

March 22, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Misti Wall
Date of Filing: February 15, 2007
Case Number: TBU-0061

Misti Wall (the complainant or Wall), 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 reversed and the matter remanded for further processing to the Whistleblower Program Manager (Manager) at the National Nuclear Security Administration Service Center (NNSA).

I. Background

The complainant was an employee with Sandia Corporation (Sandia), a DOE contractor that runs Sandia National Laboratories (SNL), located in Albuquerque, New Mexico. Pursuant to Part 708, she filed a complaint of retaliation against Sandia with the NNSA. In her complaint, she stated that in October and November 2005 she disclosed to Sandia managers that her newly-hired supervisor was involved in a situation that indicates a conflict of interest in performing the supervisor's official Sandia duties. The complainant noted that this supervisor was hired to be the manager in Business, Leadership, Management and Development (BLMD) at SNL and that the supervisor's own company, LTD Unlimited (LTD), was a contractor of SNL, providing services to BLMD. Among the specific actions representing conflicts that the complainant cited were the following. The supervisor: (i) asked BLMD employees whom she managed to contact LTD so LTD (under the direction of the supervisor's daughter) could continue to provide services for BLMD; (ii) talked to BLMD employees about contacting and setting up appointments with her daughter regarding LTD's providing services for BLMD; (iii) talked to BLMD employees whom she managed about circumventing the Sandia Procurement process to continue contracting with LTD; and (iv) remained "a partner" of LTD.

On February 16, 2006, the complainant was terminated from her position at Sandia. On April 5, 2006, she contacted the Manager regarding this alleged retaliation. On April 7, at the complainant's request, the matter was held in abeyance pending consideration of the termination issue by the New Mexico Human Rights Division. This matter was dismissed by the New Mexico Human Rights Division, and on October 10, 2006, Wall filed a Part 708 complaint of retaliation with the Manager.

In the complaint, Wall claimed that she was terminated in retaliation for making protected disclosures regarding the supervisor's conflict of interest. She stated that the conflicts violated Sandia's Corporate Business Rule CPR001.2.3. This rule sets out Sandia's procedures for addressing employee conflicts of interest. In relevant part, it provides that employees must disclose conflicts of interest within 30 days of their hire date. CPR Section 3.2. It also provides for development of plans to mitigate any "actual, perceived or potential conflict of interest. . . ." CPR Section 3.1.

On January 31, 2007, the Manager dismissed the complaint "for lack of jurisdiction." The Manager stated as the basis for this finding that the complainant had failed to show that she had made a disclosure that is protected under Part 708. In this regard, the Manager stated that the disclosure that the complainant's supervisor might have a conflict of interest in performing her Sandia duties does not constitute a "(1) revelation of a substantial violation of law, (2) a substantial and specific danger to employees to public health or safety, or (3) fraud, gross mismanagement, gross waste of funds or abuse of authority." Specifically, the Manager found that the complainant's statement that Sandia's Corporate Business Rule was being violated by her supervisor is not sufficient to demonstrate a violation of law within the meaning of Part 708.

The Manager also noted that Sandia had responded to the complaint by asserting that it had taken steps to mitigate the conflict of interest problems and that Wall's termination was unrelated to the disclosures. In this regard, the Manager also found that the disclosures were not protected because the individuals to whom they were made were already aware of the supervisor's conflict of interest. On this basis, the Manager concluded that the complaint should be dismissed for lack of jurisdiction, citing to 10 C.F.R. § 708.17. On February 15, 2007, 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

Under Part 708, a DOE office may dismiss a whistleblower complaint for lack of jurisdiction if the facts do not present issues for which relief can be granted under Part 708, or the complaint is frivolous or without merit on its face. 10 C.F.R. §708.17(c)(2) and (4). After reviewing the record in this case, I find that the grounds for dismissal cited by the Manager did not comply with that provision. In my view, the Complaint is neither frivolous or without merit on its face, nor does it present issues for which relief cannot be granted.

In her dismissal letter, the Manager asserted that the complainant's conflict of interest disclosures "do not divulge a problem that Ms. Wall could reasonably believe 'reveals (1) substantial violation of law, (2) a substantial and specific danger to employee or to public health or safety, or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.' At most her 'disclosures' reveal her belief that Sandia's own policies were being violated by her supervisor."¹

The record does not support this conclusion. The complainant raised a specific potential conflict of interest situation and cited what she believed was a valid rule that was violated. In view of the matters alleged by the complainant, that the supervisor encouraged subordinates to award contracts to a firm operated by her daughter and where the supervisor remained partner, it appears that there was ample evidence to support a reasonable belief by Wall that Sandia's conflicts rule was being violated. However, even if she was incorrect that this particular rule was violated, I do not believe that this constitutes an appropriate basis for dismissal under Section 708.17(c)(2) or (4). Part 708 does not require that the complainant specify in her complaint the precise law, rule or regulation that was violated. 10 C.F.R. §708.12. In this regard, at this very early stage of a Part 708 proceeding, it is often difficult for a whistleblower to determine and cite the precise laws or rules that might apply to the actions she is describing. To require a whistleblower to include that type of detailed legal analysis in her complaint would subvert the purposes of Part 708. Thus, even though Wall may be unable to ascertain all

¹/ The Manager truncated her quotation of Section 708.5(a)(1), which extends protected status to disclosures that reveal "a substantial violation of a law, rule, or regulation." 10 C.F.R. § 708.5(a)(1) (emphasis supplied).

the specific violations of law, rule or regulation that might exist here, the facts thus far suggest that the complainant could have reasonably believed that the apparent conflict of interest violated a law, rule, or regulation.

