

August 29, 2011

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Appeal

Name of Case: Gennady Ozeryansky

Date of Filing: August 2, 2011

Case Number: TBU-0119

Gennady Ozeryansky (Ozeryansky), a former employee of SupraMagnetics, Inc. (SupraMagnetics), appeals the dismissal of his retaliation complaint filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.¹ The DOE's Employee Concerns Program Manager (the ECP Manager) dismissed Ozeryansky's complaint on July 13, 2011. As explained below, the Appeal should be denied.

I. Background

The DOE'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, contractor operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are 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. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

During the period 2006 until 2009, Ozeryansky was employed by SupraMagnetics, Inc. (SupraMagnetics), a DOE grant recipient. On April 16, 2009, Ozeryansky e-mailed DOE contracting officials and expressed concerns that SupraMagnetics had not provided him with information to account for DOE funds connected with a failed project. On June 3, 2009, SupraMagnetics discharged Ozeryansky for contacting the DOE on this matter.

On April 26, 2010, Ozeryansky filed a Part 708 complaint with the DOE's Employee Concerns Program Manager (the ECP Manager).² Ozeryansky alleged that because of his April 16, 2009, E-mail to DOE, which was a protected disclosure under Part 708, he was terminated from his employment.

¹ OHA reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. See 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why the Appellant thinks the dismissal was erroneous).

² The ECP Manager's December 29, 2010, dismissal letter erroneously refers to this date as April 26, 2009.

On December 29, 2010, the ECP Manager informed Ozeryansky that the DOE was dismissing his Part 708 complaint because it was untimely. Specifically, Ozeryansky had not filed his Part 708 complaint within 90 days from the date of his termination as required by 10 C.F.R. § 708.14(a). The ECP Manager also found that, because Ozeryansky had filed a complaint regarding his termination in a State Board of Review, section 708.15(c) of Part 708 barred further consideration of his case under Part 708.³

In a submission received by the DOE on January 27, 2011 (the January 27 Appeal), Ozeryansky appealed the ECP Manager's determination dismissing his Part 708 complaint. In the January 27 Appeal, Ozeryansky contended that his case before a State Board of Review was only in regard to unemployment benefits and did not involve a claim for wrongful termination. Ozeryansky also contended that SupraMagnetics was a DOE subcontractor because it received DOE Small Business Innovation Research (SBIR) grants and because it also supplied materials to the DOE's Brookhaven National Laboratory (BNL).⁴ On March 3, 2011, we remanded Ozeryansky's January 27 Appeal to the ECP Manager to obtain additional information and make a new determination with regard to Ozeryansky's Part 708 complaint as to the issue of whether SupraMagnetics was a "subcontractor" within the meaning of Part 708 at the time that the alleged protected activity and the alleged retaliation took place. *See Gennady Ozeryansky*, Case No. TBU-0113 (March 3, 2011) *slip op.* at 2.⁵

The ECP Manager issued a new determination on July 13, 2011 (July 13 Determination), in which he first stated that SupraMagnetics had provided the ECP Manager with documentation establishing that its only relationship with DOE was as a recipient of Assistance Agreement Awards (financial grants) through the DOE's SBIR program. July 13, 2011 Letter from William A. Lewis, Jr., Employee Concern Program Manager, DOE, to Gennady Ozeryansky (July 13 Determination) at 1. The ECP Manager then stated that, as a "grant recipient," SupraMagnetics was not a contractor or subcontractor as defined in section 708.2 of the Part 708 regulations. Consequently, the ECP Manager found that Ozeryansky could not avail himself of the protections of Part 708. July 13 Determination at 2.

In his July 29, 2011, appeal of the July 13 Determination (July 29 Appeal), Ozeryansky argues that the dismissal of his complaint was inappropriate.⁶ Ozeryansky asserts that the title page of the SBIR award notification states that 10 C.F.R. Part 600 is applicable to the grant and that this regulation specifies that the grant recipient must have an internal controls structure that provides reasonable assurance that the grant recipient is managing the award funds in compliance with all federal laws and regulations. Because Ozeryansky was never given monthly account activity statements, SupraMagnetics could not have an effective internal controls system as mandated by 10 C.F.R. Part 600. Ozeryansky apparently argues that because 10 C.F.R. Part 600 was

³ Section 708.15(c) bars processing of a Part 708 complaint if a complainant chooses to pursue a remedy, based upon the same facts, under state or other applicable law.

⁴ The ECP Manager did not further press the untimeliness of Ozeryansky's Part 708 complaint as a ground to dismiss. *See infra*.

⁵ OHA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov>.

⁶ The Appeal was dated July 23, 2011, but was not received by OHA until July 29, 2011.

applicable to SupraMagnetics, Part 708 likewise is applicable to the firm. Ozeryansky also argues that SupraMagnetics' purchase order to supply materials to BLN should provide jurisdiction under Part 708 to hear his complaint.

II. Analysis

For a complaint to be covered under Part 708, it must be filed by an *employee of a contractor* that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation, or refusal described in section 708.5 of Part 708.⁷ 10 C.F.R. § 708.3 (emphasis added).

Section 708.2 defines a contractor as follows:

Contractor means a seller of goods or services who is a party to:

- (1) A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities, or
- (2) A subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or -leased facilities.

10 C.F.R. § 708.2. As a grant recipient, SupraMagnetics was not a "seller" of goods or services to the DOE. In this role, SupraMagnetics was not trying to complete a commercial transaction for goods or services with the DOE but instead sought funds from DOE to assist it in its own research without any *quid pro quo* or repayment. Consequently, we concur with the ECP Manager's determination that SupraMagnetics' acceptance of grant money did not make it a contractor for purposes of section 708.2 of the Part 708 Contractor Employee Protection Program. Thus, Ozeryansky can not sustain a Part 708 complaint based upon SupraMagnetics' grant awards.

We note, however, that DOE signed a purchase order with SupraMagnetics on September 18, 2007, to supply DOE with 2000 feet of superconducting wire. *See* January 27 Appeal (BNL Purchase Order No. BNL-0000106985 under Contract No. DE-AC02-98CH10886). Nonetheless, this contract is also not sufficient to confer Part 708 jurisdiction to Ozeryansky's complaint.

SupraMagnetics is not a party to a management and operating contract with the DOE. Nor is it a party to a contract with DOE or a DOE contractor requiring it to perform work directly related to activities at a DOE-owned or -leased facility. Consequently, SupraMagnetics cannot be a "contractor" pursuant to section 708.2. A purchase order for project-specific goods or services might, in some circumstances, qualify a firm as a subcontractor to a management and operating contractor as defined in section 708.2. However, such circumstances are not present in this case. To be considered as a subcontractor under Part 708.2 a firm must *perform work related to activities* at DOE-owned or -leased facilities. 10 C.F.R. § 708.2. A one-time sale of 2000 feet of superconducting wire cannot be considered performing work related to activities at a DOE-

⁷ We will assume for the purpose of this jurisdictional appeal that Ozeryansky's April 16, 2009, E-mail met the subject-matter requirements of section 708.5.

owned or -leased facility. *See* 10 C.F.R. § 708.2. In selling superconducting wire to BNL, SupraMagnetics sells a product which does not have a direct nexus with any specific BNL project or research. Consequently, we find that the purchase order is not a subcontract that would make SupraMagnetics a “subcontractor” for Part 708 purposes. Because SupraMagnetics is not a contractor or subcontractor as defined by section 708.2, there is no jurisdiction under Part 708 for consideration of Ozeryansky’s complaint. Thus, his July 29 Appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed by Gennady Ozeryansky (Case No. TBU-0119) is hereby 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. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 29, 2011