

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Order to Show Cause

Name of Petitioner: C. Lawrence Cornett

Date of Filing: June 10, 1996

Case Number: VWX-0009

This Order to Show Cause is issued with regard to a Motion to Dismiss filed by Maria Elena Torano Associates, Inc. (META) on May 21, 1996. In its Motion, META seeks the dismissal of the underlying complaint and hearing request filed by C. Lawrence Cornett (Cornett) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708.

I. Background

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 or -leased 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.

In November 1992, Cornett was hired as a Senior Environmental Scientist by META. At the time of Cornett's hiring, META was under contract to the DOE to provide services regarding the development of a Programmatic Environmental Impact Statement (PEIS). <1> In October 1993, the University of Chicago (UC), the contractor which operates Argonne National Laboratory (ANL), a DOE facility, contracted with META to continue to provide technical support regarding the development of the PEIS. The ANL contract described three technical areas where META was to provide support: (1) reviewing and revising draft materials for the PEIS including the performance of data analysis; (2) assisting in the National Environmental Policy Act process to develop a Final PEIS; and (3) providing general administrative support relating to the development of the PEIS. See

ANL Contract No. 34006426 Article I, Section A and Appendix B at 2-3. The ANL contract's stated goal was for META to produce, under ANL direction and with input from other national laboratories, a highly refined, publicly and legally defensible document that clearly explained the policy and direction of the DOE Office of Environmental Restoration and Waste Management. Id. Appendix B at 2.

Cornett worked on the PEIS project until March 1994, when his employment with META was terminated. Cornett alleges that his employment was terminated by META due to his disclosures to management officials of META and its subcontractor, Louis A. Berger Associates (Berger), of his concerns about the PEIS's deficiencies in addressing potential human health risks as a result of inadequacies in its risk assessment methodologies. He further alleges that he made these and other disclosures throughout the period of his employment, and that beginning in the fall of 1993, he suffered from various acts of reprisal such as: (1) being excluded from various meetings; (2) having various work-related information withheld from him; (3) having his duties change to more marginal tasks and being threatened with reassignment; and, finally and most importantly, (4) being terminated from META and not being subsequently rehired when META later filled other positions.

On March 9, 1994, Cornett filed a complaint pursuant to 10 C.F.R. Part 708. The Office of Contractor Employee Protection (OCEP) conducted an investigation of Cornett's allegations and issued a Report of Investigation and Proposed Order (Report) on April 17, 1996. OCEP, in the Report, concluded that Cornett had made protected disclosures regarding health and safety issues and that it had jurisdiction over Cornett's complaint. Further, OCEP concluded that a preponderance of the evidence supported a finding that Cornett's protected disclosures contributed to his selection by META to be terminated and that META had failed to show by clear and convincing evidence that Cornett would have been terminated absent his protected disclosures.

In a submission to OCEP dated April 30, 1996, Cornett asked for a hearing under 10 C.F.R. § 708.9. On May 1, 1996, META also submitted a submission to OCEP requesting a hearing pursuant to Section 708.9. On May 9, 1996, OCEP transmitted these requests to the Office of Hearings and Appeals (OHA) together with the Report, the complaint file, and its request that a hearing officer be appointed. On May 13, 1996, I was appointed hearing officer in this matter.<2>

On May 21, 1996, META submitted a Motion to Dismiss the proceeding. In its Motion, META argues that neither OCEP nor OHA has jurisdiction to hear Cornett's complaint since Part 708 applies only to employees of DOE contractors who perform work at DOE-owned or DOE-leased facilities.<3> META asserts that it did not perform any work under the PEIS contract at a DOE site other than a relatively small number of employee visits regarding matters ancillary to the contract. Specifically, META asserts that almost all of the substantive work done on the PEIS was performed at its Gaithersburg, Maryland facility, a facility neither owned nor leased by the DOE. In support of its Motion, META has submitted an affidavit from Eric V. Tanner, a senior budget analyst at META's Gaithersburg facility, in which he states that META personnel traveled only sporadically to DOE facilities to perform work "ancillary" to the main object of the contract. Consequently, META argues that Part 708 does not apply to META and that OHA and OCEP lack jurisdiction over Cornett's complaint.

Cornett submitted a Reply to META's Motion on May 24, 1996, in which he argues that META is subject to Part 708 since META employees did in fact perform work at DOE sites. In support of this argument, Cornett draws our attention to the ANL contract provision which specifically authorizes META employees to travel to DOE sites to obtain information necessary to perform

analysis and attend meetings. Further, Cornett asserts that while the ANL contract provision refers to only "occasional" travel by employees to DOE sites, META employees in fact traveled on a regular and frequent basis to those sites. Cornett also alleges that this travel was necessary to obtain information for analysis integral to the performance of the PEIS contract. In support of this assertion Cornett has submitted affidavits from himself and three Berger employees, Dr. Jane Rose, Dr. Thomas Hale and Susan Panzitta, stating that they and other META and Berger employees regularly traveled to evaluate DOE site conditions, participate in decision making meetings and determine the scope, substance and implementation of the PEIS at DOE sites. These employees assert that their visits were integral to the completion of the PEIS. Consequently, Cornett argues that META in fact performed work at DOE sites and thus is subject to Part 708.

