

Case No. VBH-0024

March 1, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Matthew J. Rooks

Date of Filing: July 6, 1999

Case Number: VBH-0024

This Initial Agency Decision considers a complaint filed by Matthew J. Rooks under the whistleblower protection program of the Department of Energy, 10 C.F.R. Part 708. As explained below, Rooks' complaint is denied.

Background

Rooks filed this complaint under the Part 708 regulations on November 17, 1998, and the Department's Office of the Inspector General began an investigation. While the investigation was pending, responsibility for conducting investigations of Part 708 complaints was transferred to the Office of Hearings and Appeals (OHA). 64 Fed. Reg. 12826 (March 15, 1999).

The OHA issued a Report of Investigation on July 6, 1999. The Report, which I will discuss further below, essentially found that Rooks had failed to provide enough evidence to establish that a retaliatory act occurred. In accordance with 10 C.F.R. § 708.21(a), a hearing on Rooks' complaint was scheduled. Rooks and the contractor subsequently requested that the Initial Agency Decision be issued on the basis of the existing record, without a hearing. 10 C.F.R. § 708.31.

The incidents relevant to Rooks' complaint took place at the Department's Oak Ridge National Laboratory (ORNL). The management and operating contractor at ORNL was Lockheed Martin Energy Research (LMER). LMER contracted with several firms to provide technical personnel for programs at ORNL. One such firm was Jaycor Environmental (Jaycor).

Rooks had been hired by Jaycor in 1992 as an environmental scientist and assigned to ORNL. At times relevant to this complaint, he was a member of a team working on the Environmental Compliance and Management Program (ECAMP). The ECAMP was a project of the Department of the Air Force's Air Combat Command (ACC), which contracted with LMER to carry out its duties under the ECAMP. LMER tasked one of its divisions, the Environmental Sciences Division (ESD), with responsibility for the ECAMP. The supervisor for the ECAMP team was XXXXX (the Supervisor), an employee of LMER. Besides Rooks, ECAMP team members included Alizabeth Aramowicz Smith, who was also an employee of Jaycor, and Stephanie Ashburn, an employee of ORISE. Rooks, Smith, and Ashburn have all filed similar whistleblower complaints, and I will refer to them collectively as "the complainants."

The following account of the Supervisor's actions is taken from the complainants' submissions, unless otherwise noted.

In March 1996, the Supervisor met with the complainants to discuss her frustration with LMER and ESD management. She told them she wanted to move the ECAMP contract from LMER to another firm. The record shows that the Supervisor had often expressed the same frustrations during the five years that Rooks worked with her.

In fall of 1996, the supervisor began pressuring the complainants to choose a new consulting firm for which they wanted to work. Smith and Ashburn went to Dave Shriner, a manager in the ESD, to complain about the Supervisor's pressure tactics. Shriner referred them to Jim Loar, the Supervisor's immediate supervisor. They told Shriner and Loar that the Supervisor was trying to force them to work for another subcontractor. Loar told Smith and Ashburn not to change employers, and said he would speak with the Supervisor about her behavior. Smith or Ashburn relayed this information to Rooks.

The Supervisor was upset when the complainants refused all job offers that she had helped arrange. On November 15, she told the complainants that one of them would be fired if they could not agree on a single firm from which each would accept a job offer. Ashburn immediately telephoned Loar to report the Supervisor's threat. Loar told the Supervisor immediately to stop trying to force the complainants into working for another firm, and to apologize to them for having done so. She verbally apologized and wrote a letter to Loar justifying her attempt to place the complainants with another employer.(1)

On November 25, 1996, an anonymous call was made to the Lockheed Martin Ethics Help Line. According to the Help Line Report, the caller alleged that the Supervisor "was manipulating contracts in order to create a situation where she could retire from LMER and go to work with a subcontractor working on the same job. There were other allegations also dealing with [the Supervisor's] interactions with subcontractors regarding setting salaries."

