

July 9, 2007

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Franklin C. Tucker

Date of Filing: April 25, 2007

Case Number: TBA-0023

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on April 9, 2007, involving a Complaint of Retaliation filed by Franklin C. Tucker (also referred to as the employee or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Tucker claims that his former employer, DOE contractor BWXT Y-12, L.L.C. (BWXT or the contractor), retaliated against him for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that the employee engaged in activity that is protected under Part 708, but that BWXT showed that it would have taken the same adverse personnel actions in the absence of the protected activity. Tucker filed a Statement of Issues appealing the IAD determination. 10 C.F.R. § 708.33. As set forth below, I have decided that the IAD is correct.

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 taken adverse personnel

actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Tucker in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Tucker's Complaint are fully set forth in the IAD. *Franklin C. Tucker* (Case No. TBH-0023), 29 DOE ¶ 87,021 (2007). For purposes of the instant appeal, the relevant facts are as follows.

Tucker was employed by BWXT at a DOE facility in Oak Ridge, Tennessee, first as a security inspector, then as a laboratory technician, and finally as a chemical operator. On October 20, 2003, he filed a Complaint of Retaliation under Part 708, alleging that his employer retaliated against him for disclosing safety-related concerns. According to the record, on September 30, 2001, the complainant alleged that proper precautions were not taken during the removal of PCB paint chips in his work area and that management did not require respirators to be worn while workers were involved in the process of converting liquid waste to dry material for disposal.

The complainant alleged that thereafter BWXT took the following adverse personnel actions against him. First, in November 2001, the complainant received counseling for sleeping while on duty. Then, in February and March 2002, the complainant was not interviewed for two BWXT positions for which he applied. Next, on May 17, 2002, the complainant received a "pattern of absence" letter. In addition, on June 14, 2002, the complainant left work on two weeks of medical leave authorized by the BWXT medical department. This short-term leave was extended through January 2003. In a January 2003 case review meeting, the medical department at BWXT again reviewed the complainant's case and found that in view of his medical condition, certain restrictions on his work assignments were appropriate, including that the complainant refrain from prolonged or strenuous exertion, use of a ladder over four feet high and work at an unprotected elevation. BWXT then

determined that the complainant could not be permitted to return to work as a chemical operator with his work-related restrictions. Finally, Tucker contends that BWXT allowed another employee to harass him and to circulate rumors that he was a "snitch for the DOE." 1/ These actions constitute the contractor's retaliations that Tucker alleges took place in this proceeding.

On October 20, 2003, the complainant filed this Part 708 whistleblower complaint with the Oak Ridge Operations Office of the DOE. The matter was referred to the Office of Hearings and Appeals for an investigation, and a Report of Investigation (ROI) was issued on February 2, 2005. 10 C.F.R. § 708.22, .23.

Thereafter, Tucker requested and received a hearing on this matter before an Office of Hearings and Appeals Hearing Officer. The Hearing Officer received testimony from 14 witnesses. The complainant testified and presented the testimony of two of his former co-workers, Mark Korly and Carl Smith. BWXT presented the testimony from the following employees: Les Reed, the division manager for environment safety and health for BWXT Y-12 at the time of the allegations; Ben Davis, operations manager for special materials; Earl Dagley, shift manager; Karl Vincent, chemical supervisor and the complainant's direct supervisor; Janet Sexton, labor relations representative; Diane Grooms, staffing manager; Pat Fortune, department manager for the assembly and disassembly organization; Gary Bowling, general foreman in the garages and the fleet; Tonya Warwick, certified physician assistant in the medical department; Dr. Russ Reynolds, staff clinical psychologist; and Steve Laggis, manager of the special materials organization. 2/

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

1/ The Hearing Officer determined that BWXT took appropriate steps to minimize this matter and that it is not the responsibility of BWXT to ensure that employees get along. Accordingly, she gave this issue no further consideration.

2/ All the job descriptions relate to the time during which the complainant has alleged that he was retaliated against. Many of these employees have changed job titles since then; one has retired.

II. The Initial Agency Decision

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. See 10 C.F.R. §§ 708.5 and .29. The IAD further noted that if the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. 10 C.F.R. § 708.29. The IAD considered the application of these elements to the Tucker proceeding.

A. Protected Activity and Contributing Factor

The IAD first noted that BWXT admitted that the complainant made protected disclosures, and that it took the four personnel actions about which Tucker has complained. Further, the IAD found that the complainant established by a preponderance of the evidence that his protected disclosures were a contributing factor to the personnel actions. The Hearing Officer based this conclusion on the fact that there was proximity in time between the disclosures and the allegedly retaliatory personnel actions. The Hearing Officer also found that Tucker made his protected disclosures to the very supervisors who were involved in the adverse personnel actions, and that they were thus aware of the protected disclosures. Based on these findings, the Hearing Officer concluded that the employee satisfied his burden of proof under Part 708. IAD at 20.

