May 16, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Donald E. Searle**

Date of Filing: **May 2, 2007**

Case Number: **TBU-0065**

Donald E. Searle (Searle or the complainant) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

During the period in question in this case, the complainant was an employee of UT-Batelle, LLC (UT-Batelle), the contractor responsible for operating the DOE's Oak Ridge National Laboratory (ORNL). He claimed that in the spring and summer of 2005 he made protected disclosures to his supervisor regarding beryllium handling at his work site. He further indicated that in September 2005 that same supervisor informed him that he was to be laid off. His final day of employment was February 28, 2006. He stated that he was rehired by UT-Batelle on May 15, 2006, although at a reduced salary and pay grade.

On January 4, 2007, Searle filed a complaint of retaliation under Part 708 with the Employee Concerns Manager (EC Manager) of the DOE's Oak Ridge Office. In that complaint, Searle claimed that the February 28, 2006 termination and the May 15, 2006 rehiring at a lower pay level were retaliations for the protected disclosures that he made concerning the beryllium handling. On April 9, 2007, the EC Manager determined that jurisdiction of the complaint should be accepted, and it was forwarded to the Office of Hearings and Appeals (OHA) for investigation. On April 11, 2007, the Office of Hearings and Appeals received Searle's Complaint of Retaliation and Request for Investigation. Pursuant to Section 708.22, an OHA investigator was appointed.

After reviewing the record in this matter, the OHA investigator determined that the complaint and the accompanying request for investigation should be dismissed for failure to file in a timely manner. 10 C.F.R. § 708.17(a). April 17, 2007 Letter of Thomas L. Wieker to Donald E. Searle. I have set out a summary of the investigator's rationale below.

The investigator first noted that Section 708.14(a) provides that a complainant must file his complaint by the 90th day after the date he knew or reasonably should have known of the alleged retaliation. The investigator pointed out that Searle indicated that he first realized that UT-Batelle retaliated against him during the period of his unemployment, between the February 28, 2006 termination and the May 15, 2006 rehiring. *See Undated Letter to Jeff Smith* at 3. Therefore, the OHA investigator stated that the complaint of retaliation under Part 708 should have been filed no later than August 11, 2006.

The OHA investigator also considered whether Searle had good reason for not filing within the 90-day period. 10 C.F.R. § 708.14(d). The investigator reviewed Searle's assertion that UT-Batelle officials offered to resolve his complaint informally and Searle's contention that this suggests that UT-Batelle believed the complaint was valid. Searle claims that UT-Batelle was trying to "stall" these proceedings. The investigator found that this assertion did not provide any valid reason why Searle could not have filed his claim on time. He believed Searle's views as to UT-Batelle's motivations are irrelevant to the issue of whether Searle could have filed on time.

The investigator also considered the complainant's claim that he made complaints to a number of officials regarding this matter, including the "Director of Human Resources," and to the DOE Office of Inspector General (OIG), and that after the issuance of an OIG report on September 9, 2006, he "finally had evidence to support [his] contentions." The investigator rejected this reasoning on the grounds that under Part 708, a complainant is not required to wait until he has "official" evidence in order to file a complaint of retaliation. The investigator noted that the complaint must be filed within 90 days from the date that the employee knew or reasonably should have known of the adverse personnel action in question. Since in this case, the complainant knew by May 15, 2006, of the two adverse personnel actions that he alleged took place, and concluded at that same time that these actions were retaliatory, the investigator could discern no legitimate reason why Searle could not file in a timely manner. In this regard, the

investigator pointed out that even if he accepted the September 9 date as the relevant date, Searle's January 4 filing would still have been untimely, based on the 90-day filing period.

Finally, the investigator considered the complainant's contention that he was unaware of the existence of the Office of Employee Concerns, and, by implication the Part 708 process, until he again contacted the OIG in January 2007. The investigator found that the fact that Searle may not have learned of the existence of Part 708 protections until many months after his termination is simply not a sufficient excuse for the late filing, and does not constitute a good reason to accept the untimely submission. Individuals are generally expected to know and understand their rights and obligations under applicable DOE regulations. *Caroline Roberts*, Case No. TBU-0040 (February 23, 2006).

Based on the above considerations, the investigator concluded that the EC Manager incorrectly determined that jurisdiction should be accepted for further processing and investigation by the Office of Hearings and Appeals. He therefore reversed the EC Manager's decision and dismissed the complaint. However, the investigator stated that Searle could request that the Acting Director OHA review this finding. See 10 C.F.R. §708.18. On May 2, Searle filed a request seeking a reversal of the investigator's determination. He also submitted a letter dated April 25, in which he offered several additional contentions regarding why his complaint of retaliation should be accepted. I consider below Searle's response to the investigator's letter and the assertions raised in the April 25 letter.