The Help Line Report relates that Steve Stow, an LMER ethics official, responded to the complaint by setting up a meeting attended by himself, the Supervisor, and the Supervisor's first and second level managers, Loar and Steve Hildebrand. When the Supervisor was questioned about the allegations, she denied manipulating subcontracts, claiming that she had no authority to move subcontracts. Based on the interview with the Supervisor, the Help Line Report concludes that "investigation did not substantiate the allegations. It is felt that they were brought by a disgruntled subcontractor, probably one whose salary requests could not be met." The Report further notes that "because of the non-specificity of the original anonymous allegation and based upon the interview with [the Supervisor] ... the conscious decision was made not to interview subcontractors individually, but to hold [a] group meeting."

In accordance with the Help Line Report, a meeting was arranged for January 14, 1997. The participants in the meeting were Ashburn, Smith, the Supervisor, Hildebrand, Stow, and Loar. Rooks was away on an ECAMP assignment when the meeting was held. However, Rooks learned of the matters discussed at the meeting and claims that as a result, he became convinced that he would soon lose his job. He began to look for new employment. In March 1997, he resigned from his job with Jaycor and accepted a position with another firm.

In April 1997, Rooks returned to the LMER site and, with the other complainants, met with Charlene Edwards. As an LMER ethics officer, Edwards initiated a new investigation. On August 21, 1997, the investigation was closed. Edwards met with the complainants and informed them that her office had reached the following findings:

1. An employee of ... LMER [*i.e.*, the Supervisor] acted in a manner that was unfair to Jaycor, some of its employees, and another individual [*i.e.*, Ashburn, an employee of ORISE]. These actions, which were not authorized or condoned by LMER management, constituted a clear violation of LMER ethical principles and policies.
2. A personal conflict of interest was identified.
3. The allegation that an LMER employee [*i.e.*, the Supervisor] was working with various subcontracting firms to establish salaries for those team members, who might go to work for them,

was not substantiated.

4. Although there is some support for the allegation that team members would lose their jobs if they did not reach a consensus and select an employer other than Jaycor, the evidence was not sufficient to substantiate the allegation.
5. The following corrective actions are being taken:

- a. Letters of reference will be prepared for the non-LMER team members.
- b. Efforts will be made to prevent even the perception of retaliation. A record of decision will be prepared and approved by the Environmental Sciences division manager for major decisions involving the ... ECAMP that may affect the non- LMER members of the ECAMP team.
- c. Division management will prepare a written plan of action to prevent recurrence of this issue.
- d. Originally the Ethics Office recommended that management review the suitability of the ECAMP work per the guidelines of the Economy Act. This is in reality a ... sponsor's decision. On September 3, 1997, notification was received from the sponsor that current funding of the ECAMP project at the Oak Ridge National laboratory would expire on September 30, 1997, and that the option to extend work in FY 1998 would not be exercised.
- e. Appropriate disciplinary action will be taken.

On November 7, 1997, Rooks filed this complaint against LMER.

Analysis

1. The Part 708 Regulations

The goal of the Part 708 regulations "is simply to restore employees to the position they would have occupied but for the retaliation" committed against them for whistleblowing. 64 Fed. Reg. 12867 (March 15, 1999). To accomplish this goal, the regulations authorize a set of restitutionary remedies at 10 C.F.R. § 708.36. *Id.*

The retaliation for which employees can seek restitution is defined at 10 C.F.R. § 708.2 to mean "an action ... taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)" as a result of the employee's whistleblowing activities, which are defined at 10 C.F.R. § 708.5.

The complainant in a Part 708 proceeding has the burden of showing, by a preponderance of the evidence, that his protected disclosure was a contributing factor to a retaliatory act. 10 C.F.R. § 708.29. According to the Report of Investigation, the complainants disclosed that the Supervisor had abused her authority. Such an allegation constitutes a protected disclosure. 10 C.F.R. § 708.5(a)(3).

Rooks, however, did not make an actual disclosure about the Supervisor until the April 1997 meeting with Charlene Edwards, after he had left Jaycor. Nevertheless, the Report of Investigation concludes that "Rooks made an *indirect disclosure* to Loar [before he left Jaycor], by virtue of his close association with Ashburn and Smith, who identified Rooks as an employee adversely affected by [the Supervisor's] actions" (emphasis added).

