

Case No. VBA-0038

March 28, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Ann Johndro-Collins

Date of Filing: October 29, 1999

Case Number: VBA-0038

This Decision considers an Appeal of an Initial Agency Decision issued on September 27, 1999, on a complaint filed by Ann Johndro-Collins (Johndro-Collins or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her complaint, Johndro-Collins seeks compensation for alleged retaliatory actions taken against her by Fluor Daniel Hanford (FDH), a DOE contractor, as a result of making an alleged protected disclosure to DOE. As set forth in this decision, I have determined that Johndro-Collins's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy'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 or -leased facilities. 57 Fed. Reg. 7533 (March 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. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant.

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included independent fact-finding by the DOE Office of Inspector General (IG), followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant may request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12, 862 (March 14, 1999). Certain of these amendments have bearing upon the present proceeding. Under the revised regulations, review of an Initial Agency Decision, as requested by Johndro-Collins in the present Appeal, is performed by the OHA

B. Complaint Proceeding

The present case was initiated by the filing of a complaint by Johndro-Collins in July 1997. The factual allegations set forth in the Johndro-Collins complaint, described below, are essentially uncontroverted.

In 1989, the Complainant began working for Westinghouse Hanford Company, a contractor at the Department's Richland Operations Office, as a records management specialist. In August 1994, she attained the position of Project Control Analyst I. On October 1, 1996, FDH acquired the Westinghouse Hanford contract at the Richland Operations Office. The Complainant's duties and chain of supervisors remained essentially unchanged when FDH acquired the contract.

In July 1997, the Complainant filed a complaint with the IG. In her complaint, she alleged that FDH retaliated against her for disclosing "a conflict of interest, waste, fraud, and abuse" by her team leader at FDH. At the time the Complainant made her disclosures, she worked on the Strategic Planning team. The subject of her disclosures was her team leader and her supervisor was Larry Hafer. In July 1997, the Complainant was transferred to the Reporting team, where her team leader was Eileen Murphy-Fitch and her supervisor was Gordon McCleary. This transfer took place because Murphy-Fitch needed additional personnel and had requested the Complainant. In addition, management was aware that Complainant and her team leader were not getting along.

In January 1998, the Complainant was transferred back to the Strategic Planning team. This transfer was made because she had requested reassignment to the group and there was an opening caused by the departure of another employee, Dave Eder. Her supervisor was again Larry Hafer, but her previous team leader had moved to another group. In March 1998, McCleary was promoted to the position of Director of Reporting, where he had supervision over Hafer's Strategic Planning team.

The IG conducted an investigation and issued a Report of Inquiry and Recommendations on March 30, 1999 (IG Report). The IG Report found that the Complainant had established by a preponderance of evidence that she made protected disclosures to FDH management under 10 C.F.R. Part 708. The IG Report further found that in six of seven alleged retaliatory acts, the Complainant failed to establish by a preponderance of the evidence either that the alleged retaliatory acts constituted adverse actions, or that her protected disclosures were a contributing factor to the actions. With regard to one of the alleged retaliatory acts - the Complainant's transfer from the Strategic Planning team to the Reporting team - the IG found that the Complainant's protected disclosures were a contributing factor, but that FDH had provided clear and convincing evidence that the reassignment would have taken place absent the disclosures.

On April 20, 1999, the Complainant submitted a request for a hearing under 10 C.F.R. § 708.9, that was transmitted to the Office of Hearings and Appeals (OHA) on April 27, 1999, at which time a Hearing Officer was appointed by the OHA Director. The Hearing Officer convened a hearing in this case on July 13, 1999, at which the Complainant and six witnesses testified.

Prior to the hearing, the parties stipulated that the Complainant made a protected disclosure as defined by 10 C.F.R. § 708.5. As stipulated by the parties, the Complainant disclosed to management of FDH alleged acts of abuse of authority by her team leader. *See* 10 C.F.R. § 708.5(a)(3). In addition, the Complainant alleged that FDH committed retaliatory acts, as defined by 10 C.F.R. § 708.2, after her protected disclosure. Before the hearing, the parties stipulated that three of the alleged retaliatory acts could be remedied under the Part 708 regulations. These three alleged acts are listed below:

1. In October 1997, the Complainant received an annual performance assessment that allegedly did not accurately reflect her performance. The Complainant claims that the assessment evaluated her work at a lower level than it should have. As a result, the Complainant alleged that she was excluded from

- a cash bonus program that rewarded employees for high achievement.
2. The Complainant alleged that in January 1998, she received a promotion from Project Controls Associate Grade I (pay grade 14) to Project Controls Associate Grade II (pay grade 16) without a corresponding pay raise.
 3. The Complainant also alleged that in January 1998, she was assigned to a position where she performed duties at a level expected of employees in pay grade 18, while she was compensated at pay grade 16.

