Daniel Holsinger, Complainant, v. K-Ray Security, Inc., Respondent OHA Case Nos. VWC-0001 and VWC-0002

DECISION AFFIRMING AGENCY DECISION AS MODIFIED

Issued: January 19, 2000

This is a request for review by K-Ray Security, Inc., the current security operations contractor at DOE's Federal Energy Technology Center ("FETC"), of the Decision of the Office of Hearings and Appeals ("OHA") on remand from the Deputy Secretary adhering, after an additional evidentiary hearing and an assessment of the equities, to its earlier finding that reinstatement of Complainant Holsinger as a security guard is a necessary and appropriate action to effect full relief, even though it was the prior security contractor, Watkins Security Agency, Inc., ("WSA") that was found to have committed the act of reprisal prohibited under 10 C.F.R. *§708.5.* /1

On October 7, 1994, Mr. Holsinger filed a complaint with the Office of Contractor Employee Protection ("OCEP") alleging that he had made protected disclosures about the possible theft of government property by another member of the security force and that those disclosures led to suspensions and termination of his employment. R. 00 1-002. After an investigation, OCEP issued a report concluding that Holsinger's dismissal had been at least in part in reprisal for his protected disclosures. Mr. Holsinger's complaint sought back pay and benefits and reinstatement from WSA, but, while the complaint was pending, K-Ray took over the security function at FETC. OCEP proposed that WSA pay Holsinger back pay and benefits and that K-Ray reinstate him based on its assessment that, absent the termination, Holsinger would have been hired automatically by K-Ray .R.003.

Following the issuance of OCEP's investigatory report and recommendations, complainant, WSA, and K-Ray all requested a hearing before OHA. Prior to the hearing, WSA and Mr. Holsinger entered a settlement agreement which satisfied the proposed requirement that WSA pay Mr. Holsinger back pay and benefits. Consequently, WSA was dismissed as a party. R.003. K-Ray did not challenge the conclusions that Part 708 had been violated by WSA, but objected to OCEP's proposal that K-Ray be required to reinstate the complainant. K-Ray argued that such a remedy would create an unwarranted hardship on K-Ray and require it to terminate an existing employee. R.003-004. Agreeing with OCEP, however, OHA found that reinstatement of Mr. Holsinger was necessary to restore him to the position he would have occupied absent the acts of reprisal by WSA, since all thirteen of the other WSA security personnel were hired by K-Ray when it assumed the contract in June 1995. R.004.

K-Ray appealed OHA's decision to the Deputy Secretary. The Deputy Secretary concluded that OHA had overlooked uncontradicted testimony that reinstatement of Mr. Holsinger would require discharge of another K-Ray security officer, and that under OHA's own precedent, reinstatement is disfavored when it causes displacement of an innocent employee. Accordingly, the Deputy Secretary remanded the case for a full assessment of the equities involved in reinstatement. R. 005-007.

On remand, OHA conducted an evidentiary hearing, where the testimony of eleven witnesses was presented. Mr. Holsinger, now employed full-time as a security guard at the University of West Virginia and part-time with the police department of Kingwood, West Virginia, testified that he did not want to put anyone else out of work at K-Ray. He indicated that he would accept part- time employment on an as-needed basis up to one or two nights a week, so long as he was treated like "everyone else" in the part-time roster. R. 590-59 1, 598-599, 613,723-724. OHA accordingly analyzed K-Ray's claims of hardship against Mr. Holsinger's diminished request for relief, and determined that they were without merit. R. 724-726.