The showing of which provisions of Section 708.5 are applicable often becomes clearer as the proceeding develops through the investigation and hearing stages. Therefore, it is inappropriate to dismiss the claim at this point, when the complainant's limited knowledge of the facts and law are not sufficiently refined to permit her to specify all the laws, rules and/or regulations that she believes have been violated by the information she has disclosed, as well as violations of other provisions of Section 708.5.

Thus, dismissal of the complaint because it does not cite an applicable law, rule or regulation at this early stage is premature. It is obvious that conflict of interest laws, rules and regulations do exist. The mere fact that Sandia has put into place CPR001.2.3, which sets forth its own requirements for disclosing and mitigating conflicts of interest, supports that position.

As stated above, Section 708.5(a)(1) does require, however, that the violation of the law, rule or regulation be a "substantial" one. The conflict of interest issue raised by the complainant meets that standard. In my opinion, the complainant's disclosures concerning her supervisor's alleged promotion of her personal business interests in the context of her SNL position raise a matter of substantial importance. I believe that the alleged conflict of interest could significantly impact the supervisor's objectivity in performing her Sandia functions. It is a well-recognized principle that individuals involved in administering contracts should not have a financial interest in the firms providing services. ²

2/ The disclosures made by Wall also could raise issues of fraud, gross mismanagement, gross waste of funds or abuse of authority under Section 708.5(a)(3). In this regard, the supervisor could certainly exert undue influence on her BLMD employees in order to promote LTD. Although the complainant did not allege mismanagement, fraud or abuse, she has made allegations that the supervisor did attempt to influence Sandia employees to favorably consider her firm.

The Manager also found as a further basis for rejecting the complaint that the individuals to whom complainant made her disclosures were already aware of the potential conflict and had taken steps to mitigate its effect. In this regard, the Manager appears to rely on Sandia's Motion to Dismiss the Complaint. In that Motion, Sandia claims that it was aware at the time it hired the supervisor that she was involved in LTD, and that her firm was providing services to Sandia. Sandia claims that since it was well aware of the entire situation, no conflict of interest could occur and, in fact, it informed Wall that a mitigation plan was in place.

I find Sandia's argument unpersuasive, and the Manager's conclusion premature. The record in this case indicates that the complainant made a disclosure regarding the conflict of interest matter on October 25, 2005, one day after the supervisor was hired. The complaint further indicates that Wall also disclosed information about a conflict of interest regarding the supervisor on October 31, November 1, 2, 4, and 16. The record also shows that the supervisor signed a "Personal Conflict of Interest Questionnaire for Sandia Corporation Employees" on November 27, 2005, and she signed a mitigation plan on November 29, 2005. These documents therefore seem to have been put into place weeks after the complainant first raised her conflict of interest concerns. Accordingly, even if Sandia was aware of the potential conflict, the record at this point does not clearly demonstrate that Sandia had already taken care of the problem at the time the individual first raised it in October 2005.

Moreover, as stated above, Sandia CPR 1.2.3 provides that all employees are required to complete a "Personnel Conflict of Interest Questionnaire" within 30 days of their hire date. As indicated previously, the supervisor's "hire date" is October 24, 2005. The record further indicates that on November 27, the supervisor filled out a form disclosing the conflict of interest. Sandia Motion to Dismiss, Exhibit 2. Thus, the Sandia 30-day conflict of interest provisions were not strictly adhered to here. The implication by Sandia that at the time the complainant made her initial disclosure on October 25, company personnel that she spoke to were already aware of the possible conflict of interest and had taken steps to mitigate the concern, is not supported by the record thus far. ³

3/ In any event, we do not believe that the fact that disclosures are made to officials who are already aware of the potential conflict of interest necessarily means that the disclosures
(continued...)

A resolution of the parties' competing assertions concerning the legitimacy of the alleged conflict of interest concerns is beyond the scope of this initial stage of the proceedings. As stated above, in the present context, Section 708.17 permits a program manager to dismiss a Part 708 complaint if the allegations set forth in the complaint fail to allege a non-frivolous claim for which relief can be granted under Part 708. In the subject case, however, the parties' conflicting claims concerning whether or not the complaint presents a disclosure protected under Section 708.5, is not susceptible to summary resolution under Section 708.17. On the basis of the present limited record, we cannot say that the allegations in the complaint that the complainant suffered retaliation for making a protected disclosure are either plainly frivolous or without merit, or, if ultimately proven, would not support relief under Part 708. *William Cor*, 29 DOE ¶ 87,016 (2006) at 89,072.

I find that the claims raised here present issues for which relief can be granted and which are not frivolous. Accordingly, I find that the dismissal by the Manager was incorrect, and that the complaint should be accepted for further processing.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that the decision and order shall be implemented by the affected NNSA element, official or employee.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Misti Wall (Case No. TBU-0061) is hereby granted and her Part 708 complaint is hereby remanded to the Employee Concerns Program Manager, NNSA Service Center, for further processing as set forth above.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: March 22, 2006

3/ (...continued)
are not protected under Part 708 where, as here, the complainant additionally disclosed specific incidents of improper conduct by the supervisor that were apparently unknown to Sandia management.