As explained in the Initial Agency Decision issued on September 27, 1999, the Hearing Officer determined that the Complainant did not prevail on any of the three allegations of retaliatory acts. *See Initial Agency Decision*, 27 DOE ¶ 87,530 (1999). With regard to the allegation that her FY 1997 performance assessment was inaccurate, the Hearing Officer found that FDH has shown by clear and convincing evidence that it would have given the Complainant the same assessment absent her protected disclosures. With respect to the allegations that the Complainant was given a promotion without a raise and given a work assignment above the level of her pay, the Hearing Officer found that the Complainant has failed to show that these acts occurred as she claimed. The Hearing Officer concluded that the Complainant is not entitled to any relief under 10 C.F.R. Part 708.

In accordance with section 708.32(a), the Complainant filed a Notice of Appeal of the Initial Agency Decision on October 29, 1999, followed by a Statement of Appeal (Appeal) on December 6, 1999. On December 22, 1999, FDH filed a Response to the Appeal.

II. Analysis

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the OHA Director. *See David Ramirez*, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee for “[d]isclosing to a DOE official . . . information that [the employee] reasonably and in good faith believe[s] reveals -- (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority.” 10 C.F.R. § 708.5(a)(3). However, the regulations clearly place the initial burden upon the complainant: “The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure” 10 C.F.R. § 708.29; *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). “Preponderance of the evidence” is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence §339 at 439 (4th Ed. 1992). Under this standard, the burden of persuasion is allocated roughly equally between both parties. *See Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake.)

A. Complainant’s Appeal

In her Appeal, the Complainant raises a number of contentions in support of her position that the determination reached in the Initial Agency Decision is incorrect as a matter of fact and law. The Complainant’s contentions focus on the three alleged retaliatory acts. These contentions are addressed successively below.

1. The Complainant’s FY 1997 Performance Assessment

In support of her Appeal, the Complainant contends that her 1997 Performance Assessment did not take account of her “excellent work” performing Integrated Site Baseline functions for nine months of the

rating period, thus preventing her from receiving a cash bonus under FDH's "MVP" program. She further contends that the alleged inaccurate assessment is the "direct result of my filing protected disclosures." Complainant's Appeal at 2. The Complainant adds that her manager and team leader believed her FY 1997 work to be "excellent." She disagrees with the Hearing Officer's statement that her assertion that the assessment does not accurately reflect her performance is highly speculative and not supported by the evidence. Id.

I note first that the Complainant made this same argument during the hearing. The Hearing Officer found that FDH gave credible and convincing explanations for why the Complainant's 1997 Assessment emphasized the last three months of the rating period, and that the Assessment would have been written in the same manner absent the Complainant's protected disclosures. The following testimony at the hearing from FDH management officials supports the Hearing Officer's conclusion:

Q. In 1997, after Ms. Johndro-Collins left your supervision and Mr. Fish's lead, during the remaining part of that year did you have any input into Ms. Johndro-Collins' evaluation for the year, fiscal year 1997?

A. Yes

Q. Please describe it.

A. Witness Hafer: Gordon McCleary [Complainant's manager] approached me as he was actually going to give the performance appraisal and asked me for my input. I went to see . . . who was the lead. Frankly, I thought his input was a little overly critical and my input to Gordon McCleary was that she had performed acceptable over the nine months.

.....

Hearing Transcript at 115.

Q. Did you agree with the section regarding the four categories she was rated acceptable in?

A. Witness Hafer: Yes, I do.

Q. How would you characterize the input you received from Mr. Fish as to what category she should have ended up in that performance appraisal for the first nine months evaluation?

A. Witness Hafer: I didn't ask him [the lead] to actually mark any of the boxes, but my opinion of his input was he would have had at least one or two categories that would have said 'needs improvement'.

.....

Id. at 117.

Q. The allegation has been made that the first nine months of Ms. Johndro-Collins performance in fiscal 1997 was ignored by management. Is that true?

A. Witness McCleary: No, it's not.

.....

Q. There has been ample testimony that the company emphasized the last three months of the fiscal 97 period for her performance appraisal, the whole of which you just read a part. Can you tell us, is that accurate to the best of your recollection.

A. Witness McCleary: Yes, it is accurate

Q. Why did the company do that?

A. Ann's performance had not been satisfactory in [the] view of the people who had been supervising her prior to her becoming a member of my team. My opinion was that they were unduly hard about that. My intent was to . . . she was doing good work for me. I wanted to give her a fresh start, focus on the positive, not the negative aspects of the review.

