

Case No. VWD-0002

May 21, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Supplemental Order

Name of Petitioner: Frank E. Isbill

Date of Filing: May 4, 1999

Case Number: VWD-0002

This determination will consider two requests for discovery filed with the Office of Hearings and Appeals (OHA) on May 4, 1999, by Frank E. Isbill (the complainant). These requests (which have been grouped together as one Motion for Discovery, Case No. VWD-0002) concern the hearing requested by the complainant under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). He requested this hearing on March 29, 1999 (Case No. VWA-0034) in connection with the Part 708 complaint he filed against NCI Communications, Inc. (the contractor). The DOE recently issued revised Part 708 regulations. The regulations were published in the Federal Register on March 15, 1999. See 64 Fed. Reg. 12,862 (March 15, 1999) and by their terms, apply to all cases which were pending as of the date they became effective, April 14, 1999, including the instant case. 10 C.F.R. § 708.8. I was appointed the Hearing Officer in this matter on March 30, 1999.

Requests for Discovery

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). The newly revised regulations more specifically lay out the types of discovery that can be ordered. See 10 C.F.R. § 708.28(b). The regulations grant the Hearing Officer authority to arrange for the issuance of subpoenas for witnesses to attend the hearing

on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing that the requested discovery is "designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1).

It is within the spirit of the DOE Contractor Employee Protection Program regulations that arrangements for pre-hearing discovery be worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer. However, the OHA is prepared to issue a discovery order if necessary to ensure compliance with any reasonable discovery request. Since there are material disputes regarding the complainant's discovery requests, this Supplemental Order is necessary.

In email sent on April 30, 1999 and May 2, 1999, and received by OHA on May 4, 1999, the complainant requested twelve items of discovery, six in each email. The contractor responded to these requests on May 12, 1999 (contractor's response).

Factual Background

The complainant was an employee of the contractor's abstracting and indexing group. This group aided in the processing of various types of scientific reports for inputting into DOE databases. The complainant has made many allegations of protected disclosures, including that the contractor fraudulently reduced employees' sick and vacation leave and that cost-recovery monies were not allocated properly either to the contractor by DOE or the complainant's work group by the contractor. The contractor alleges that when a DOE office decided to no longer fund the contractor's abstracting and indexing task (and to contract that work to a different firm), the contractor had no choice but to lay off the three employees remaining in the work group, including the complainant.

A. Request sent April 30, 1999

Item 1. The complainant requested that a search be performed of one of the DOE databases he had worked on. Three separate contractors inputted reports into this database during the time period of the request, June 1996 through April 1997. The complainant wishes to know how many reports each of the three contractors inputted during that time period, and to have these totals broken down by subject matter category. The purpose of this discovery is to gather information regarding the DOE decision to shift the abstracting and indexing function to another contractor.

I find that the motivations of DOE actions are beyond the scope of this Part 708 complaint. Part 708 is designed to protect contractor employees against retaliation by their employers, not DOE. See 10 C.F.R. § 708.1. Assuming that the contractor can demonstrate that the layoffs occurred on the basis of DOE direction, the contractor will have met its burden. In that situation, the complainant may try to prove the contractor should have offered him another position within the company. I therefore will deny this particular item of the discovery request.

Item 2. The complainant requested information from the 1995 and 1998 versions of the contractor's employee handbook concerning the definition of a full-time employee, part-time employee and salaried and exempt employees, in order that he could determine how benefits were supposed to be granted to each of these groups. The contractor responded that the issue of benefits for each of these categories is irrelevant to the Part 708 complaint filed in the instant case since benefits in the private sector are not mandated by law and it treated all its employees the same with respect to benefits. Further, it says that the complainant has not alleged any reprisal regarding his benefits, making the request irrelevant.

I find that the request with respect to the 1995 handbook is relevant. The complainant is claiming as one of his protected disclosures that the contractor fraudulently reduced employees' vacation and sick leave. An allegation of fraud made in good faith and reasonably is a protected disclosure under 10 C.F.R. § 708.5(a)(3). Under Part 708, the complainant has a duty to show that he had a reasonable, good faith belief that he was revealing fraud, regardless of whether fraud actually occurred. The reasonableness portion of this test is objective, and I believe the way to define this portion is to ask whether a logical person with the characteristics of the complainant, including his knowledge and position, would have come to this conclusion regarding fraud. One way for the complainant to demonstrate his knowledge of the facts surrounding his disclosure is to review the 1995 handbook (which I assume all employees received unless demonstrated otherwise). However, I do not see that the 1998 handbook has any relevance to this case, as it was issued after the complainant's firing. I will therefore order the contractor to comply with this item of the discovery request with respect to the 1995 handbook but deny the portion of the request for the 1998 handbook.(1)

