

Case No. VWA-0004

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Richard W. Gallegos

Date of Filing: June 27, 1994

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This Decision involves a whistleblower complaint filed by Richard W. Gallegos (Gallegos) under the Department of Energy's (DOE) Contractor Employee Protection Program. Since 1957, Gallegos has been employed at DOE's Sandia National Laboratory (Sandia). At present, Lockheed Martin Corporation (Contractor) is the management and operating contractor at Sandia. Gallegos is employed as a Staff Technical Assistant, whose job is to facilitate and expedite the purchase of printed circuit boards for projects at Sandia. Gallegos alleges that the Contractor retaliated against him for making disclosures about mismanagement to various managers at Sandia, an auditor at Sandia, the ombudsperson at Sandia, and the DOE's Office of Inspector General.

I. Legal Standards Governing This Case

The Department of Energy'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 (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

Proceedings under 10 C.F.R. Part 708 offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. *See David Ramirez*, 23 DOE & 87,505, *affirmed*, 24 DOE & 87,510 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences [a] violation of any law, rule, or regulation [or] a substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5(a)(1); *see also Francis M. O'Laughlin*, 24 DOE & 87,505 (1994).

The Part 708 regulations were not self-executing. Rather, the DOE stated that the provisions of Part 708 would become operative after they were incorporated into each prime contract that the DOE maintains to operate its GOCO facilities. In the case of health and safety disclosures, incorporation into the contracts was immediate, since all existing contracts required contractors to adhere to health and safety requirements that the DOE promulgated. However, in the case of disclosures concerning waste, fraud and abuse, the Part 708 protections became operative only after the Part was incorporated by reference into a specific contract. Therefore, the Part 708 regulations do not apply to complaints that arise from disclosures that do not concern health or safety where such alleged acts occurred before the underlying contract was amended to require compliance with Part 708 by the contractor. *Mehta v. Universities Research Ass'n*, 24 DOE ¶ 87,514 (1995). Furthermore, in *Mehta* the Deputy Secretary of Energy held that an extended leave of absence that spanned the effective date of the regulatory protections for the contractor did not bring that leave of absence under the purview of the regulations, since the retaliatory act occurred prior to amendment of the underlying contract when the contractor sent a letter to the complainant advising him of its decision to proceed with his termination. *Id.* at 89,065.

In the present case, Gallegos made disclosures related only to mismanagement. The Part 708 protections therefore did not operate until they were incorporated into the contract between the Department of Energy and the Sandia Corporation. The record is clear that those contractual provisions were adopted in the relevant contract on October 1, 1993. Therefore, Part 708 protections in this case apply only to alleged acts of reprisal that occurred after October 1, 1993.

Gallegos alleges that a number of reprisals were taken against him prior to October 1, 1993. Since these acts occurred prior to the start of Part 708 protections, I will not consider or discuss them here. However, Gallegos also has set forth a number of alleged reprisals that occurred after October 1, 1993:

Gallegos was placed on a performance action plan (PAP) on October 22, 1993 for a period of one year.

In October 1993 Gallegos was denied an opportunity to apply for a vacant position.

1 In October 1993 Gallegos was not given any work to perform.

In November 1993 Gallegos requested permission to attend a conference, but that permission was denied.

1 In March 1994 Sandia improperly released documents related to him in response to a subpoena in a court proceeding.

In December 1995 Gallegos was improperly denied medical leave.

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under ' 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. ' 708.9(d). *See Ronald Sorri*, 23 DOE & 87,503 (1993) (citing McCormick on Evidence ' 339 at 439 (4th ed. 1992)). In the present case Gallegos must make two showings. First, he must demonstrate that he made a disclosure to a DOE official or to the Contractor that he believed evidences mismanagement. Second, he must show that the disclosure was a contributing factor to an adverse personnel action taken against him.

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . ." 10 C.F.R. ' 708.9(d). *See Ronald Sorri*, 23 DOE & 87,503 (1993) (citing McCormick on Evidence, ' 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Gallegos establishes that he made a protected disclosure that was a contributing factor to an act of reprisal, Sandia must convince me by clear and convincing evidence that it would have taken the action even if Gallegos had not raised any concerns. *Helen Gaidine Oglesbee*, 24 DOE & 87,507, at 89,034-35 (1994).

