

March 2, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: S. R. Davis
Date of Filing: February 6, 2004
Case Number: VBU-0083

S. R. Davis, a former employee of Fluor Fernald, Inc. (Fluor), a Department of Energy (DOE) contractor, appeals the DOE Ohio Field Office's (OFO) dismissal of the whistleblower complaint against Fluor she filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. As explained below, I am affirming OFO's dismissal of the subject complaint.

I. BACKGROUND

A. The DOE's Contractor Employee Protection Program

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.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

B. The Procedural History

On June 21, 2001, the Complainant filed her original whistleblower complaint with OFO. ^{1/} On May 31, 2002, OFO issued a letter which granted jurisdiction and attempted to refine the issues set forth

^{1/} The June 21, 2001 Complaint is not at issue in the present case.

in the Complaint (the May 31, 2002 Letter). On June 14, 2002, the Complainant wrote to OFO. The June 14th letter attempted to clarify the Complaint and requested that the Complaint be forwarded to this office for an investigation and hearing. The June 14th letter further indicated that, in addition to the allegations set forth in OFO's May 31, 2002 Letter, the Complainant was also alleging: "over the years, my disclosures to [Fluor] and DOE management have caused me to be demoted and/or passed over for promotions." June 14th letter at 3. Apparently, there was no further correspondence between the OFO and the Complainant before I appointed an OHA Staff Attorney to investigate the allegations contained in the Complaint. A Report of Investigation (ROI) was issued by this office on August 7, 2003. After the ROI was issued, I appointed a Hearing Officer, and the case proceeded to the hearing stage. During the preliminary stages of the Hearing proceeding, however, the Hearing Officer issued two letters indicating that the Complainant's allegations that she was demoted or passed over for promotions would not be considered. These letters are dated September 24, 2003 and November 12, 2003.

After the Hearing Officer issued her first letter indicating that she would not consider the Complainant's allegations that she was demoted or passed over for promotions, the Complainant filed with OFO a second complaint (the November 10th Complaint) which contained these allegations. It is this November 10th Complaint which is at issue in the present case.

On January 22, 2004, OFO issued a Jurisdictional Decision dismissing the November 10th Complaint. The Jurisdictional Decision was based on OFO's determination that November 10th Complaint had not been filed in a timely matter. On February 6, 2004, the Complainant filed the present appeal.

II. ANALYSIS

10 C.F.R. § 708.17 sets forth those circumstances under which a complaint may be dismissed for lack of jurisdiction or for other good cause. 10 C.F.R. § 708.17(c)(1) provides: "Dismissal for lack of jurisdiction or other good cause is appropriate if: Your complaint is untimely." OFO's January 22, 2004 Jurisdictional Decision cites § 708.14(a)(1) as the basis for its dismissal of the November 10th Complaint. Section 708.14(a)(1) states: "You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation."

The November 10th Complaint clearly sought relief from the Hearing Officer's ruling that certain allegations would not be considered at the hearing stage of the proceeding. 2/ However, OFO could not have properly considered the November 10th Complaint. The DOE's whistleblower regulations do not provide for interlocutory relief from Hearing Officer's rulings, nor allow for review of a Hearing Officer's ruling by a DOE field office. The only appeal of a Hearing Officer's ruling provided by the regulations is set forth at 10 C.F.R. § 708.32. Section 708.32 allows a party who is dissatisfied with the Hearing Officer's "initial agency decision" to appeal that decision to the

2/ There is no indication that OFO was aware of the Hearing Officer's rulings when it decided to dismiss the 2nd Complaint. However, the 2nd Complaint asked that the issues raised in the 2nd Complaint be considered in the same proceeding as the issues in the Original Complaint, and that fact should have led OFO to consult with OHA.

Director of the Office of Hearings and Appeals. 10 C.F.R. § 708.32(a) (emphasis supplied). OFO does not have the regulatory authority to review an OHA Hearing Officer's ruling, therefore OFO should have dismissed the complaint filed by S. R. Davis on November 10, 2003. Since the Hearing Officer has not yet issued a initial agency decision, the Hearing Officer's ruling that certain allegations would not be considered is not yet ripe for appeal. Since this matter is not yet ripe for appeal, I will not consider it at this time. Moreover, I note that the interests of fairness and efficiency would be poorly served by allowing a party to appeal a Hearing Officer's ruling to DOE field offices or by allowing for interlocutory appeals, except in extraordinary circumstances.

III. Conclusion

As indicated by the foregoing, I find that the DOE Ohio Field Office correctly dismissed the complaint filed by S. R. Davis on November 10, 2003. However, OFO dismissed the November 10th Complaint for the wrong reason. Since the November 10th Complaint was not yet ripe for review and OFO did not have jurisdiction to consider a matter that was before a Hearing Officer, OFO should have dismissed the November 10th Complaint on those bases rather than by ruling on the timeliness of the allegations contained in that complaint. Accordingly, the present appeal should be denied. However, if the Complainant remains dissatisfied with the Hearing Officer's ruling after the issuance of the initial agency decision, she may appeal that issue under the provisions set forth at 10 C.F.R. § 708.32.

It Is Therefore Ordered That:

The Appeal filed by S. R. Davis (Case No. VBU-0083) is hereby denied.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 2, 2004