

Ronald A. Sorri

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motions for Discovery

Supplemental Order

Name of Petitioner: Ronald A. Sorri

L&M Technologies, Inc.

Ronald A. Sorri

Dates of Filing: September 24, 1993

September 27, 1993

October 12, 1993

Case Numbers: LWD-0008

LWD-0009

LWX-0011

This determination will consider two requests for discovery filed with the Office of Hearings and Appeals (OHA) on September 24 and 27, 1993, by Ronald A. Sorri (Sorri) and L&M Technologies, Inc. (L&M), respectively. These motions concern the hearing requested by Sorri under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708, on June 9, 1993 (OHA Case No. LWA-0001). The DOE Contractor Employee Protection Program and the Sorri proceeding are described in a previous decision issued by the OHA, Sandia National Laboratories, 23 DOE ¶ 82,502 (1993) (Sandia). The hearing will be convened on October 26 and 27, 1993, in Albuquerque, New Mexico. In addition to ruling on the discovery requests, we will establish procedures for the submission of exhibits before the hearing, and set the order of witnesses.

I. Requests for Discovery

In a letter dated September 24, 1993, Sorri requested discovery of "all resumes and ranking materials for each L&M employee ranked, and for each of these ranked employees, the last two written performance appraisals immediately preceding the resume ranking process." Sorri indicated that he planned to have an expert witness examine the performance appraisals and testify about their role in the decision by Sandia officials not to retain Sorri as an employee of L&M. */ As explained in Sandia, Sorri claims that decision constituted an act of retaliation for his filing of a safety complaint with DOE about conditions in the Microelectronics Development Laboratory (MDL). In a letter dated September 27, 1993, L&M requested that Sorri identify the expert witness he planned to call at the hearing, and provide answers to written interrogatories.

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. As indicated in the preamble to the DOE Contractor Employee Protection regulations, administrative hearings conducted under Part 708 are intended to be informal in nature and are not intended to emulate formal trial proceedings. 57 Fed. Reg. 7533, 7537-8, (March 3, 1992) (formal rules of evidence, including the Federal Rules, are to be used only as a guide in hearings under Part 708). While the regulations do not provide a formal mechanism for conducting discovery, they 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 of the necessity for such witness or evidence has been made to the satisfaction of the Hearing Officer.

10 C.F.R. § 708.9(f); see also 10 C.F.R. §§ 708.9(c), (i) and (j) (sanctions for failure to comply with a lawful order of the Hearing Officer including adverse findings, and dismissal of a claim, defense or party). In the same manner as suggested in the preamble to Part 708 for informally using the Federal Rules of Evidence, we will use the Federal Rules of Civil Procedure as a guide for discovery. It is within the spirit of both the Federal Rules and 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, as we advised the parties to this proceeding, the OHA is prepared to issue a discovery order if

necessary to ensure compliance with any reasonable discovery request. On October 5 and 6, 1993, Sorri reported certain difficulties that he had encountered in obtaining the requested discovery from the other parties. This matter was discussed at length in a telephonic prehearing conference with counsel for the parties that was held on October 12, 1993.

As explained in the prehearing conference, we have determined that Sorri's request for the L&M performance appraisals, and any other ranking materials used by Sandia MDL manager Ronald V. Jones in the selection process, is reasonable. It is designed to yield evidence that may be relevant and material to the alleged retaliatory discharge issue in this case, and it is not unduly burdensome on either L&M or Sandia to produce the requested documents. Therefore, we will order that L&M and Sandia produce these materials no later than October 15, 1993. For the same reasons, we also find that the L&M request for discovery about Sorri's expert witness is reasonable under the circumstances of this case. Thus, we will also order Sorri, as soon as possible, to provide L&M and Sandia with full information about the identity and qualifications of his expert witness, and the substance of the facts and opinions to which the expert is expected to testify.

II. Other Prehearing Matters: Exhibits and Witnesses

In addition to discovery, our October 12, 1993 prehearing conference also discussed arrangements for the submission of exhibits, and the scheduling of witnesses. With respect to exhibits, we stated that each party shall, no later than October 22, 1993, file with the OHA and serve on the other parties, a numbered list, and one numbered set, of any exhibits which the party intends to submit at the hearing. We determined that the order of witnesses will be as follows: (1) witnesses for Sorri; (2) witnesses for Sandia; and (3) witnesses for L&M. If necessary, arrangements will be made to schedule the hearing on October 27 to accommodate a Federal court appearance by Sandia's counsel.

It Is Therefore Ordered That:

- (1) The Motions for Discovery filed by Ronald Sorri and L&M Technologies, Inc., Case Nos. LWD-0008 and LWD-0009, are hereby granted as set forth in Paragraphs (2), (3), and (4) below.
- (2) L&M Technologies, Inc. shall submit to counsel for Ronald A. Sorri, no later than October 15, 1993, the two written performance evaluations immediately preceding the ranking process for each of the L&M contract employees ranked under Task II of the contract between L&M and Sandia National Laboratories
- (3) Sandia shall submit to Sorri, no later than October 15, 1993, all resumes and other materials used in ranking L&M contract personnel under Task II of the contract between L&M and Sandia.
- (4) Sorri shall submit to the counsels for L&M and Sandia, at the earliest possible date prior to the hearing in this matter, information regarding:
 - (a) the identity of the expert witness whom he expects to call to testify at the hearing,
 - (b) the subject matter on which the expert is expected to testify,
 - (c) the relevant credentials of the expert which qualify the expert in the subject matter to which he or she will testify,
 - (d) the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

In addition, the prospective expert witness shall be made available for depositions or shall provide answers to written interrogatories of L&M and Sandia prior to the hearing.

- (5) Sorri, Sandia, and L&M shall submit to the OHA and to each other, no later than October 22, 1993, a numbered list, and one numbered set, of any exhibits which the party intends to submit at the hearing.
- (6) This is a final Order of the Department of Energy.

Thomas O. Mann

Deputy Director

Office of Hearings and Appeals

Date:

*/ Sorri also requested that subpoenas be issued to several L&M and Sandia employees he planned to call as witnesses, and sought the opportunity to depose these persons. Arrangements have been made between counsel for the parties to conduct these depositions in Albuquerque on October 15 and 20, 1993.