

HOWARD W. SPALETTA, Complainant

v.

EG&G IDAHO, INC., Respondent.

OHA Case No. LWA-0010

FINAL DECISION AND ORDER

This is an appeal by complainant Howard W. Spaletta from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA") finding that the complainant, an engineer formerly employed by EG&G Idaho, Inc. (EG&G), previously the DOE's management and operating contractor at the Idaho National Engineering Laboratory (INEL), had established by a preponderance of the evidence that he suffered reprisal as a result of his protected safety disclosures, and ordering back pay and other remedial actions. However, OHA declined to grant the complainant certain further relief that he sought, and rejected his claim that his acceptance of an offer of early retirement constituted a constructive termination.

1. As a preliminary matter, the timeliness of the complainant's appeal must be addressed. 10 C.F.R. § 708.10(c)(2) provides that the Initial Agency Decision "shall become the final decision of DOE unless, within five calendar days of its receipt, a written request is filed with the Director [of the Office of Contractor Employee Protection] for review by the Secretary or designee." In the instant case, the complainant received the Initial Agency Decision by certified mail on January 12, 1995. The letter transmitting the Initial Agency Decision advised both parties of the five day appeal period.

The complainant's request for review was sent to the Director by facsimile on January 26, 1995. The request did not address the complainant's failure to submit his request for review within the time required by the regulation, and the complainant failed to respond to this issue in his reply to the respondent's brief. Absent a showing of good cause for late filing of the complainant's request for review, the request must be dismissed as untimely.

2. Notwithstanding the fact that the complainant's request for review was untimely, I have nevertheless reviewed the portions of the record relevant to the two issues raised by the complainant on appeal. The first concerns OHA's denial of the complainant's request that a November 1987 final report of EG&G's Weld Evaluation Project regarding the Tennessee Valley Authority's Watts Bar Lake Nuclear Power Plant be formally withdrawn. The Initial Agency Decision concluded that such relief was beyond the scope of the "whistleblower" regulation.

The "whistleblower" regulation provides that, based on a determination that a DOE contractor violated the prohibitions against reprisal contained in subsection 708.5, specific individual relief, including reinstatement and back pay, may be provided to the complainant. See 10 C.F.R. §§ 708.10(c) and 708.11(c). The regulation is designed to protect employees from adverse actions taken in reprisal for protected disclosures, not to provide corrective action with respect to the underlying substance of such disclosures. Therefore, the Hearing Officer correctly determined that the relief requested by the complainant was outside the scope of relief provided by the "whistleblower" regulation.

Second, the complainant challenges OHA's determination that he failed to establish that he was constructively discharged by his employer. OHA rejected this claim, finding that the complainant failed to submit this claim until relatively late in the proceeding, and then submitted no evidence in support of the claim.

The complainant's challenge to OHA's factual determination that he voluntarily accepted early retirement should be overturned only if that determination was "clearly erroneous." See, e.g., *Pullman Standard v. Swint*, 456 U.S. 273 (1982); *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). Measured against this standard, my review of the record shows no basis for overturning OHA's finding that the complainant was not constructively discharged from his employment with EG&G.

For the reasons set forth above, the Initial Agency Decision is hereby affirmed and adopted as the Final Agency Decision in this case. The Office of Hearings and Appeals is directed to issue a Supplemental Order specifying the amount of damages to be awarded to the complainant.

Dated: June 28, 1995

William H. White

Deputy Secretary