Factual Background

Gallegos started working at Sandia in 1957. Transcript of Hearing at 15 (hereinafter cited as Tr.). He moved to his current position in approximately 1985, when he started working as an expeditor. Tr. at 17. Gallegos was a designated buyer for services purchased from L & L Electronics (L&L). L&L and Sandia maintained a contract whereby L&L supplied Sandia with circuit boards which it designed to Sandia's specifications. The contract allowed work to be sent to L&L without the need to competitively bid each circuit board that was needed by the engineering staff at Sandia. Gallegos believes that he had a good working relationship with L&L between 1985 and 1990, at which time the firm moved from California to Albuquerque, New Mexico. Tr. at 17-18. Shortly thereafter, Gallegos' son-in-law started working for L&L as a designer. Tr. at 19. In June 1990, Gallegos filed a conflict of interest form with Sandia and did not disclose that his son-in-law worked for L&L.

In 1991, the prices L&L charged increased substantially. Tr. at 20. Engineers for whom work was being done at L&L complained to Gallegos, who in turn raised the issue with L&L. Tr. at 20. As a result, Gallegos started seeking bids from multiple suppliers rather than giving jobs to L&L under the sole source contract maintained between Sandia and L&L. Tr. at 22. Sometimes Gallegos would initiate the bidding process, and other times Sandia engineers for whom the work was being done would ask Gallegos to use a bid process. Tr. at 23.

In June 1992 L&L fired Gallegos' son-in-law after discovering that Gallegos' daughter had started a design company that directly competed with L&L. She then hired her husband as a designer. In discussions with engineers he served, Gallegos told them about his daughter's company and said that it could bid on design jobs. Although L&L complained to Sandia about Gallegos' behavior, his manager investigated and concluded that Gallegos was not diverting business away from L&L to the company owned by his daughter. Tr. at 327. Indeed, the manager testified at the hearing that part of Gallegos' job was "to make certain engineers have available to them the best and most reasonable company to do the work," and that Gallegos telling engineers about his daughter's company was proper. Tr. at 325.

In 1992 it came to the attention of Sandia management that Gallegos had failed to disclose on financial disclosure forms that his son-in-law worked for L&L between 1990 and 1992. This matter was referred to the Disciplinary Review Committee, along with allegations that Gallegos had disparaged L&L to another outside firm, and that Gallegos had told a supplier that bids that it telephoned into Sandia could be heard by anyone passing the answering machine that accepted the bids, because the machine broadcast messages to anyone in its immediate vicinity. Tr. at 436-37. The Committee recommended to Gallegos' management that he be given a 30-day suspension, forfeit non-base compensation for one year, and be placed on a performance action plan that would prevent him from further conflicts of interest for a one year period. Tr. at 540-47. Sandia management implemented these actions between August and October 1993. The only action implemented after October 1, 1993 was the imposition of the performance action plan.

On November 15, 1993, Gallegos filed a complaint pursuant to the DOE's Contractor Employee Protection Program. 10 C.F.R. Part 708. The DOE's Office of Contractor Employee Protection conducted an on-site investigation of Gallegos' allegations of reprisal in September 1994. It issued a Report of Investigation and Findings on July 18, 1995, in which it concluded that Gallegos' disclosures did not contribute to any of the retaliatory acts which he claims were taken against him. Gallegos requested a hearing, and I held a hearing in this case on February 6 and 7, 1996, in Albuquerque, New Mexico. Post-hearing briefs were accepted

through April 10, 1996.

