**United States Department of Energy**
**Office of Hearings and Appeals**

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| In the Matter of Shou Yuan Zhang | ) | |
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| Filing Date: May 31, 2019 | ) | Case No.: WBA-17-0011 |
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Issued: July 16, 2019

## Decision and Order

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on May 16, 2019, denying a Complaint of Retaliation filed by Shou Yuan Zhang against his employer, Brookhaven Science Associates (BSA) under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. On appeal, Dr. Zhang alleges that BSA retaliated against him for a previous Part 708 complaint he had filed. As set forth in this Decision, we have determined that the Appeal be denied.

### I. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established for the purpose of "safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its 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 retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "participating in a Congressional proceeding or an administrative proceeding conducted under this part" 10 C.F.R. § 708.5(b). Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, conducting hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. At the hearing, a complainant must prove by a preponderance of the evidence that he made a disclosure protected by Part 708 and that his employer retaliated against him in response to the protected disclosure. 10 C.F.R. § 708.29. Even so, if the employer can prove by clear and

convincing evidence that it would have taken the same actions regardless of the disclosure, the complaint will be denied. *Id.*

## II. Background

On August 6, 2017, Dr. Zhang filed a Part 708 Complaint against BSA, alleging that BSA had retaliated against him for filing a previous Part 708 Complaint in 2016. Initial Agency Decision at 8 (May 16, 2019) (IAD). The Complaint was forwarded to an OHA investigator, who conducted an investigation into Dr. Zhang's allegations. *Id.* at 9. On December 19, 2017, prior to the completion of the investigation, BSA terminated Dr. Zhang for unsatisfactory performance. *Id.* The OHA investigator issued a Report of Investigation on August 13, 2018. *Id.* An OHA Administrative Judge was appointed the next day to conduct a hearing on the Complaint. *Id.* At the hearing, held on February 19–20, 2019, eight witnesses testified, including Dr. Zhang, and 55 exhibits were accepted into the record. *Id.* The parties were permitted to submit written closing arguments by April 8, 2019. Upon receipt of the closing arguments, the Administrative Judge closed the record. *Id.* On April 12, 2019, Dr. Zhang attempted to submit new evidence into the record. Zhang Request to Submit Post-Hearing Evidence (April 12, 2019). The Administrative Judge denied the request for three reasons. Letter Denying Request to Submit New Evidence (April 12, 2019). First, the Administrative Judge deemed the record closed as of April 8, 2019. *Id.* Second, the Administrative Judge determined that accepting the new evidence would be prejudicial to BSA, as the contractor would not have the opportunity to cross-examine Dr. Zhang concerning the new evidence. *Id.* Finally, the Administrative Judge did not perceive any extraordinary circumstances warranting reopening the record to receive new evidence. *Id.* The Administrative Judge issued his decision on May 16, 2019. IAD.

On May 31, 2019, Dr. Zhang timely filed a notice of appeal with the OHA. He submitted a Statement of Issues on June 14, 2019, outlining the issues for review in his appeal. In its response, BSA argued that Dr. Zhang failed to show clear error in the underlying decision and that Dr. Zhang failed to demonstrate extraordinary circumstances sufficient to allow the submission of new evidence. BSA Response to Statement of Issues (July 3, 2019). On July 8, 2019, Dr. Zhang replied to BSA's response and requested that I conduct an investigation into the credibility of the witnesses at the hearing. Zhang Request for Investigation (July 8, 2019). BSA responded, stating that Dr. Zhang's request was an attempt to "substitute his view of witness credibility for that of [the Administrative Judge]." BSA Response to Zhang Request for Investigation (July 10, 2019).

## III. Analysis

Dr. Zhang's appeal fails for reasons both procedural and substantive. First, his appeal fails to allege a defect with the underlying decision. Second, a review of the decision below reveals no errors of fact or law. For these reasons, discussed in detail below, we deny Dr. Zhang's appeal. We also deny his request to admit new evidence and his request for a new investigation into the credibility of BSA witnesses.

### A. Extraordinary Circumstances

An appellate tribunal does not "receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination." *Goland v. CIA*, 607 F.2d 339, 371 (D.C.

Cir. 1979). Fact-finding and the creation of a record is the function of the Administrative Judge; accordingly, consideration of new evidence is a matter for the Administrative Judge. *Id.* However, under extraordinary circumstances, it may be appropriate for an appellate tribunal to consider new evidence in order to prevent a miscarriage of justice. *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949); *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) (stating that such procedures "should be only sparingly used."). Regarding new evidence, extraordinary circumstances may present when the new evidence was unknown or unavailable to the party, despite due diligence, at the time of the hearing, or when a party presents "a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980).

On April 12, 2019, Dr. Zhang sought to enter into evidence "documents that [he] recently discovered on a 'memory stick' external drive" that involved "work Dr. Zhang did regarding 'quadrupoles.'" Zhang Request to Submit Post-Hearing Evidence. The request stated that testimony at the hearing had caused Dr. Zhang to look further into the documents he had on the memory stick. *Id.* The Administrative Judge denied Dr. Zhang's request because he did not perceive the kind of extraordinary circumstances necessary to reopen the record.