On June 3, 1996, META filed a Reply to Cornett's May 24 Reply. In its submission, META asserts that the primary purpose of its contracts with DOE and ANL was to produce drafts of the PEIS and perform analysis on data provided by DOE, and that this was performed at META's Gaithersburg facility. Further, META asserts that its records indicate that over 99% of the "man-days" of work charged to the ANL contract took place at that facility, and that none of the Cornett Reply affiants traveled to a DOE site during the ANL contract period. META also asserts that any work which was performed on-site was only for the purposes of resolving data reporting/scheduling problems or to familiarize META employees with DOE sites. In support of these assertions, META submitted an affidavit from Albert N. Tardiff (Tardiff), the META Program Manager of the ANL contract.

Cornett filed a Response to META's Reply on June 4, 1996. In his response, Cornett asserts that, while he does not accept META's figures regarding the percentage of "man-days" performed by META employees at DOE sites, all of the META visits were essential to the ANL contract because the contract itself required travel to DOE sites to obtain information and participate in meetings. Cornett also argues that META could not produce a complex four-volume draft environmental statement assessing the condition of DOE sites without ever sending staff members to those sites. Although he argues that Part 708 does not define a contractor's work on-site as "ancillary" by reference to any minimum time requirement, he also asserts that META's estimate of the amount of time spent by META employees at DOE sites is faulty since it is limited to the time period of the ANL contract and does not take into consideration that PEIS work was performed by META under two predecessor DOE contracts. Finally, Cornett requests that if I am unable to find jurisdiction based on the facts presented, discovery should be allowed on travel records, work orders and task orders for all META/Berger employees from 1991 to 1994, and that an evidentiary hearing be held.

II. Analysis

Section 708.9(j) states that in any case where a dismissal of a claim is sought, "the Hearing Officer shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order." 10 C.F.R. § 708.9(j). For the following reasons, I have determined that it is appropriate to issue an Order to Show Cause in this matter.

There is no indication in the record that the jurisdictional issue raised by META's Motion to Dismiss was presented by META to OCEP or was considered by OCEP when it determined that it had jurisdiction to consider Cornett's complaint. See Report at 2-3. Nor has this issue been considered before by an OHA Hearing Officer. Therefore, I must initially look to the purpose and scope of the DOE Contractor Employee Protection Program, as set forth in the Part 708 Regulations, to determine whether Cornett's complaint falls within the jurisdictional parameters of this Program. It is clear from the text of Part 708, as well as the preamble to these regulations, that the Contractor Employee Protection Program is intended to encourage employees of DOE contractors and subcontractors to disclose concerns about health, safety, mismanagement and unlawful or fraudulent practices without fear of employer reprisal, and that employees who believe that they are subject to a reprisal should feel that they are able to seek protection from the DOE. See Sandia National Laboratories, 23 DOE ¶ 87,501 at 89,003 (1993) (denying Motion to Dismiss) .

However, Part 708 does not cover all contractor employee disclosures. In order for OCEP and OHA properly to consider a complaint by a contractor employee, the contractor must be covered by the specific regulatory provisions of Part 708. See *Mehta v. Universities Research Association*, 24 DOE ¶ 87,514 (1995) (Final Agency Decision and Order dismissing complaint). Those regulations in four separate places indicate that the important protections afforded under Part 708 are limited to employees of contractors that perform work at DOE sites. See Sections 708.1 ("Purpose") ("complaints by employees of contractors performing work at sites owned or leased by the Department of Energy"), 708.2(b) ("Scope") (Part 708 is applicable to employees of contractors performing work on-site at DOE-owned or -leased facilities), 708.3 ("Policy") ("employees of contractors at DOE facilities"); 708.4 (Definition of "Contractor") (Part 708 applies to a non- Management and Operating Contractor "only with respect to work performed at a DOE-owned or -leased facility").

With respect to contractors, Section 708.4 defines "work performed on site" as:

work performed within the boundaries of a DOE-owned or -leased facility. However, work will not be considered to be performed "on-site" when pursuant to the contract it is the only work performed within the boundaries of a DOE-owned or -leased facility, and it is ancillary to the primary purpose of the contract (*e.g.*, on-site delivery of goods produced off-site).

10 C.F.R. § 708.4. An employee of a contractor covered by Part 708 does not, however, have to perform work on site in order to be protected by the prohibition against reprisals set forth in Section 708.5.<4>

META acknowledges that its employees performed some work within the physical boundaries of DOE sites. <5> Therefore, in order to be excluded from coverage under Part 708, META must show that this work was "ancillary" to the primary purpose of the ANL contract.