III. Analysis

In the present case, Gallegos claims that he disclosed numerous events of mismanagement at Sandia over the course of approximately five years. Under 10 C.F.R. Part 708, Gallegos has to show two things with respect to each disclosure. First, he has the burden of establishing that he "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor) information that [he] in good faith believes evidences a violation of any law, rule or regulation [or]. . . a substantial and specific danger to employees or public health and safety." 10 C.F.R. ' 708.5(a)(1)(i) and (ii). See *Francis M. O'Laughlin*, 24 DOE & 87,505 (1994). This disclosure must be to a DOE official, a member of Congress, or to the contractor; a disclosure to a supplier of a contractor does not qualify for protection. Second, he has the burden of showing that the disclosure was a contributing factor to an adverse action that was taken against him. Each of these burdens may be shown by a preponderance of the evidence. I will go through each claimed disclosure in chronological order.

A. Alleged Disclosure in the Summer of 1989

Gallegos claims that in the summer of 1989, he informed his former supervisor of a co-worker's alleged misconduct. Tr. at 32. That misconduct involved the co-worker's allegedly excessive trips to a supplier in California and the co-worker's claim for overtime pay. However, assuming that the events occurred, there is no evidence, and Gallegos does not claim, that his information had any effect on any adverse action that was taken against him. The supervisor to whom Gallegos made the report retired prior to any alleged retaliation that occurred after October 1993, and there is no evidence that he communicated Gallegos' claims to anyone at Sandia. With respect to this disclosure, Gallegos has failed to meet his burden of showing the existence of a disclosure that contributed to an adverse action against him.

B. Alleged Disclosure in the Fall of 1991

In the fall of 1991, Gallegos informed his former supervisor and a lab buyer that a contractor was charging significantly higher prices for work. While Gallegos characterizes this as evidence of mismanagement, I do not believe that that is a fair characterization. That higher prices were being charged at the time by the contractor appears to have been a well known fact at Sandia. In fact, Gallegos notified the engineers for whom he expedited work that the contractor's prices had increased. Gallegos talked to the contractor about the increase in prices. There is no suggestion that these price increases were somehow illegal or not appropriate under the contract between Sandia and the contractor. At the time there were a number of other firms who were providing similar work to Sandia and who could supply competing bids. Nevertheless, Gallegos himself continued to do business with the firm and placed substantial orders with the firm after it had raised its prices. Under these circumstances, there is no evidence that disclosure of these higher prices relates to waste, fraud, or mismanagement. 10 C.F.R. ' 708.5(a)(1). Accordingly, this disclosure does not raise any concerns that are protected by the DOE's Contractor Employee Protection Program.

C. Alleged Disclosure in October 1992

In October 1992, Gallegos claims that he reported to David Barnes, a supervisor at Sandia, that a contractor had provided work of a shoddy nature. In the summer of 1993, Gallegos reiterated this statement to the Sandia ombudsperson. Tr. at 27-32. At the hearing that I held in February 1996, Mr. Barnes testified that he was already aware of the low quality of that particular job when Mr. Gallegos brought it to his attention. Tr. at 421. While Mr. Barnes was surprised at the low quality work because of the reputation for quality that the contractor enjoyed, Tr. at 421, he was not alarmed by it. Tr. at 422. Mr. Barnes testified that it was not unheard of for Sandia to reject a particular piece of work and to require the contractor to redo the project. That was what occurred in this case. Gallegos has not claimed the Barnes testimony on this issue to be incorrect. In any event, there is no suggestion that management at Sandia tried to cover up this episode or treat it in a manner that would otherwise evidence waste, fraud or mismanagement. Gallegos has therefore failed to show that these disclosures qualify for protection under of DOE's Contractor Employee Protection Program.

D. Alleged Disclosures in Fall of 1993

In the fall of 1993, Gallegos reported to the Sandia ombudsperson and A. T. Schwyzer, the Audit Services Manager at Sandia, possible violations of Sandia travel policies. Gallegos stated that Mr. Barnes and an aide traveled from 1990 to 1993 about once a month to visit contractors in California and New Jersey. He stated that first class airline accommodations were used on these trips and that the aide should not have accompanied Mr. Barnes. In response to these disclosures, Sandia investigated and determined that no action was appropriate because there were no records that could corroborate Gallegos' allegations. Gallegos also reiterated his 1989 claim about a co-worker's alleged improprieties in 1992 and 1993.