In transmitting his Statement of Issues for this appeal, Dr. Zhang sought to enter into evidence "reports [he] recovered from a memory stick regarding the issue of 'quadrupole.'" Zhang Appeal Statement Email (June 14, 2019). I find no extraordinary circumstances that merit consideration of new evidence at this stage. It appears likely that the "new evidence" submitted is the same evidence Dr. Zhang attempted to submit on April 12, 2019. Dr. Zhang's original request shows that the memory stick was in his possession before the hearing and that he simply did not submit the documents at that time. The issue of quadrupoles is not particularly central to BSA's arguments that Dr. Zhang would have been terminated notwithstanding his protected disclosure. The issue is just one of several which, when taken together, showed that Dr. Zhang failed his Performance Improvement Plan (PIP). Furthermore, admission of this evidence was expressly denied by the Administrative Judge below because he did not find extraordinary circumstances. Letter Denying Request to Submit New Evidence. I find no error in this judgment, and circumstances have not changed in the intervening weeks. For the foregoing reasons, Dr. Zhang's request to submit new evidence is denied.

### B. Request for New Investigation

Part 708 allows the OHA Director to initiate an investigation into any statement contained in the request for review. 10 C.F.R. § 708.33(b)(1). Dr. Zhang's request for an investigation, however, does not pertain to a statement made in his appeal, but rather to the credibility of the witnesses at the hearing. The OHA gives "due regard to the trier of fact to judge the credibility of witnesses." *Curtis Hall*, OHA Case No. TBA-0002 at 5 (2008). Credibility is best judged by an eyewitness. The Administrative Judge, with his first-hand experience of the testimony, is best positioned to assess the witnesses' credibility. Without evidence of clear error on his part, it would be inappropriate to substitute my assessment for his. For the foregoing reason, Dr. Zhang's request for an investigation is denied.

### C. The Appeal

We review the underlying decision's findings of fact for clear error and its conclusions of law *de novo*. *Curtis Hall*, OHA Case No. TBA-0002 at 5 (2008). Part 708 appeals exist to fix defects in initial agency decisions, not to relitigate issues previously decided by the Administrative Judge. As the Supreme Court has stated, the initial presentation on the merits "should be 'the main event' . . . rather than a 'tryout on the road.'" *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). By the time they reach the appellate stage, the parties have had a full opportunity to present their case. Appellate review is properly limited to correcting errors in the initial decision.

Part 708 requires that an appeal of an initial agency decision state the issues that it wishes the OHA Director to review. 10 C.F.R. 708.33(a). A tribunal system should not, of its own accord, deconstruct and discredit its own decisions. Doing so would undermine the tribunal's credibility and, more importantly, could unjustly deny successful parties the judgment they were lawfully awarded. *See Ramirezde Arellano v. Weinberger*, 240 U.S. App. D.C. 363, 745 F.2d 1500, 1537 & n.163 (D.C. Cir. 1984) (en banc) ("Unless the new issue uncovered by the appellate court was one which was clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appellate court to direct the issuance of summary judgment on a new issue raised *sua sponte* on appeal."), *vacated on other grounds*, 471 U.S. 1113 (1985). *See also Fund for Animals, Inc. v. United States BLM*, 460 F.3d 13, 25 (D.C. Cir. 2006). It is incumbent upon an appellant to state how and why an underlying decision is wrong.

Dr. Zhang argues that his Statement of Issues "demonstrate[s] that the evidence that BSA provided in the Hearing [was] inconsistent and self-contradictory, and, therefore, not 'clear and convincing.'" Statement of Issues at 1. He attempts to prove his argument by selecting quotes from the hearing transcript that, out of context, may appear contradictory. However, he points to no clear errors in the Administrative Judge's decision or assessment of witness credibility. In the IAD, the Administrative Judge thoroughly explained his reasoning. He considered admitted evidence going back over 10 years when he evaluated testimony regarding Dr. Zhang's performance, and he cited to documented events—such as Dr. Zhang's failure to report to work for two months and the fact that Dr. Zhang was the only scientist in his position to ever be placed on multiple PIPs—in finding that BSA had met its burden. IAD at 18–20. The Administrative Judge's decision, well-reasoned and supported by the record, reasonably interprets the available evidence. I find no discernable error, clear or otherwise, in the IAD, and Dr. Zhang's appeal alleges no clear error, just an alternate opinion. For the foregoing reasons, Dr. Zhang's appeal is denied.

## IV. Conclusion

Dr. Zhang's arguments in opposition to the Initial Agency Decision fail to demonstrate clear error. Accordingly, based on the foregoing, the determination of the Administrative Judge is affirmed.

It is therefore Ordered that the Appeal filed by Shou Yuan Zhang, Case No. WBA-17-0011, is hereby denied.

This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial

Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 16, 2019