B. Whether BWXT would have terminated Tucker absent the Protected Activity

The IAD analyzed each of the alleged retaliations cited by Tucker.

Sleeping on Duty

The IAD found that in spite of the fact that the complainant denied he was sleeping on duty, the weight of the evidence was convincing that BWXT was justified in "coaching and counseling" Tucker in this regard. This level of discipline was the mildest possible and was less than other employees had received for this infraction. Accordingly, the IAD determined that BWXT would have taken this same action absent the protected disclosures. The IAD also noted that since there was nothing in the complainant's permanent record

to show that he was coached and counseled, there is no remedy that OHA could provide.

Not Being Interviewed for Two BWXT Positions

After hearing the testimony of the contractor's witnesses and considering the job qualifications as specified in the relevant postings, the Hearing Officer found that Tucker did not have the necessary qualifications for either of the two positions. She found convincing the testimony of the staffing manager and the two persons responsible for choosing those who would be interviewed for the positions that the complainant's resume did not indicate that he had the minimum qualifications for the positions. IAD at 21.

Pattern Absence Letter

BWXT witnesses testified that the complainant had a pattern of absences in which he took sick leave adjacent to a scheduled day off or a holiday. IAD at 10-12. They believed that the incidence of his "pattern" of such absences was excessive when compared to other employees. IAD at 12. For this reason, the individual was issued a pattern absence letter which informed him that he would be required to have a doctor's verification if he wished to be paid for the days that he took sick leave. The Hearing Officer was convinced by testimony that there was a pattern of absences by this individual prior to a holiday, scheduled day off or weekend. She also noted BWXT evidence showing 31 examples of pattern absence letters that were presented to other employees. Based on this evidence, the Hearing Officer concluded that BWXT would have issued the Tucker pattern absence letter in the absence of the protected disclosures. IAD at 21-22.

Long Term Disability

The IAD stated that BWXT placed the complainant on long term disability when it was unable to find a position for him with the work restrictions placed by the BWXT medical department. The Hearing Officer found that BWXT showed that the medical department had reasonable concerns about the complainant's ability to do strenuous work. She noted that the complainant admitted to the staff clinical psychologist that he had pressured his personal physician into releasing him to work. While the complainant denied at the hearing that he made this statement, the Hearing Officer found the testimony of the staff clinical psychologist more convincing on this matter. The Hearing Officer also noted the testimony of the staff clinical psychologist to the effect that the

complainant had symptoms that concerned him, such as night sweats which kept him from sleeping and caused him to be extremely fatigued the following day.

The Hearing Officer was not convinced by the complainant's assertions that many people work at BWXT with more restrictions than his. She believed BWXT's evidence that the restrictions under which he would have had to work would have made it impossible for him to work as a chemical operator. Based on these considerations, the Hearing Officer concluded that BWXT had shown by clear and convincing evidence that it would have taken the same action absent the complainant's protected disclosures.

IAD therefore found clear and convincing evidence that BWXT would have taken each of the personnel actions regarding Tucker even if he had not engaged in protected activity under Part 708. In sum, the IAD concluded that Tucker was not entitled to relief.

III. Issues on Appeal and Analysis

Tucker filed a statement identifying the issues that he wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or appeal). BWXT filed a Response to the Statement of Issues. 3/ 10 C.F.R. § 708.33.

After fully reviewing the arguments raised in the Statement of Issues, I find that there is no basis for overturning the result in this case.

Complainant's Arguments On Appeal

A. Medical Disability

The complainant's chief objection to the IAD involves the issue of his medical disability. As stated above, the Hearing Officer found that BWXT justifiably placed the complainant on long term disability when it was unable to find a position for him with the work restrictions placed on his return to work by the BWXT medical department. In reaching this conclusion, the Hearing Officer noted that the complainant admitted to the staff clinical psychologist,

3/ There is no need in the instant case to set out the specifics of the response, some of which are incorporated into my analysis below.

Dr. Russ Reynolds, that he had pressured his personal physician into releasing him to work. In his appeal, Tucker claims that this statement is false, and insists that he did not "pressure" his physician into "returning him to work." He points to two reports that were filed at the time he tried to return to work, one by his physician, Dr. Bennet, and the other by his psychologist, Dr. Simmons. He alleges that both reports show he was able to return to work. Tucker therefore claims that he had no need to assert to Dr. Reynolds that he had "pressured" his doctors to allow him to return to work.