The primary purposes of the ANL contract were for META to revise draft materials for the PEIS, perform needed data analyses for the Draft PEIS and ultimately to prepare under ANL direction the Final PEIS. META alleges that its employees visited DOE sites only for administrative purposes such as familiarizing themselves with DOE sites or resolving data reporting or

scheduling problems. Such visits may have been ancillary to the primary purposes of the ANL contract. As indicated above, however, Cornett and his three affiants assert that META employees "regularly" and "consistently" travelled to DOE sites, where they evaluated site conditions and determined the scope, substance and implementation of the PEIS. These assertions, if accurate, would clearly bring META and its employees on the PEIS contracts within Part 708. However, these assertions are strongly disputed by Tardiff, who asserts that META employees did not conduct evaluation or inspection of site conditions. Based upon META's records and his personal knowledge of the firm's operations, Tardiff states that META employee visits to DOE sites constituted a very minimal portion of the total time spent on the ANL contract, and that the work done there was not related to the primary contractual purposes of data review and drafting of the PEIS.

Given the record before me, particularly the conflicting statements in the affidavits concerning the type of work done at DOE sites, I am unable to find that the work performed within the physical boundaries of DOE sites was ancillary to the primary purposes of the ANL contract. However, in view of the arguments presented by META and the provisions of Section 708.9(j), I am issuing this Order to Show Cause. In addition, because of the factual disputes concerning the nature of the work performed by META employees at DOE sites, I will convene a hearing on July 31, 1996 to afford both parties the opportunity to present evidence and oral argument relevant to the Motion to Dismiss.<6> Specifically, the parties may present testimony and other evidence relating the nature and extent of the work performed by META employees within the physical boundaries of DOE sites. <7>I agree with Cornett that activities should not be declared ancillary to the primary purpose of a contract solely on the basis of time spent at a DOE site. However, time spent on work activities on DOE sites may provide some evidence as to whether the work activities do not qualify as ancillary to the primary purpose of a contract. Consequently, I will permit discovery of META/Berger employee travel records that pertain to the three contracts involving the PEIS as well as work orders and task orders related to the travel covered by those records.<8>

It Is Therefore Ordered That:

(1) The Office of Hearings and Appeals of the Department of Energy shall convene a hearing regarding the META Motion to Dismiss and to permit C. Lawrence Cornett to show cause why his Complaint to the Office of Contractor Employee Protection and Request for a Hearing pursuant to 10 C.F.R. Part 708 should not be dismissed. The hearing will be convened at 9 a.m. on July 31, 1996 at 1000 Independence Avenue, SW, Washington, DC, Room 1E-250. The views, statements and testimony shall relate to the nature and extent of META and Berger employee work performed within the boundaries of DOE-owned and -leased facilities under META's PEIS contracts.

(2) META shall submit to counsel for C. Lawrence Cornett by June 28, 1996, travel records for META and Berger employees pertaining to DOE Contracts No. DE-AC01-91EM4002, and DE-AC01-93EW40411 and ANL Contract No. 34006426 during the period from the onset of the first contract to the conclusion of the third contract as well as all work orders and travel orders related to the travel covered by those records.

(3) Cornett and META shall submit to the Office of Hearings and Appeals and to each other, no later than July 17, 1996, a numbered list, and one numbered set, of any exhibits that the party intends to submit at the hearing together with a list of witnesses.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

<1>The purpose of the PEIS was, *inter alia*, to evaluate alternatives for DOE environmental restoration and waste management activities and explain the policy of the DOE's Office of Environmental Restoration and Waste Management. See ANL Contract No. 34006426 Appendix B at 1-2.

<2>Cornett's hearing request was assigned OHA Case No. VWA-0007 and META's request was assigned Case No. VWA-0008.

<3>In this Decision, I will also refer to DOE-owned or -leased facilities as "DOE sites."

<4>The definition of "employee" in Section 708.4 states, in pertinent part, that "[t]he determination of whether a person has standing as an employee shall be made without regard to the on- or off-site locale of the person's work performance."

<5>References to META employees in this discussion include employees of META's subcontractor, Berger. From the record before me, it appears that Berger employees performed essentially the same types of work as META employees under the ANL and predecessor DOE contracts.

<6>Pursuant to a telephone conference call with the attorneys for the parties, procedures and a briefing schedule were set regarding the underlying hearing in this matter. See Letter from Ted Hochstadt, Assistant Director (Hearing Officer), OHA, to A. Alene Anderson, Counsel for C. Lawrence Cornett and Jose Otero, Counsel for META (May 22, 1996). I originally scheduled a hearing on the merits of Cornett's complaint for July 31, 1996. In light of this Order to Show Cause, I now postpone this hearing until the resolution of META's Motion to Dismiss.

<7> The affidavits submitted by Cornett, and Tardiff's response to them, indicate that there may have been differences in the nature or extent of the on-site work performed under the two predecessor DOE contracts and that performed under the ANL contract. Since the work performed under the ANL contract was a continuation of the work under the DOE contracts, see, e.g., META Motion to Dismiss at 2, the evidence to be submitted at the hearing may include the time period encompassed by the DOE contracts.

<8>The travel records subject to this discovery will be those records of trips taken under the ANL contract reviewed by Tardiff in connection with his affidavit and the same type of records under the predecessor DOE contracts.