

September 19, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: John Merwin
Date of Filing: August 30, 2006
Case Number: TBU-0052

John Merwin (Merwin or the complainant) appeals the dismissal of his May 1, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. He filed the complaint with the Whistleblower Program Manager (WP Manager) of the DOE's National Nuclear Security Administration Service Center (NNSA/SC), located in Albuquerque, New Mexico. As explained below, the WP Manager's August 14, 2006 dismissal of the complaint should be upheld, and the appeal denied.

I. Background

The complainant is employed by BWXT Pantex, LLC (BWXT), the Management and Operations Contractor at the DOE's Pantex Plant located in Amarillo, Texas. On May 1, 2006, Merwin filed a Complaint of Retaliation with the NNSA/SC WP Manager. In that complaint, he alleged that he had participated in a protected proceeding under Part 708. Specifically, in July 2005, he appeared as a witness in a hearing involving two other Part 708 complaints of retaliation filed by Clint Olson and Curtis Broaddus. See *Clint Olson*, 29 DOE ¶ 87,007 (2005). He claimed that BWXT retaliated against him in a number of ways, all involving the contractor's refusal to certify him under the DOE's Human Reliability Program (HRP). 10 C.F.R. Part 712. In an amendment to the complaint, he included an additional retaliation, contending that BWXT assigned him to work in an unsafe office that was permeated by mold. As relief for these alleged retaliations, Merwin requested that BWXT be directed to (i) approve him for HRP status; (ii) provide him with a position more closely aligned with his skills and abilities; and (iii) raise his salary to the level it was prior to his "initial employment action." He also requested punitive damages for pain and suffering, attorney fees, a letter of apology and

assurances that no additional adverse employment actions will be taken against him during his tenure of employment at Pantex.

In the August 14, 2006 dismissal letter, the WP Manager determined that the complaint should be dismissed for the following reasons. With respect to the HRP claim, the WP Manager found that in a July 7, 2006 letter, the complainant had withdrawn the request for reinstatement into the program. The WP manager therefore determined that the entire HRP claim had been withdrawn. Further, the WP Manager determined that a complaint of retaliation based on the HRP falls outside the scope of Part 708, since HRP is a "requirement of the Department of Energy which provides its own administrative process for resolution."

With respect to Merwin's claim that he was assigned to a moldy office, the WP Manager noted that BWXT moved him to an acceptable office "within a relatively short period of time." The WP Manager therefore found that this aspect of the complaint had been "rendered moot by these subsequent events." She therefore determined that this aspect of Merwin's complaint should be dismissed pursuant to 10 C.F.R. § 708.17(c)(5).¹

Based on the above findings the WP Manager dismissed the complaint.

Pursuant to 10 C.F.R. § 708.18(a), Merwin filed the instant appeal with the Office of Hearings and Appeals. In that appeal, Merwin again claims that BWXT (i) used the HRP as a "retaliatory tool" against him; and (ii) retaliated against him by failing to accept his physician's recommendations that he be moved to a "mold free environment" and that this refusal was deliberate since BWXT was aware of his medical condition. He also asserts that BWXT retaliated against him by moving his office nine times in eight months, by refusing to produce environmental testing results on his health request/accommodation issues; and by "using performance appraisals and merit increases against him."

1/ This Section provides that dismissal for lack of jurisdiction or other good cause is appropriate if "the issues presented in your complaint have been rendered moot by subsequent events or substantially resolved."

II. Analysis

A. HRP Program

As the WP Manager noted, in a July 7 2006 letter Merwin's attorney appeared to withdraw his claim regarding Merwin's HRP status. This should end the issue of review of the HRP matter in this case. However, given that it reappears in his appeal, I will revisit the issue, if only to repeat what is already part of the record. As we stated in a June 23, 2006 letter to Merwin's attorney, the remedy for challenging an erroneous denial of HRP status does not lie within Part 708, but rather within Part 712, which provides a mechanism for review of denial of HRP certification. 10 C.F.R. §§ 712.14-23. Thus, as a rule, we will not make a determination regarding denial of HRP status involving purported retaliation in the context of a Part 708 proceeding.

However, if Merwin can establish that BWXT has not followed its normal procedures in determining whether to submit his name to the DOE for HRP status, this could fall within the realm of a Part 708 retaliation. For example, Merwin seems to suggest that BWXT has required him to undergo many psychological tests in connection with his HRP application. Therefore, Merwin could file a fully developed complaint of retaliation, demonstrating that BWXT used unfair or unusual procedures in requiring those tests before deciding whether to submit him for HRP status, or that BWXT unfairly determined that the tests indicated that he should not be put forward to the DOE for HRP status. In such a case, we could, if otherwise appropriate and subject to other Part 708 jurisdictional limitations, direct BWXT to follow its normal procedures and submit Merwin for HRP consideration. If the DOE then rejected Merwin's application, he would be limited to Part 712 in the type of review he could seek. Part 708 would not be available to him if the DOE rejected his HRP certification.