I have reviewed those reports, copies of which were included with the appeal. Dr. Bennet's report was made in connection with Tucker's disability claim. Seemingly dated November 27, 2002, it advises that Tucker is able to return to work as of that date. The "Supplemental Statement of Functional Capacity" signed by Dr. Simmons does not indicate any significant function impairment, other than depression and anxiety disorder, which according to the report "have improved substantially." Thus, Tucker's claim that his own physicians held the opinion that he was fit to return to work in November 2002 seems to be substantiated by these two reports. However, the reports do not prove or disprove any assertion regarding whether Tucker may have pressured those doctors to return him to work. In any event, this point, even if true, does not establish that Tucker is entitled to prevail. The key here is whether Tucker was fit to return to work as a chemical operator, or whether BWXT correctly placed him on long term disability.

I see nothing in the record here that would suggest that the Hearing Officer's finding was incorrect. From my own review of the hearing transcript, I note that Dr. Reynolds stated that Tucker was "exhausted," and "stressed," and experienced fevers. Transcript of Hearing (Tr.) at 237-38. Dr. Reynolds had "real concerns" about the complainant's return to work as a chemical operator. Tr. at 245. I also note the testimony of the BWXT physician assistant, Tonya Warwick, who performs "return to work" evaluations for BWXT. Tr. at 218. She stated that she did not necessarily agree with opinions of "outside doctors" who recommended that employees be returned to work, because these outside physicians are not familiar with the working conditions faced by employees. Tr. at 224. Thus, she provided an important reason why the reports of Tucker's own medical team might not be considered definitive.

The record shows that as of January 2003, Dr. Reynolds and Ms. Warwick believed that Tucker's functional status was such that he could only return to work with significant restrictions. Tr. at

240-41. Thus, there is considerable evidence to support the Hearing Officer's determination that BWXT would not have allowed Tucker to return to full time work as a chemical operator even if he had not made protected disclosures. There is also evidence from Dr. Reynolds that BWXT did not have any part time work of this nature available for Tucker, whom he believed had only "two or three good days a week." I therefore see no reason to disturb the Hearing Officer's determination regarding the long term disability issue.

B. Work Place Violence Issue

Tucker reiterates that BWXT did not correctly handle his concerns about work place violence by restraining Danny Mullins. The Hearing Officer found that BWXT took appropriate steps to minimize this matter. IAD at note 3. In fact, Tucker has not shown any retaliatory action by BWXT in this regard. He has simply made allegations that a fellow employee may have acted improperly. Thus, overall, I find no adverse personnel action with respect to Tucker that falls within the purview of Part 708.

C. Animosity of Earl Dagley

Tucker also argues that shift manager Earl Dagley did not want him to return to work. Tucker explains in great detail the reasons for the animosity that Earl Dagley purportedly felt towards him. Tucker thereby implies that the adverse testimony from Earl Dagley regarding the pattern absence letter, not being interviewed for the two job openings, the long term disability determination, and the counseling for sleeping on duty was false, simply reflected Dagley's own negative view of Tucker, and should therefore be disregarded.

The fact that Earl Dagley may have had some reason to seek Tucker's severance from the BWXT workplace does not establish any error in the IAD. Even if Tucker's assertions regarding Dagley's animosity towards him were true, I find that the Hearing Officer's conclusion about the reliability of testimony and other evidence concerning the adverse personnel actions was sound. Tucker's accusations in and of themselves do not establish that the Hearing Officer's overall conclusions were incorrect, based on the testimony at the hearing. There was ample evidence besides that of Dagley to support her conclusion. For example, the Labor Relations Representative provided considerable testimony on the issue of the pattern absence letter, and the Hearing Officer relied extensively on that testimony. IAD at 21-22. With respect to the job interview issue, the Hearing Officer relied on the testimony of the staffing manager, Diane Grooms, for her conclusion that Tucker was not qualified for

either of the advertised positions. IAD at 21. I reviewed above, the solid evidence confirming that BWXT's placing Tucker on long term medical disability was justified. Accordingly, I will not overturn the Hearing Officer's conclusions based on Tucker's assertion that Dagley did not want him to return to work.

D. False and Misleading Statements

In his appeal, Tucker alleges 13 instances of false and misleading testimony by five witnesses. He requests that his allegations be reviewed and that the witnesses providing that testimony "be stripped of their clearances and turned over to the Department of Justice for further action."

After reviewing Tucker's allegations, I cannot find that he has established falsification in any of those examples. Accordingly, I see no basis for any further action with respect to the allegations, and furthermore see no reason to disturb the Hearing Officer's conclusions based on any of these assertions regarding falsehood. I discuss below three typical examples of the purportedly false or misleading testimony.