Gallegos has failed to show how these disclosures about alleged travel improprieties and actions of a co-worker were contributing factors to any adverse action taken by Sandia. The only alleged reprisals that occurred after these disclosures are the March 1994 release of documents that Gallegos believes do not respond to a subpoena, and a refusal by Sandia to grant Gallegos medical leave in December 1995. Gallegos has not attempted to provide any factual basis on which I might conclude that these disclosures were a cause of these actions. With respect to the medical leave, as noted below, Sandia medical personnel received additional medical records while the hearing in this matter was occurring and approved the medical leave. At the hearing, the medical director of Sandia explained why the documentation previously provided by Gallegos was inadequate and what additional information was necessary. Tr. at 590-630. There is no information in the record which would lead me to believe that the medical leave had been improperly withheld by Sandia. With respect to the subpoena, the evidence shows that the attorney in charge of responding to the

subpoena may not have been as attentive as he should have been to the precise requirements of the subpoena. Moreover, Gallegos has not shown that he was adversely affected by the release of these documents. He has therefore failed to convince me that these disclosures were a contributing factor to an adverse action taken by Sandia.

E. Alleged Disclosure in November of 1993

In November 1993, Gallegos informed the Sandia ombudsman that the son of a buyer of printed circuit boards for Sandia worked for a company with which the buyer placed business. While this disclosure evidences a conflict of interest that should be reported, the record indicates that management at Sandia took responsive action upon learning about the conflict. It reprimanded the employee concerned in September 1993 for failing to disclose that his son worked for a supplier. Thus, there does not appear to be any suggestion of waste, fraud, or mismanagement in this matter. Gallegos has therefore failed to show that these disclosures qualify for protection under of DOE's Contractor Employee Protection Program.

F. Alleged Disclosure in the Spring of 1994

In the spring of 1994, Gallegos informed the Office of Inspector General at the Department of Energy of possible contracting irregularities at Sandia. To take a reprisal action against Gallegos for this disclosure, Sandia would have to have known about it. However, there is no evidence that the Office of Inspector General notified anyone at Sandia that they had been contacted. Indeed, only one alleged act of retaliation occurred after the Spring of 1994 – the alleged denial of medical leave in December 1995. Gallegos alleged for the first time at the hearing that he had been denied medical leave in December 1995 as part of Sandia's ongoing retaliation toward him. However, while the hearing was in progress, Gallegos supplied additional information to Sandia, and Sandia granted Gallegos' request. As noted above, there is no information in the record which would lead me to believe that the requested medical leave had been improperly withheld by Sandia. Under these circumstances, Gallegos has failed to show that this disclosure qualifies for protection under of DOE's Contractor Employee Protection Program.

IV. Conclusion

Much of this proceeding was consumed by Gallegos attempting to show that the discipline that was imposed on him prior to October 1993 pursuant to the Disciplinary Review Committee recommendations was excessive and that there was a pattern of "negative" events in which Sandia did not treat him appropriately. However, this is not an appellate proceeding where the focus might be in the appropriateness of the discipline Gallegos received. The burden in this proceeding is on the employee to show that he disclosed to an official of DOE, to a member of Congress, or to the contractor information that he in good faith believes evidences waste, fraud, or mismanagement. 10 C.F.R. § 708.5(a)(1)(i) and (ii). He also has the burden of showing that the disclosure was a contributing factor to an adverse action that was taken against him. Despite what I may think about the manner in which Sandia treated Gallegos, for the reasons set forth above I have concluded that Gallegos has not shown by a preponderance of the evidence that he made disclosures that are protected by 10 C.F.R. Part 708, or that, if they are protected disclosures, that they contributed to adverse actions taken against him after October 1, 1993. Furthermore, Gallegos has failed to establish that the alleged reprisals resulted from his disclosures. I therefore find that no violation of 10 C.F.R. ' 708.5 has occurred.

It Is Therefore Ordered That:

(1) The request for relief filed by Richard W. Gallegos under 10 C.F.R. Part 708 is denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Assistant Inspector General for Assessments.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: