MEHTA, Complainant

v.

UNIVERSITIES RESEARCH ASSOCIATION, Respondent.

OHA Case No.LWA-0003, LWZ-0023

FINAL DECISION AND ORDER

This is an appeal by respondent Universities Research Association ("URA"), from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA") finding that the complainant, Dr. Naresh C. Mehta, a scientist formerly employed by URA, had established that his disclosures of mismanagement were a contributing factor in URA's December 16, 1992, decision to terminate his employment. The Initial Agency Decision also reaffirmed OHA's previous denial of URA's motion to dismiss based on lack of jurisdiction under 10 C.F.R. Part 708.

1. On appeal, URA requests reconsideration of its motion to dismiss on jurisdictional grounds. URA contends that applying DOE's "whistleblower" regulation at 10 C.F.R. Part 708 to Dr. Mehta's complaint constitutes an erroneous retroactive application of an administrative regulation, since URA's contract was not modified to include a provision requiring compliance with the regulation until March 31, 1993. OHA found that there was no retroactivity issue because the alleged acts of reprisal occurred after April 2, 1992, the effective date of the regulation, and URA's contract was subsequently modified to require compliance with the regulation. See 10 C.F.R. §708.2(a).

Based on my review of the regulatory language, I conclude that OHA's interpretation is incorrect, and that the regulation should not be interpreted as applying retroactively to complaints involving alleged acts of reprisal that stem from disclosures, participations or refusals that do not concern health or safety where such alleged acts occur after the effective date of the regulation but before the underlying contract is amended to require compliance with Part 708. Non-retroactive application is consistent with the distinction drawn in Section 708.2(a) between health or safety complaints and "other" complaints, such as those involving waste, fraud, and mismanagement, and with the different approaches that the regulation takes in defining its applicability to health or safety and "other" complaints. Non-retroactive application also is necessary to harmonize Section 708.2(a) with the broader regulatory structure. See Section 708.6(d) (time limit for filing complaint).

Retroactive application of a regulation should not be inferred in the absence of express language to such effect. *See, e.g., Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1497-1501 (1994); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). The presumption against retroactivity is especially compelling where, as here, a contract must be modified in order to make a regulation applicable. *See Lockheed Aircraft Corp. v. United States*, 426 F.2d 322, 327-328 (Ct. Cl. 1970); McBride and Wachtel, 1 Government Contracts, §4.100[3] (1984).

Accordingly, I conclude that 10 C.F.R. Part 708 does not apply to complaints involving alleged acts of reprisal where such acts occur prior to the adoption or amendment of a contract requiring compliance with Part 708 and do not stem from health or safety disclosures, participations or refusals.

2. URA argues that the allegations raised by the complainant are not cognizable under 10 C.F.R. Part 708, since the alleged acts of reprisal and the filing of the complaint occurred prior to the effective date of URA's contract modification. My review of the record establishes that the alleged acts of reprisal occurred prior to March 31, 1993, the effective date of the amendment to URA's contract which required compliance with Part 708. Further, although URA placed the complainant on an extended leave of absence subsequent to his termination, the last "retaliatory" act occurred when the complainant was issued the December 16, 1992, letter advising of URA's decision to proceed with his termination. Since there is no evidence of further acts of reprisal subsequent to the effective date of URA's contract modification that might support a finding of a "continuing violation," the regulation is not applicable to this complaint. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 256-258 (1980); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 134-137 (5th Cir. 1992).

3. URA also challenges OHA's determination that the parties' agreement to attempt to resolve this complaint through mediation estopped URA from challenging the applicability of the "whistleblower" regulation. Based on my review of the agreement, I have determined that the language of the agreement cannot fairly be read as a waiver of URA's right to assert jurisdictional defenses.

4. Although my conclusions on the jurisdictional issues make it unnecessary to reach the merits of this dispute, and the merits are not relevant to my conclusions on the jurisdictional issues, some comments on the merits are appropriate both to provide guidance for subsequent decisions of OHA and to communicate to the disappointed litigant the nature of legitimate competing interests. The Initial Agency Decision dated March 17, 1994, grants reinstatement to Dr. Mehta, a scientist employed by a DOE contractor, based on a finding that his complaints that procedures governing his access to a computer should be changed constituted protected disclosures of mismanagement under the "whistleblower" regulation. The decision concludes that these complaints contributed to his dismissal despite URA's contention that the dismissal was based on Dr. Mehta's performance and the relevance of his work. However, OHA's decision does not address whether any of the particular changes in procedures for access to the computer would have materially improved the utilization of the computer for its intended purposes, and such a determination could best be made with the assistance of experts and an opinion formed on the basis of expert testimony.

This illustrates the difficult distinctions needed in order to focus the remedy on appropriate cases of retaliation for exposures of fraud, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to employees or public health or safety. Undeniably, there is a degree to which differences of

opinion concerning the conduct of operations might legitimately contribute to the dismissal of an employee, particularly in combination with deficiencies in other elements of an employee's performance. However, this observation should not be construed as a conclusion based on a review of the record; rather, it simply points out that the Hearing Officer's analysis in this regard is inadequate. Equating a particular type of disagreement to "mismanagement" as contemplated by the "whistleblower" regulation demands a careful balancing lest the term encompass all disagreements between a contractor and its employees. While a conclusion with respect to the merits of a particular claim of mismanagement may not be required in all cases, there must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, at the same time granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork.

5. Finally, the Hearing Officer conducting the appeal is to be commended on the prompt decision on the complaint. This contrasts painfully with the time taken for disposition of the instant appeal. In a December 14, 1994, letter, Dr. Mehta reminded the Secretary of Energy that justice delayed can be justice denied. However, Dr. Mehta should understand that the "whistleblower" regulation is of relatively recent origin, and that DOE has a [sic] been a pioneer in attempting to establish protection for contractor employees that make specified types of disclosures. This appeal involved an important and difficult legal issue, and the issuance of this Final Decision and Order required a thorough legal analysis of this matter, which was completed within the last five weeks. For the reasons set forth above, the Initial Agency Decision is hereby reversed and the complaint is dismissed. This decision is the Final Agency Decision and Order in this case.

Dated: March 20, 1995

William H. White

Deputy Secretary