The complainant's technique in several instances is to ask "questions" about the testimony. These "questions" do not establish error or falsehood. For example, Tucker cites testimony of Earl Dagley that a piece of machinery that Tucker operated was dangerous. Tucker then states, "How come my line supervisor was not notified?" This type of objection does not show any false or misleading testimony by Dagley or any error in the IAD.

As an example of purportedly unreliable testimony, Tucker cites the following: "Earl Dagley states he saw Dennis Nabors on Dock 212 and that he told Mr. Dagley I was being interviewed for an assembly position and this was close to happening. [Tr. at 103 line 20.] On page 199 line 8 Diane Grooms states that I did not meet the requirements for the assembly job and I would not be interviewed. Why did Dennis Nabors state I was close to an interview to Earl Dagley when Diane Grooms states I wasn't even qualified for the job." With respect to this example, I find that the Hearing Officer properly gave little weight to the second-hand, hearsay evidence of Dagley, and properly relied on the direct testimony of Diane Grooms. Further, although these two witnesses may have held differing views of Tucker's situation regarding a possible interview, I no evidence of any falsification, especially since Dagley was only referring to what he had heard from Nabors.

Tucker also reargues the conclusion by the Hearing Officer that BWXT should have accommodated his work restrictions. In this regard, he stated: "Another operator had restrictions to the amount of weight he could move. When I returned to work I had no restrictions placed on me by my doctor. The plant medical staff placed restrictions on me when I returned to work. It is shown that SMO [Special Materials Organization] had operators working with work restrictions. Why didn't SMO accommodate me like they did the other operators?"

With respect to this assertion, Tucker cites testimony by Dagley at page 96, line 13 of the hearing transcript. In this part of his testimony, Dagley was referring to another SMO employee who had had work restrictions that involved weight. Accordingly, SMO measured the weight of the carts this employee would be required to push. Dagley testified that the carts weighed 35-40 pounds. There was no testimony that this individual was offered any kind of accommodation due to his restriction. Dagley's testimony only confirmed that the amount of weight that a worker might be required to push was 35 to 40 pounds, and that SMO knew this because it had to measure the weight on behalf of an employee with weight restrictions. Thus, Tucker's assertion that this testimony shows other employees' restrictions were accommodated, but his was not, is simply unfounded. Moreover, there is nothing in this testimony that is false or misleading.

None of Tucker's contentions persuades me that the result in this case should be overturned, or that there is any false or misleading testimony in the examples Tucker has offered. I am convinced that there was sufficient evidence in the record in this case to support the Hearing Officer's conclusion that BWXT clearly and convincingly established that it would have taken the cited personnel actions absent Tucker's protected activity. I am also convinced that the testimony received at the hearing was given in good faith and that the Hearing Officer properly relied on it.

E. Procedural Objections

Tucker also raises two procedural objections in this case. He complains of an excessive time period between the date he filed his complaint of retaliation in 2003 and the hearing date in August 2006. This delay, while indeed unfortunate, does not in and of itself show any error in the IAD. However, Tucker further argues in this regard that because he was excluded from the BWXT site he could not gain access to information from Larry Jones of the National Nuclear Security Administration (NNSA) or from the OHA

investigator in this proceeding. Tucker contends that the Hearing Officer refused to subpoena these witnesses.

Tucker seems to think the Jones report is necessary because he claims the Jones report showed "what I had complained about was true as far as health and safety went." Since the substance of Tucker's protected disclosures is not an issue in this case, there was no need for testimony or other evidence on this point.

It was further unnecessary to have testimony from the OHA investigator in this case. Tucker asserts that the investigator found that retaliation by BWXT was probable, thereby implying that her testimony would have helped him. 4/ The investigator's conclusion is not determinative. She simply made some preliminary findings of fact about the issues here. The Hearing Officer is not required to follow those findings. 10 C.F.R. § 708.30(c). Tucker has provided no basis for requiring the testimony of the investigator and I see none here.

Thus, the refusal to issue subpoenas to these two individuals was correct.

IV. Conclusion

As is evident from the above discussion, Tucker disputes both the findings of fact and conclusions of law reached in the IAD. Ultimately, it was the role of the Hearing Officer to make findings of fact based on her assessment of the witnesses and their testimony. The Hearing Officer did so and, after the reviewing the entire record, I find no error. I see nothing in the Tucker Statement of Issues that would cause me to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

4/ This assertion is not accurate. The investigator concluded that BWXT had not provided clear and convincing evidence that it would have taken the adverse personnel actions in the absence of the protected disclosure.

It Is Therefore Ordered That:

(1) The Appeal filed by Franklin C. Tucker on April 25, 2007 (Case No. TBA-0023), of the Initial Agency Decision issued on April 9, 2007, be and hereby 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. 10 C.F.R. § 708.35.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: July 9, 2007