Q. Did you feel the emphasis on the last three months benefited her?

A. Yes.

Id. at 150-151.

I agree with the Hearing Officer's conclusion that FDH management offered convincing explanations as to why the Complainant's Assessment emphasized the last three months of the rating period. As stated in the above testimony, Hafer, the Complainant's manager for the nine month period in question, expressly stated that the Complainant's performance was acceptable, not outstanding during the nine month period. This period preceded the Complainant's protected disclosures. Hafer also suggested that the Complainant's Team Leader would have given input that would have led to a less than "acceptable" rating in two of four categories during this time period. In addition, the testimony also emphasizes that the Complainant's first nine months of performance during FY 1997 were not discounted, but rather the last three months were emphasized because it would benefit the Complainant.

As for the Complainant's contention that she was prevented from receiving a cash bonus, the testimony in the record indicates that an "acceptable" performance appraisal did not prevent FDH employees from receiving cash bonuses. But that rating also did not automatically mean that an employee would get a bonus. In light of this testimony, I find Complainant's contention regarding her FY 1997 Assessment to be without merit, and uphold the Hearing Officer's determination concerning this issue.

2. The Complainant's Promotion Without A Raise

As with the first contention, I find equally unavailing the Complainant's second contention that she received a promotion from a Grade 14 to a Grade 16 without a corresponding pay raise. The Hearing Officer's finding regarding this issue is quite persuasive. He states:

Although the Complainant has characterized her advancement to grade 16 as a promotion without a raise, this characterization is not accurate. The general procedure at FDH is for salary changes to occur once a year, in October. The ceiling for pay increases in FY 1997 was 5%. Approximately 80% of FDH employees received some increase, with most increases in the 3-4% range. The Complainant received a 4% merit raise in October 1997. The following January, the merit raise was re-coded as a promotion, made retroactive to October 1997. Consequently, it is accurate to say that the Complainant received a promotion to grade 16 with a 4% raise, effective in October 1997.

[Initial Agency Decision](#), 27 DOE ¶ 87,530 at 89,160.

As explained in the Initial Agency Decision, the Complainant, as well as other employees, in essence received in January 1998 a "dry promotion" (the process by which an employee is advanced in pay grade while not simultaneously receiving an increase in salary). The testimony in the record reflects that shortly before receiving the dry promotion, the Complainant filed an EEO complainant, alleging gender discrimination. According to FDH management, the EEO complaint elicited a review of the Complainant's work, which in turn led to the dry promotion. Thus, FDH management asserted that the EEO complaint caused it to review the Complainant's performance and consider whether she was qualified for a Grade 16. In addition, the record reflects that rather than being considered a negative personnel action, receiving a dry promotion has its advantages. According to the testimony of Harold Lacher, the

manager of Human Relations for FDH, two benefits of receiving a dry promotion are 1) the employee acquires the potential for greater future pay increases and 2) the employee can accumulate time in the new grade, a consideration when the employee is being considered for future promotion. Based on the foregoing, I find that the Complainant has not shown any negative aspects from her promotion from Grade 14 to Grade 16 and therefore the promotion does not constitute a retaliatory act as defined in 10 C.F.R. § 708.2. I uphold the Hearing Officer's determination regarding this issue.

3. The Complainant's Assignment to a Position Formerly Held by an Employee in Pay Grade 18

Finally, the Complainant asserts that the Hearing Officer disregarded her manager's testimony "where he agrees that work I have done under his direction over the last five years is all currently done by grade 18s." Appeal at 5. In the Initial Agency Decision, the Hearing Officer found that the Complainant's assignment in January 1998 to the Strategic Planning team was not a retaliatory act. The position was offered to the Complainant at a pay grade 16, and she accepted it on those terms. The Hearing Officer further found that there was no evidence that the Complainant is performing work at a pay grade 18 level. He refers to testimony in the record that indicates that the Complainant does not bear the responsibility that grade 18 employees have. The Complainant has referred me to nothing which would controvert his conclusions. The testimony in the record clearly supports the Hearing Officer's conclusions regarding this contention and therefore, it is not necessary to analyze the Complainant's contention further.

B. Conclusion

On the basis of the foregoing, I conclude that the Complainant has failed to show in her Appeal that the determination reached in the Initial Agency Decision is erroneous as a matter of fact or law. I concur with the determination that the Complainant has not prevailed on any of the three allegations of retaliatory acts. Accordingly, the Complainant's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Ann Johndro-Collins on October 29, 1999, of the Initial Agency Decision issued on September 27, 1999 (Case No. VWA-0037), is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Ann Johndro-Collins under the Contractor Employee Protection Program, 10 C.F.R. Part 708 , is 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.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 28, 2000