As noted above, a complainant in this proceeding must show, by a preponderance of the evidence, that he made a protected disclosure and that the protected disclosure was a contributing factor to a retaliatory act. The issue of "indirect disclosures" is murky, and I make no finding on it in this Decision. I find, however, that Rooks has failed to show that he was subject to retaliation, as defined in the regulations, and has

therefore failed to meet his evidentiary burden.

In some whistleblower cases, the whistleblower is discharged or demoted, and there is no need to establish that there was retaliation against the whistleblower. In Rooks' case, however, he has claimed that certain acts by the LMER management forced him to resign. It is part of Rooks' burden, therefore, to show that the actions he claims as retaliation meet the regulatory definition of retaliation.

As an initial matter, it is not clear what Rooks is claiming as a retaliatory act. The Part 708 regulations require a complainant specifically to describe the alleged retaliation taken against him. 10 C.F.R. § 708.12(a)(1) (emphasis added).(2) Rooks did not specify the acts for which he sought restitution, either in his complaint or in subsequent written submission to this Office.

Nevertheless, the Report of Investigation infers from Rooks' submissions that "the adverse personnel actions affecting Rooks were Lockheed's decision to enter into a task-based contract with Jaycor beginning in early 1997, and certain statements concerning subcontractor employees made by [Hildebrand] in a meeting held on January 14, 1997, and subsequently conveyed to Rooks." On August 12, 1999, I sent Rooks a letter requesting, among other things, that he specify the negative actions with respect to employment for which he sought restitution. Rooks did not respond to this request.

Rooks' claim is essentially that these events made his job conditions so unbearable that he was forced to resign. I will therefore consider whether these two events could have reasonably caused Rooks to leave his job with Jaycor.

2. Hildebrand's Comments at the January 14 Meeting

The January 14, 1996 meeting between the complainants and a group of LMER managers occupies a central role in Rooks' complaint. First, Rooks finds it significant that the meeting was held while he was traveling on an ECAMP assignment. Although Rooks claims his absence shows that the purpose of the meeting was intimidation and harassment, I find no support for his belief. If the managers wanted to intimidate Rooks, they would have wanted him to be at the meeting with the other complainants.

There is no explanation in the record of why the meeting was held without Rooks. As noted above, at the time of the meeting Smith and Ashburn had personally come forward with complaints about the Supervisor's conduct, while Rooks had not.

Besides claiming that his exclusion from the meeting indicates retaliatory intent, Rooks asserts that the content of the meeting led him to leave his job with Jaycor. Although he missed the meeting, Rooks says that Smith, Ashburn, and Wojtowicz told him what had been said. Rooks summarizes the meeting as follows:

Alizabath [Smith] and Stephanie [Ashburn] were told that an anonymous call had been placed with the Lockheed Martin ethics hotline. They were informed that the allegations made in that call were baseless and that this meeting was their opportunity to say anything or nothing at all about the *conclusions* of the investigation. They also listened to the division director discuss budget cutbacks and personnel layoffs in the division, and how he hoped we could continue to have a working relationship. The message was clear, and Alizabath and Stephanie kept mum. Instead, we called Lockheed Martin's ethics hotline senior official ... to express our disgust at being railroaded by the LMER management and ethics officer, threatened with layoffs, and labeled "disgruntled subcontractors seeking revenge" without being given the opportunity to tell our side of the story during the "investigation."

S.G. Hildebrand's comments during the meeting I missed in January, as relayed to me by ... Wojtowicz, made it clear to me that it was just a matter of time, a few months or even less, before Lockheed Martin would terminate my employment. I began to look for another job. Although I would lose my benefits, I would at least guarantee income for my family. In addition, I knew that [the Supervisor] had acted unethically and perhaps illegally. I further knew that the Lockheed Martin employees who were above [the

Supervisor] in the chain of command told us that she had done nothing wrong. They were embracing her unethical, perhaps illegal behavior. I feared that under their guidance, I would be mired in even more unethical, even illegal behavior.

Rooks also gave a statement during the investigation, in which he claimed that comments made in this meeting led him to look for a new job.

I recall that I was told that Mr. Hildebrand made comments that our jobs at LMER were not long term....