First, OHA concluded that K-Ray's position that reinstatement of Mr. Holsinger would necessarily be at the expense of other employees was not supported by the record. Since there was no requirement in the contract about the number of employees K-Ray could use, it was clear that reinstatement merely on an as-needed basis could not require termination of another employee. R.726. The remaining question, however, was the extent to which any part-time hours given Mr. Holsinger would necessarily be at the expense of other employees. In a fact-bound analysis, OHA reviewed both the testimony and the company's work schedules for one calendar quarter. From this evidence, OHA concluded that the amount of normal re-scheduling and the hours generally available to part-time employees were sufficient to ensure that no regular hours of other part-time guards would need to be changed to accommodate Mr. Holsinger. Furthermore, OHA concluded that reasonable expectations of irregular part-time hours available to other guards would not be impaired and that, to the extent two recently hired part-time guards might sometimes get fewer hours as a result of Mr. Holsinger's availability, it should not overcome the important interest in protecting a whistleblower. R. 726-727, 729. Additionally, OHA concluded from the testimony of six other guards that there was little danger that reinstatement ofMr. Holsinger would cause morale problems. R. 727-729.

Second, OHA analyzed the extent to which reinstating Mr. Holsinger would impose unfair additional financial burdens on K-Ray. OHA concluded that the additional financial burden would most likely be minimal and, if not, would be subject to adjustment by DOE under the contract in furtherance of the goals of Part 708. R. 730-733.

Third, OHA analyzed K-Ray's claim that the burden of accommodating Mr. Holsinger's schedule would be excessive. Noting that it was premised on providing Mr. Holsinger the midnight shift regularly two nights a week, OHA determined that it would not impose that burden on K-Ray but would instead require offering him two shifts per week, but would only require utilizing Mr. Holsinger the equivalent of one shift per week. R.733-734.

Finally, in accord with the Deputy Secretary's suggestion (R. 007 n. 1) that some assessment should be made whether Mr. Holsinger's disclosures were of the kind the regulation was designed to protect, OHA concluded that Mr. Holsinger's report of possible theft of DOE property was well within the rule's scope, but that his complaint that management did not do anything about the report did not necessarily fall within the rule's protection, since it might have reflected a mere disagreement concerning the magnitude of the problem. R. 735-736. Accordingly, OHA ordered that K-Ray reinstate Mr. Holsinger as a part-time security guard on an as-needed basis, that Mr. Holsinger provide K-Ray monthly with a schedule of his available shifts, that K-Ray offer him a minimum of two shifts per week consistent with his schedule filling in for other employees on leave, and that K-Ray actually utilize him a minimum of one shift per week. R.736. K-Ray filed a timely appeal of OHA's decision on remand.

As was spelled out in the earlier decision of the Deputy Secretary in this case, reinstatement may be appropriate in order to remedy a violation of Part 708. 10 C.F.R. 708.10 (c) /2 provides:

> The initial agency decision may include an award of reinstatement, transfer, preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses * **.

See also 10 C.F.R. 708.11(c) ("Relief ordered * * * may include reinstatement").

Reinstatement is an equitable remedy, and with any equitable remedy, however, an adjudicator "must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims'." Teamsters v. United States, 431 U.S. 324,375 (1977) [quoting Hecht Co. v. Bowles, 321 U.S. 321,329-330(1944)]. "Especially when * * * an equitable remedy threatens to impinge upon the expectations of innocent parties, the [adjudicator] must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.'" Ibid.[quoting Lemon v. Kurtzman, 411 U.S. 192,200-201 (1973)(plurality opinion of Burger, C.J.)].

As OHA noted in Boeing Petroleum Services. Inc., 24 DOE ¶87,501 at p. 89,007 (1994), reinstatement generally is not "an appropriate remedy under Part 708 where * * * there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract." Rather, the normal rule is that a wrongfully discharged contractor employee is not entitled to relief for the period after the contract under which he is employed is terminated. Id. at pp. 89,006-89,007, citing Holley v. Northrop Worldwide Aircraft Services. Inc., 835 F.2d 1375 (11th Cir. 1988), and Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992). Additionally, as the Deputy Secretary noted in the previous appeal in this case, OHA has pointed out that reinstatement is a "disfavored remedy" when it would "require the displacement of an innocent employee." Boeing Petroleum Services. Inc., 24 DOE ¶87,501 at p. 89,007, citing Edwards v. Department of Corrections, 615 F. Supp. 804, 811 (M.D. Ala. 1985).