II. Searle's Arguments Regarding Why His Complaint Should Be Accepted In Spite of Its Untimeliness

A. Searle's Response to the Investigator's Letter

The complainant asserts that on September 26, 2007, he revealed to Jeff Smith, Deputy Director of ORNL the essence of the retaliation that is under consideration here. Searle's undated letter to Mr. Smith documenting their meeting is part of the file in this case. However, the letter cannot stand as an acceptable substitute for filing a complaint of retaliation with the EC Manager, as required by Section 708.10. Moreover, even if it were considered to be such a complaint, it was filed after the 90-day period since he was terminated and rehired.

Searle points to Section 708.14(b), which provides that the "time period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure." Searle argues that his discussion with Mr. Smith should be considered an attempt to resolve this dispute informally, and therefore falls within Section 708.14. This is incorrect. The term "grievance-arbitration procedure" used in the context of Part 708 has a specialized meaning related to procedures negotiated by employees and management under labor agreements. *Darryl H. Shadel*, 27 DOE ¶ 87,561 (2000). See also 64 Fed. Reg. 12862 at 12868 (March 15, 1999). The time frames set forth in Section 708.14 simply do not apply to informal discussions by an employee to resolve an alleged retaliation with his contractor employer.

Searle next argues that the DOE should be interested in investigating the fact that his supervisor, whom he characterizes as unqualified and vindictive, was given a position by UT-Batelle. He reiterates the importance and the "gravity" of his disclosure regarding beryllium safety, and DOE's purported indifference to that disclosure. He claims that he came to believe that he was being silenced by UT-Batelle personnel. He believes that the Office of Inspector General (OIG) should have the opportunity to investigate this entire matter.

As an initial matter, as Searle has previously indicated, the OIG has already investigated the issue of the ORNL's handling of beryllium. *Beryllium Controls At The Oak Ridge National Laboratory*, September 2006, DOE/IG-0737. Thus, Searle's concerns about the overall viability or possibility of an OIG investigation are unfounded. The OIG, a separate entity from OHA, does not perform its responsibilities pursuant to the limitations of Part 708. The OIG is certainly free to investigate further whether a DOE contractor acted improperly or irresponsibly, apart from any determination OHA reaches in this Part 708 proceeding. In fact, the OHA's investigation of Searle's complaint would not reach the issue of whether UT-Batelle, his contractor employer, actually acted inappropriately in its handling of beryllium. With respect to UT-Batelle's actions, our focus under Part 708 would involve only the issue of whether the personnel actions cited by Searle were retaliatory and violated Part 708 prohibitions against such actions. Similarly, the OIG could also investigate whether the Searle personnel actions taken by UT-Batelle were improper. An OIG investigation is not precluded or limited in any way by a jurisdictional determination dismissing Searle's complaint of retaliation made by the OHA pursuant to Part 708.

I also find no merit in Searle's position that the "gravity" of the subject matter of his protected disclosure, beryllium handling at ORNL, should be given some special consideration here. There is nothing in Section 708.14 that leads me to conclude that it is appropriate to give any weight to the nature of the protected disclosure itself in assessing whether a complainant has shown a good reason that he could not file his complaint within the 90-day period. The issue before OHA at this point is not whether Searle made an important protected disclosure or whether his contractor employer was irresponsible in its handling of beryllium. It is whether Searle had a good reason to delay filing a complaint of retaliation. The purported importance of the disclosure in and of itself does not explain why he delayed or provide a reason to disregard the limitations of Section 708.14.

B. Searle's April 25 Letter

In this submission, Searle again highlights what he believes is the importance of his disclosure regarding beryllium handling. He also mentions that it was during the period just after his termination that he became "suspicious of a link between my personal conflict with the supervisor who filed me and the dispute (albeit low-key) over beryllium handling. . . . You must appreciate that though this was very convincing to me, I still felt I had no grounds to make an accusation this bold with any further corroborating evidence." This statement once again suggests that shortly after his termination the complainant actually did believe that his firing was a retaliation. He is not required to have any actual or official corroborative evidence of the motive in order to file a complaint under Part 708. The letter confirms the overall conclusion here that shortly after the termination and rehiring took place, Searle came to believe it was retaliatory. Accordingly, I see nothing in the April 25 letter that would cause me to reverse the dismissal.

III. Conclusion

In sum, the complainant's arguments here reflect his belief that he should have been accorded extra time to file his Part 708 complaint of retaliation because his protected disclosure involved an important and "grave" subject. I cannot agree with this proposition, which is simply not provided for under the Part 708 regulations. In this regard, I find that in spite of the additional opportunity he has been granted to explain why he should be accorded an exception to the time limitation set out in Section 708.14, Searle has not provided a single substantial reason why he

could not file in a timely manner. Accordingly, I find that the complainant has not shown that good cause exists for his failure to file his Part 708 complaint in a timely manner. Accordingly, the dismissal by the investigator should be sustained and the instant Part 708 complaint should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Donald E. Searle (Case No. TBU-0065) is hereby denied.

(2) 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. 10 C.F.R. § 708.19.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: May 16, 2007