Because of the situation, I knew that I would not be employed by Jaycor much longer, and I knew that I would have no future opportunities to work in a unique environmental data base development area. Although I was never expressly told by Jaycor that my funding would end at a certain time, I began to look for work elsewhere, as well as to seek alternative funding that would allow Ms. Smith and I to continue working for Jaycor. In March 1997, I received an employment offer and gave Jaycor two and one-half weeks notice. I had no real desire to leave Jaycor, but I could not take the financial risk of being unemployed.

Thus, as summarized in the Report of Investigation, "Rooks ... perceived Hildebrand's statements as a threat and they formed the basis for his decision ultimately to resign and accept a position with another firm in March 1997." The investigator concludes, however, that "I do not find that Rooks has shown by a preponderance of the evidence that Hildebrand's statements, which appear to have been merely advisory on their face, constituted a threat within the reasonable perception of those receiving the statements." I concur with the Report of Investigation in finding that the evidence does not support the conclusion that Hildebrand's comments can be reasonably construed as the type of intimidation that would reasonably cause Rooks to resign.

There is some dispute about the exact phrasing of Hildebrand's comments. Smith, Ashburn, and Wojtowicz recall Hildebrand saying that subcontracts and fellowships were not permanent careers, and that no long term expectations of employment should be held. Loar did not recall the comment. Hildebrand said his comment about not expecting permanent careers concerned only fellowships, and was a response to a question from Ashburn about whether her fellowship could be extended beyond the expiration date. Hildebrand also acknowledged telling Rooks and Smith that they may face difficulties because the downsizing of the ESD staff could affect Jaycor's work load and staffing levels.

Thus, while there is disagreement about Hildebrand's precise wording, the general nature of his comments seems clear. The question is how to interpret the comments. When considered outside any context, the words themselves are ambiguous. They may indicate nothing more than Hildebrand's expression that ESD would undergo staffing reductions in the future. Rooks, however, interprets Hildebrand's words as a threat of retaliation for blowing the whistle on the Supervisor. He claims that Hildebrand's comments made it clear to him "that it was just a matter of time, a few months or even less, before [LMER] would terminate [his] employment." I do not find that Rooks' interpretation is supported by the evidence.

The circumstances of the meeting suggest that Rooks' interpretation is inaccurate. LMER had just extended its contract with Jaycor to October 1, 1997. Immediately after the meeting described above, a "kick off" meeting was held to announce the terms of the contract extension. Thus, Rooks could not have reasonable concerns that the Jaycor's contract with LMER would end within "a few months or even less." Moreover, Rooks has not advanced a claim that LMER actually took steps to have him discharged from his job with Jaycor, and there is no indication in the record of such steps. On the contrary, Wojtowicz, the Jaycor manager in Oak Ridge, told an investigator that he had never been asked to take any adverse actions against Rooks or Smith.

Rooks asserts that it is "clear" that Hildebrand's statements meant it was "only a matter of time" before he was unemployed. On the other hand, he acknowledges that Hildebrand expressed a desire to continue working with Jaycor.

I find that Rooks' interpretation of Hildebrand's comments is unreasonable given the context in which those comments were made. As a result, I find that Rooks has failed to meet his burden of showing by a preponderance of the evidence that Hildebrand's comments were a threat for the purposes of the Part 708 regulations.

In addition to his claims about Hildebrand's statements, Rooks apparently alleges that the failure of the investigation by the LMER ethics office to substantiate charges against the Supervisor was retaliatory. I find that it is unreasonable for Rooks to contend that the charges were covered up in an attempt to intimidate the complainants. As noted above, the complainants made two complaints against the Supervisor, in November 1996 and in April 1997, that were similar to the anonymous complaint. Neither charge was made anonymously. Both charges resulted in findings against the Supervisor, which tends to show that there was no cover up. Moreover, Rooks has not brought forth any evidence to suggest that the results of the investigation into the anonymous complaint had any adverse effect on him. I therefore find that the investigation into the anonymous complaint does not constitute retaliation under the Part 708 regulations.

3. The Decision to Move Smith and Rooks Off-Site.

Rooks' second allegation involves the implementation of a management plan adopted by LMER. The plan, known as "PRO-7," was described in the Report of Investigation.