At the hearing on remand, the issue on which the remand was ordered all but evaporated. The threat of displacement of another K-Ray employee was eliminated by Mr. Holsinger's reduced request for reinstatement merely for "as needed" shifts not to exceed two per week. K-Ray's contract administrator, Diane Lewis, testified that the part-time guards are not guaranteed any hours when they are hired. R. 676. Another of K-Ray's witnesses, Captain Munz, admitted that K-Ray's two part-time hires since K-Ray had taken over the contract had been told only that K-Ray "would probably give" them two or three days a week. R. 581-583. Accordingly, it is difficult to see how giving Mr. Holsinger one day a week would disrupt even the expectations of the other part-time guards, and OHA's conclusion that it would not do so is not clearly erroneous and should be sustained. It is well settled that OHA's factual determinations are subject to being reversed on appeal only if they are clearly erroneous. Oglesby v. Westinghouse Hanford Company, 25 DOE ¶ 87,501 (1995).

Regarding the other issues raised by K-Ray, OHA's determinations seem unexceptionable. As OHA noted, there was some testimony to the effect that reinstating Mr. Holsinger might cause morale problems among his co-workers, but the weight of the testimony seemed to the contrary, and it was not clearly erroneous for OHA to conclude that "on balance, the record as a whole does not support this view." R. 727. Concerning the expense of reinstating Mr. Holsinger, OHA correctly noted that K-Ray's claim in this respect was "based on several unsupported assumptions" (R. 730) (e.g. that every time Mr. Holsinger worked there would be a lower-paid newer employee not working overtime available), and I cannot find fault with OHA's painstaking analysis of the record. R. 730-733. Additionally, the record adduced at the hearing supports OHA's conclusion that any likely potential additional expense incurred as a result of reinstating Mr. Holsinger can be accommodated under the contract. R. 733. Finally, regarding K-Ray's alleged scheduling difficulties, Mr. Holsinger's diminished request and the relief ordered by OHA all but eliminated the issue, since relief is premised on Mr. Holsinger filling in on an as-needed basis, and the record supports OHA's conclusion that one shift a week will be available. Although OHA did not make anything of it, it seems to me to undermine K-Ray's arguments in this regard that since Mr. Holsinger was terminated, there have been five or six new part-time hires in the security force. R. 510-51 1. Mr. Holsinger has asked to be treated the same as these other part-time guards, and K- Ray's claims of hardship appear exaggerated under the present circumstances.

I am concerned at the extent to which OHA seems to have put the burden on the innocent contractor to show why it should not be required to reinstate the employee, and that this approach is not entirely consistent with the above-referenced precedent. Nevertheless, the result reached appears consistent with the Deputy Secretary's earlier decision, in accordance with law, and not clearly erroneous in its premises.

I am also concerned at the extent to which the remedy crafted by OHA, to minimize the impact on other part-time employees, intrudes into management of the contractor in a way that may be difficult to enforce. Accordingly, I conclude that OHA's decision on remand should be modified as follows. K-Ray shall provide the relief ordered by OHA. When a position becomes available for

which Mr. Holsinger is qualified and is comparable to the seniority level of his previous job with WSA, K-Ray shall offer that position to Mr. Holsinger and hire him if he accepts it. That offer will terminate K-Ray's obligation to employ Mr. Holsinger on a part-time basis as ordered by OHA.

T. J. Glauthier

Deputy Secretary

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/1 DOE recently issued an Interim Final Rule amending Part 708 which became effective April 14, 1999. 64 Fed. Reg. 12,862 (March *15*, 1999). The decision in this case is unaffected by the changes in the Interim Final Rule. The numbering of the whistleblower provisions has changed, however, and this is noted in footnotes.

/2 This provision has been slightly reworded in 10 C.F.R. 708.36 in the Interim Final Rule. 64 Fed. Reg. 12862, 12875 (March 15, 1999).