: (1) an arbitrary or capricious exercise of power by an official or employee; and, (2) the exercise of power either (a) adversely affected the rights of any person or (b) resulted in personal gain or advantage to the official or employee, or to preferred other persons. *Sherrie Walker*, OHA Case No. WBA-13-0015 at 17 (2014). The Administrative Judge concluded that Appellant's belief that his referral to SIMP was arbitrary and capricious was not a reasonable belief because Appellant "had adequate information to conclude that NTESS had a legitimate basis to refer him to SIMP." *Erik DeBenedictis*, OHA Case No. WBH-20-0003 at 6 (2020). The Administrative Judge noted that Appellant's belief that Mr. Collis had ulterior motives for the referral was not supported by evidence. *Id.* at 6–7. Furthermore, the Administrative Judge concluded that Appellant failed to prove that his rights were adversely affected by the referral, or that Mr. Collis' referral benefited himself or another favored person. *Id.* at 7–8.

Appellant argues that, when he made his disclosure to Ms. Seestrom, he reasonably believed that Mr. Collis had acted arbitrarily or capriciously when he referred him to SIMP, and that the referral exposed Appellant to coercion, potential loss of rights in connection with the inventions described in his TA notices, and possible future adverse consequences resulting from the record of his non-compliance with SIMP. Appeal at 14–17. Thus, Appellant argues that the Administrative Judge made an error of law when he concluded that Appellant's disclosure to Ms. Seestrom was not protected under Part 708.

The central issue on appeal is whether Appellant reasonably believed on February 25, 2019, when he made his disclosure to Ms. Seestrom, that Mr. Collis' decision to refer him to SIMP was an abuse of authority. As noted above, an abuse of authority is an arbitrary or capricious act that adversely affects the rights of a person or results in personal gain to the decision maker or preferred persons. *Sherrie Walker*, OHA Case No. WBA-13-0015 at 17 (2014). An action is arbitrary or capricious if the decision maker has relied on inappropriate factors, failed to consider an important

aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of relevant expertise. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (listing relevant factors in determining whether an agency's action is arbitrary or capricious under the Administrative Procedure Act). Whether a decision is arbitrary or capricious is generally determined based on the information that the decision maker possessed at the time of the decision. *See AugustaWestland N. Am., Inc. v. U.S.*, 880 F.3d 1326, 1331 (Fed. Cir. 2018) (finding that the administrative record which formed the basis for an agency decision should not be supplemented except where a court could not conduct effective judicial review without doing so). Thus, in order to show that his disclosure was protected under Part 708, Appellant must show that he reasonably believed that Mr. Collis' decision to refer him to SIMP suffered from a critical defect at the time that Mr. Collis made the decision.

In his Appeal, Appellant attempts to frame the test to his advantage by considering whether Mr. Collis acted reasonably in light of what Appellant knew about the files on his computer, instead of basing it on Mr. Collis' knowledge. According to Appellant, "the issues for OHA are (1) could I, at the time, have reasonably believed that what Ms. Vanderburg heard from Mr. Collis was false, and (2) now that we have all the information, was I arguing with Mr. Collis or disagreeing with the information Ms. Vanderburg heard from Mr. Collis?" Appeal at 6. Appellant goes on to argue that he created all of the documents captured on the screenshot that led to his referral to SIMP, that only DOE documents are export controlled, and thus that Mr. Collis' referral was arbitrary and capricious. *Id.* at 5–9; Ex. 1. This approach is not supported by any authority.

Mr. Collis was copied on Mr. Wagner's January 31, 2019, e-mail in which Mr. Wagner expressed the concern that Appellant might have "sensitive documents" on his home computer. Ex. S at 2. Mr. Collis was also copied on Appellant's response to Mr. Wagner's e-mail in which Appellant suggested that "[i]f management is concerned but I am not, management should call SIMP." *Id.* at 1. Mr. Collis testified during the hearing that he believed that "certain versions of those files . . . had been evaluated back . . . in January as being sensitive," and that he had concerns "that some of those versions [on Appellant's home computer] could very well be sensitive . . . ." Tr. at 87. Mr. Collis further testified that he felt that he was required to raise his security concerns under applicable security policies. *Id.* at 94–95, 98. Mr. Wagner corroborated Mr. Collis' concerns in his testimony, and indicated that his request to Appellant to self-report to SIMP was not unusual. *Id.* at 310. Rather, Mr. Wagner testified that, based on his belief that managers were required to address these concerns, he had asked employees to self-report to SIMP "quite a number of times, and in every case, you know, the employee did that, and the outcome turned out to be, you know, a nonincident." *Id.* at 312.

The record evidence shows that Mr. Collis promptly raised security concerns to SIMP after receiving a screenshot of files on Appellant's home computer. *Supra* p. 2. Appellant has not shown that a referral to SIMP is an unusual occurrence, nor provided compelling evidence that Mr. Collis did not actually believe that he was reporting a *bona fide* security concern. Moreover, Appellant's e-mail of January 31st, indicating that "management should call SIMP" if they had concerns about the files on his computer, strongly suggested that he did not consider the possibility of management contacting SIMP unthinkable or inappropriate under the circumstances. Ex. S at 1. Appellant's

Appeal acknowledges that, had Mr. Collis reported him to SIMP based on having OUO or sensitive documents on his computer instead of export-controlled documents, SIMP "would have taken other actions and this case may have turned out very differently." Appeal at 9. This statement from Appellant effectively acknowledges that NTESS management would not have been without cause to harbor concerns about the information on Appellant's home computer. However, rather than inferring that Mr. Collis made a mistake in referring to export control instead of OUO when he made the referral to SIMP, or that Mr. Collis genuinely believed that the documents were export controlled because he did not know the full contents of a list of documents he had not seen, Appellant instead inferred that Mr. Collis was part of a conspiracy to deprive him of his IP rights. *Id.* at 14–16.[5] Appellant's logic is not sufficiently supported in the record for me to conclude that Appellant had a reasonable belief that Mr. Collis' actions were arbitrary or capricious.

For these reasons, I find that the Administrative Judge properly concluded that Appellant had no reasonable basis to believe that Mr. Collis reporting him to SIMP was an abuse of authority, and therefore that Appellant failed to establish a protected disclosure under Part 708.

III. Conclusion

Appellant has not established that the Initial Agency Decision was based on a legal defect or clearly erroneous finding of fact. Accordingly, the determination of the Administrative Judge is affirmed.

It Is Therefore Ordered That:

(1) The appeal filed by Erik DeBenedictis, Case Number WBA-20-0003, is denied.

(2) This 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, pursuant to 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

[5] Appellant alleges that a memorandum issued to him on February 28, 2019, in which Mr. Wagner provided management's expectations on a number of issues related to Appellant's performance and disputes with management, was related to management's intention to use SIMP to compromise his IP rights. Appeal at 15. Mr. Wagner noted in the memorandum that Appellant's cooperation with the SIMP review would "enable an accurate determination of ownership." Ex. F at 3. Mr. Wagner testified at the hearing that this reference to ownership had nothing to do with Appellant's IP dispute, but rather was intended to spur Appellant to provide the documents to SIMP to determine whether or not they were export controlled. Tr. at 316–17. Mr. Wagner's testimony is consistent with the use of the word "ownership" in the context of the memorandum, and in any case, a memorandum authored on February 28th could not shed light on the reasonableness of the disclosure that Appellant made on February 25th.