A Lockheed policy, embodied in a document known as "PRO- 7," at least ten years old, and revised and renamed as recently as December 1995, calls for subcontracting to obtain services not generally available from within Lockheed. This policy states that such subcontracting must be task-specific, that is, for a specific short-term purpose, not to obtain long-term support staff. Work performed under task-based contracts should be performed off-site to the extent possible.

The implementation of the PRO-7 plan with respect to the complainants was announced at the January 14 meeting. Rooks describes the event in his statement to the investigator.

Mr. Wojtowicz advised that both Ms. Smith and I would be required to remove our materials from the ESD office areas and work from the Jaycor facility that was off site. We were also told to put our computer accounts at ORNL in "vacation" status. Only Ms. Smith and I were instructed to make this move. At least one other Jaycor employee remained on site....

It appeared to us that LMER was retaliating against us because they believed we had filed an anonymous ethics complaint in November 1996....

Because of the situation, I firmly believed that I would not be employed by Jaycor much longer, and I knew that I would have no future opportunities to work in a unique environmental data base development area.

There are two important points about Rooks' statement. First, he does not make any claim that the move to his Jaycor office space had a negative impact on the terms or conditions of his employment. On the contrary, Ashburn and Smith indicate in their complaints that Rooks had voluntarily moved to his Jaycor office space before the January 1997 meeting so he could take advantage of better computing equipment there.

Second, Rooks' assertion that the off-site move led him to believe he would "not be employed by Jaycor much longer" is not credible. The record indicates that many subcontractors had been moved off- site under the PRO-7 plan without losing their jobs.

The extent to which the PRO-7 plan was carried out is shown by an affidavit submitted in this proceeding by Loar. It recounts that, in August 1995, Loar received a memorandum from Hildebrand that contained a list of 37 subcontractor employees in ESD. Two of the 37 were ORISE employees, and thus exempt from

PRO-7. Of the remaining thirty-five employees, only six were still working on-site after three months, four were still on-site after one year, and two were still on-site after two years.(3) In other words, of 35 subcontractor employees in ESD who were subject to PRO-7 in August 1995, 33 had been moved off-site within two years.

Loar's affidavit thus shows that PRO-7 had been broadly implemented in ESD before Rooks was included in it. Thus, Rooks was almost certainly aware of PRO-7 before the January 14 meeting. This conjecture is supported by Ashburn's and Smith's complaints, which state that the possibility that PRO-7 would be applied to Jaycor employees was discussed in October 1996, before the complainants made a protected disclosure.

Thus, I believe that Rooks knew before the January 14 meeting that the PRO-7 program might be applied to him, and that it did not mean he would lose his job. Consequently, it is not reasonable for Rooks to have believed that the move off-site meant that his job was in jeopardy. I therefore find that the implementation of the PRO-7 plan cannot be considered a retaliation under the Part 708 regulations.

Conclusion

As stated above, the complainant in a Part 708 proceeding has the burden of showing, by a preponderance of the evidence, that his protected disclosure was a contributing factor to a retaliatory act. 10 C.F.R. § 708.29. Rooks has failed to meet that burden. I will therefore deny Rooks' complaint.

It Is Therefore Ordered That:

(1) The Complaint filed by Matthew J. Rooks under 10 C.F.R. Part 708, Case No. VBH-0024, is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed with the Director of the Office of Hearings and Appeals requesting review of the Initial Agency Decision.

Warren M. Gray

Hearing Officer

Office of Hearings and Appeals

Date: March 1, 2000

(1) In his complaint, Rooks discusses at length a letter the Supervisor wrote to Loar in November 1996. He characterizes it as "a scathing letter to her immediate manager in which she proposed that he let our contracts expire (dismiss us) with the explanation that 'downsizing results in reductions in internships and subcontracts' because we had breached her trust (by reporting her unethical business conduct)." However, Rooks did not find out about the letter until April 1997, after he had resigned from Jaycor. The letter thus could have played no part in his resignation, and I will not consider it in this decision.

(2) See also 10 C.F.R. §708.6(c) in the previous version of the regulations.

(3) In addition, the impact of PRO-7 on three employees is unknown, because they held positions that were not on the ESD organization chart.