Item 3. The complainant requested an Inspector General (IG) report which he believes resulted from his complaints of mismanagement (separate from his Part 708 complaint), as well as other portions of that IG case file. However, Jackie Becker, counsel for the IG, informed me that no report was issued in this matter. In addition, the complainant already received all documents in the IG case file, with a few redactions, in

response to a Freedom of Information Act request that he filed. See Record of Telephone Conversation between Jackie Becker, Counsel, IG, and Dawn L. Goldstein, Hearing Officer, OHA (May 12, 1999). Therefore, no documents that he has not already received exist that are responsive to this request.

Item 4. The complainant requested a transmittal slip within that IG file mentioning Ken Williams, an employee of the DOE's Office of Scientific and Technical Information. Jackie Becker informed me that there was no such slip within the IG files, and moreover, the IG office never spoke with Mr. Williams in this matter. Id. Therefore, no documents exist which are responsive to this item of the request.

Item 5. The complainant sought information regarding a warning he received from his supervisor via email. His supervisor had received information from a DOE employee that the complainant had been seen in "non-productive conversations." See Ex. B-34. The complainant noted that he views this incident as an example of DOE management attempting to "build a case" for his termination.(2) I find this request to be irrelevant because the contractor is not alleging that complainant was discharged as a result of alleged "unproductive conversations" and further, any evidence going to DOE animus is beyond the scope of this proceeding, as explained above. Therefore, I will deny this item of the discovery request.

Item 6. The complainant sought information relating to when the contractor was made aware that the complainant had filed his Part 708 complaint. I find that this information is not relevant. The complainant filed his complaint in March 1997 and was laid off in May 1997. The closeness in time between the filing and the personnel action is sufficient to demonstrate that the filing was a contributing factor to the action. (I would most likely impute the DOE's knowledge of the filing to the contractor). I will therefore order this item of the discovery request to be denied.

B. Request sent May 2, 1999

Item 1. The complainant disagrees with the answer of one of the complainant's employees to one of his written interrogatories. The remedy for this issue is for the complainant to examine or cross-examine the employee on this point at the hearing (most likely by telephone since she is located in another state). I will therefore deny this item of the request.

Item 2. The complainant sought information regarding whether a survey taken by the contractor in August 1996 regarding whether employees would prefer reduced hours to layoffs was "binding." The contractor responded that this request is irrelevant. The complainant then explained that this survey was used to justify lower hours which then led to the allegedly fraudulent reduction of sick leave and vacation leave. Whether or not the survey was "binding," the issue in this instance is the reasonableness of the complainant's assertion of fraud. As explained above, he can only demonstrate reasonableness based on his knowledge at the time of the disclosure; information as to whether the survey was "binding" does not go to that issue. I will therefore deny this item of the request.

There is no dispute as to items 3 and 4.

Items 5 and 6. The complainant sought budget figures for his work group within the contractor broken down by normal support task work and cost-recovery monies. The complainant is seeking to support his disclosure that cost-recovery monies were not allocated properly either to the contractor by DOE or to his work group by the contractor. The contractor responded that it does not receive budget figures from DOE in this level of detail.

I will deny this request for discovery because it is seeking information concerning an issue which I consider irrelevant. The complainant is essentially seeking evidence regarding either a contract issue between the DOE and the contractor or an internal contractor management issue. I do not believe that this type of contract issue or management issue can be the subject of a protected disclosure under 10 C.F.R. § 708.5. I do not think that the potential breach of a contract is the type of substantial violation of a "law" referred to in Section 708.5(a)(1), or that a reasonable person could conclude that any of the items listed in

Section 708.5(a)(3) had occurred. I will therefore deny these items of the request.

In conclusion, I will order that the contractor produce the relevant pages of the 1995 handbook above no later than May 28, 1999.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Frank E. Isbill Case No. VWD-0002, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.

(2) NCI Communications, Inc. shall submit to Frank E. Isbill, no later than May 28, 1999, the information requested in Item 2 (with respect only to the 1995 handbook) of his April 30, 1999 discovery request.

Dawn L. Goldstein

Hearing Officer

Office of Hearings and Appeals

Date: May 21, 1999

(1) If the contractor were to concede that the complainant's disclosure of this alleged fraud was reasonable and in good faith, this discovery order would be rescinded.

(2) The complainant does not view this as a retaliatory personnel action since no reprimand was placed in his file. See email message from complainant to Hearing Officer (April 21, 1999).