

February 23, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Caroline C. Roberts

Date of Filing: January 26, 2006

Case Number: TBU-0040

Caroline C. Roberts (the complainant), appeals the dismissal of her complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant is a former employee of the DOE's Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. She claims that during the period October 2003 through August 2004 she made disclosures that are protected under Section 708.5. On August 9, 2004, she was terminated from her LANL position and on August 5, 2005, she filed the instant complaint of retaliation.

In a letter of January 10, 2006, the Whistleblower Concerns Program Manager at the National Nuclear Security Administration Service Center (NNSA) (Program Manager) dismissed the complaint. The Program Manager noted that Section 708.14 provides that a complaint must be filed within 90 days after the alleged retaliation. The Program Manger determined that the complainant's August 5, 2005 filing was untimely because it came about one year after the complainant's termination by LANL. In her letter, the Program Manager found this to constitute a basis for dismissing the complaint. 10 C.F.R. § 708.14. The January 10 letter gave as a second basis for the dismissal the failure of the complainant to specifically identify a disclosure that relates to the criteria set forth in 10 C.F.R. § 708.5. On January 26, 2006, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

II. Analysis

Section 708.17(a) provides that a complaint of retaliation may be dismissed by the Head of Field Element or EC Director for lack of jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. Section 708.17(b) states that if a complaint is dismissed for lack of jurisdiction or other good cause, the Head of Field Element or EC Director will provide a complainant with "*specific reasons for the dismissal. . . .*" (Emphasis added.) Setting out the specific reasons for the dismissal is a key part of this provision. It allows the employee to understand why his complaint may have fallen short, and also to craft an appropriate appeal. It also permits the Director of the Office of Hearings and Appeals to more effectively perform the review allowed in Section 708.18. A mechanistic repetition of the regulations by the Head of Field Element or EC Director does not permit the individual to understand the reasoning for the dismissal, nor does it promote effective review by the Director of the OHA. Thus, a jurisdictional denial letter should fully review and describe the facts that played a role in the denial, as well as the reasoning used to reach the ultimate determination. A mere formulaic repetition of the regulations or a summary rejection without reasoning or discussion of the facts in the record is simply not sufficient. With these considerations in mind, I turn to the jurisdictional determination that is under appeal in this case.

With respect to the dismissal on the grounds of untimeliness, the January 10 letter stated that there "was not enough information explaining the lapse in time from the termination of the complainant on August 9, 2003, to the filing on August 5, 2005 to be considered timely under 10 C.F.R. Part 708.14."

This explanation is inadequate. It does not discuss the information that was in the record regarding why the filing was late. The DOE Field Offices should provide a full explanation of their determinations so that a Part 708 complainant is able to understand and challenge the Field Office's reasoning if he believes its determination is incorrect. Nevertheless, in this case, for reasons of increased administrative efficiency, I will expedite this proceeding by providing my own review of the record regarding the late filing.

It is clear that the individual did not file her Part 708 complaint with the DOE until August 5, 2005. As stated above, this filing was made about one year after the termination. Section 708.14

provides that complaints of retaliation must be filed within 90 after the complainant knew or should have known of the retaliation. In this case, since the individual was terminated on August 9, 2004, the complaint should, ordinarily, have been filed with 90 days after that date. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [she] may have for not filing within that period and the [appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing.

In this case, the Program Manager asked the complainant to provide a reason for the untimely filing and the complainant provided a reason. In her December 30, 2005 filing with the Program Manager, the complainant stated that she was not aware of the DOE's Part 708 contractor employee protection provisions. She did not learn of Part 708 until August 5, 2005, which is when she submitted her Part 708 complaint to the Program Manager. The Program Manager did not discuss this assertion in the dismissal letter. I will therefore consider it now.

The fact that the complainant may not have learned of the existence of Part 708 until one year after her termination is simply not a sufficient excuse for the late filing, and does not constitute a good reason to accept her untimely submission. Individuals are generally expected to know and understand their rights and obligations under applicable DOE regulations. In this case, I find ignorance alone not to constitute good cause. Therefore dismissal seems appropriate here.

Furthermore, I have reviewed the record in this case to determine whether there is any other legal basis on which to rest an acceptance of the complaint. In this regard, I note that the submissions in the case also indicate that on the day the complainant was terminated, August 9, 2004, she filed a complaint with the head of LANL. This complaint was referred to LANL's own whistleblower office. However, after reviewing this material, I cannot find that it satisfies the requirements of Part 708. Part 708 clearly requires complaints of retaliation to be filed with the head of the DOE Field Element.¹ I cannot find that filing a

1/ Section 708.2 states: "Head of Field Element means the manager or head of a DOE operations office or field office, or any official to whom those individuals delegate their functions under this part." The head of LANL is not a delegated

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complaint with the head of LANL, run by DOE contractor University of California, to be in any way equivalent to a proper Part 708 filing with the DOE. Further, since the complainant was not even aware of Part 708, I certainly cannot conclude that she was uncertain as to whether her complaint was filed pursuant to that Part or under LANL's own procedures. Thus, there is no basis to conclude that she should be granted an extension of time based on any legitimate confusion on her part.

Section 708.14 provides for some exceptions to the 90 day time limitation. First, complainants are required to exhaust all available opportunities for resolution through an "applicable grievance-arbitration procedure." Section 708.13. Moreover, there is a tolling of the 90 day period while the individual is attempting to resolve the dispute through an internal company grievance-arbitration process. However, the time period begins to run again 150 days after the internal grievance was filed if a final decision on the grievance has not been issued. Section 708.14(b). These provisions do not help the complainant here.

First, I do not believe that the LANL whistleblower procedures constitute a grievance-arbitration procedure within the meaning of Section 708.13. The procedures that fall within the purview of Sections 708.13 and Section 708.14 are those that are negotiated grievance procedures available to bargaining unit employees. *Darryl H. Shadel* (Case No. VBU-0050), 27 DOE ¶ 87,561 (2000). There is simply no evidence in this case that the whistleblower processes that LANL had implemented were negotiated grievance procedures. Accordingly, the tolling of the time periods allowed by Section 708.14 is not applicable.

In any event, even if the tolling period applied, Section 708.14 does not permit the process to linger indefinitely. After 150 days, if there has been no final decision, the 90-day filing period begins to run again. Therefore in this case, 150 days after the August 2004 filing with LANL, or by the beginning of January 2005, the period began to run again. The complainant therefore had 90 days to file her whistleblower complaint with the DOE. She did nothing in this regard. Consequently, the tolling provisions of Section 708.14(b), even if applicable, do not provide her with any benefit here.

1/ (...continued)
official under this regulation.

Accordingly, I find that the complainant has not shown that good cause exists for her failure to file her Part 708 complaint in a timely manner, or any other reason to conclude that her complaint should be accepted even though it was not filed within the 90-day regulatory time period. Accordingly, her complaint should be dismissed.

Given my determination that the complaint was not filed in a timely manner, I need not give any further consideration to the finding by the Program Manager that the substance of complainant's disclosures does not fall within the purview of Section 708.5.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Caroline C. Roberts (Case No. TBU-0040) is hereby 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. 10 C.F.R. § 708.19.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 23, 2006