

# Case No. VBZ-0028

October 12, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Sandia Corporation

Date of Filing: August 24, 1999

Case Number: VBZ-0028

This decision considers a "Motion to Dismiss" filed by the Sandia Corporation (Sandia) on August 24, 1999. In its Motion, Sandia seeks judgment on the record of Complaint filed by Dr. Jiunn Yu (Yu) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Yu's Complaint under 10 C.F.R. Part 708 has been assigned Office of Hearings and Appeals (OHA) Case No. VBH-0028. The present Motion has been assigned Case No. VBZ-0028.

The Department of Energy established its Contractor Employee Protection Program 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 or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 F. R. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Part 708's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . ." 10 C.F.R. § 708.5(a).

Yu was employed by Sandia as a Quality Assurance Verifier from 1993, when Sandia became the Management and Operations Contractor (the M&O Contractor) for the Sandia National Laboratory, to March 30, 1995 when Sandia terminated his employment. On April 4, 1995, Yu filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Yu alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

On May 5, 1999, pursuant to the Interim Final Rule, the complaint was transferred to the DOE's Office of Hearings and Appeals (OHA) for investigation. On May 12, 1999, the OHA Director appointed an OHA Investigator. After conducting an investigation of Yu's allegations, the Investigator issued a Report of Investigation (the Report) on July 2, 1999. The Report found that: "[Yu] has met his burden of showing that his protected disclosures . . . were a contributing factor under the provisions of Part 708 to his March 30, 1995 termination from Sandia." *Report* at 10. The Report further states: "Whether in fact Sandia can show by clear and convincing evidence that [Yu's] disclosure played no role in the actions leading to his

being laid off is an issue best resolved by a hearing officer after receiving the testimony of Sandia officials, [Yu], and other relevant witnesses concerning these disputed issues " *Id.* at 14.

Sandia's motion to dismiss urges that Yu's Complaint "be dismissed on the grounds that the Record of Investigation has established by clear and convincing evidence that the adverse personnel action taken against [D]r. Yu by Sandia was not made in retaliation for any protected disclosures that may have been made by [D]r. Yu under the auspices of 10 C.F.R. part 708." Motion to Dismiss at 1. Sandia further contends that: "the record, developed by [the] Investigator . . . overwhelmingly establishes that Sandia did not engage in retaliation against [D]r. Yu within the meaning of Part 708." *Id.* at 4. If the motion were granted, judgment would be entered in favor of Sandia without providing Yu with an opportunity to conduct discovery or to present the sworn testimony of relevant witnesses at a hearing.

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999) (*Lockheed*); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997)(*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Sandia has not met the *Lockheed* standard. Moreover, the circumstances under which I may dismiss a complaint are specifically set forth at 10 C.F.R. § 708.17(c). I have reviewed each of the six enumerated bases for dismissal and it is clear that none of them applies to the present case. Therefore, I find that Yu should be given an opportunity to further develop his case through discovery and by the presentation of relevant testimony under oath at a hearing. Accordingly, the Motion to Dismiss filed by the Sandia Corporation on August 24, 1999 should be denied.

It Is Therefore Ordered That:

- (1) The Motion to Dismiss filed by the Sandia Corporation on August 24, 1999, Case No. VBZ- 0028, is hereby denied.
- (2) This is an Interlocutory Order of the Department of Energy.

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: October 12, 1999