However, I note in the record of this case that in 2003-2004 Merwin required accommodation under the Americans with Disabilities Act for headaches and associated cognitive and memory difficulties. He required treatment and medication for these conditions. Under these circumstances, BWXT does not seem at all unreasonable in requiring that Merwin undergo appropriate testing to assure that his cognitive functioning has been restored to normal. Thus, the record does not suggest at this point that BWXT has acted inappropriately or in a retaliatory manner. Quite the contrary, by requesting that Merwin submit to testing, BWXT appears to have been acting with due diligence.

Accordingly, the WP Manager's determination regarding Merwin's HRP status should be sustained.

B. Unhealthy Office

I see no Part 708 retaliation with respect to Merwin's claim that BWXT situated him in an unhealthy office. As stated above, the WP Manager indicated that BWXT had moved the complainant to a suitable office, and that this aspect of his complaint should therefore be dismissed under Section 708.17(c)(5). I agree. Merwin has indicated that BWXT moved him to an acceptable office within 10 days of the time that it learned that he was experiencing an adverse reaction to his office environment. May 18, 2006 Letter from John Merwin to Timothy Pridmore. While Merwin seems to believe that this 10 day period is too long, I disagree. I find that BWXT acted reasonably, and that 10 days does not constitute an unreasonable length of time to allow BWXT to evaluate Merwin's concern and locate another office for him and the other two affected employees. In fact, I believe that the firm acted in a relatively expeditious manner to accommodate Merwin. I therefore find that the unsafe office allegation, as described by Merwin himself, does not rise to the level of a retaliation. In any event, Merwin has been moved to a new office. Accordingly, this aspect of Merwin's complaint has been substantially resolved, and therefore no jurisdiction exists under which to consider it. 10 C.F.R. § 708.17(c)(5).

C. Other Retaliations

In several filings Merwin has indicated that he has not received proper salary increases or is not being paid at the appropriate salary level. For example, in his amended complaint he asked that BWXT be directed to raise his salary to the level it was prior to his "initial employment action." Strictly speaking, of course, this is stated as a request for relief and not a retaliation. However, taking this in the light most favorable to Merwin, I still see no adverse action that qualifies as a retaliation under Merwin's current Part 708 complaint. By "initial employment action" Merwin appears to be referring to the fact that in April 2003 he was terminated by BWXT. He took this matter to the Texas Commission on Human Rights, claiming that BWXT discriminated against him because of a disability, in violation of the Americans with Disabilities Act. The matter was settled in April 2004, and Merwin was reinstated, but apparently to a different position at a lower salary. See, BWXT June 1, 2006 Response, Exhibit 4, BWXT Pantex Employee History Profile. If Merwin is seeking a salary increase

based on this settlement agreement, it is not cognizable under his current Part 708 claim of retaliation. His alleged protected activity took place in 2005, long after the 2004 reduction in salary due to the settlement. Accordingly, the salary reduction cannot be considered a retaliation for protected activity.

Merwin indicates in his appeal that BWXT has retaliated against him by "using performance appraisals and merit increases against him." On its face, this assertion is too vague to form the foundation of a claim of retaliation. If by this Merwin means that he has received reduced salary increases and lowered performance appraisals, he should so state. Further, he should show that these personnel actions took place after he participated in the protected proceeding, rather than being associated with disability action discussed above. The record before us at this point does not indicate that Merwin's salary increases or performance ratings were reduced after he participated in the protected proceeding. In fact, it appears that the salary increases and ratings he has received since his participation in the Part 708 hearing have not been reduced. As stated above, the reduction in salary took place in 2004, after his reinstatement in connection with his 2004 disability settlement agreement, and not after his Part 708 protected activity. See Exhibit 4, BWXT Pantex Employee History File. If Merwin believes that his salary increases were reduced and his performance appraisals were lowered after his appearance in the Part 708 proceeding, he should file another Part 708 complaint of retaliation documenting this matter. This would, of course, be a new complaint and therefore subject to the filing and jurisdictional limitations of Part 708. *E.g.*, 10 C.F.R. §§ 708.14; 708.17.

Further, I find that Merwin's assertion that BWXT failed to provide environmental testing results has now been resolved, given the fact that Merwin has been moved to a new office. 10 C.F.R. § 708.17(c)(5). Finally, Merwin's allegation that his office was moved nine times in eight months, with nothing more, hardly rises to the level of a serious Part 708 retaliation. It should be dismissed under Section 708.17(c)(4) as frivolous.

As indicated by the above discussion, I find that the NNSA/SC dismissal was correct and that the Merwin appeal should be denied.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by John Merwin (Case No. TBU-0052) is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 19, 2006