May 23, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Delbert F. Bunch**

Date of Filing: **May 7, 2007**

Case Number: **TBU-0068**

Delbert F. Bunch (Bunch or the complainant), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The complaint was dated September 6, 2006. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant was an employee with Bechtel SAIC Company LLP (BSC), the prime contractor to the DOE Office of Civilian Radioactive Waste Management (OCWRM) Yucca Mountain Project. The DOE OCRWM has been tasked to develop and manage a safe system to dispose of spent nuclear fuel and high-level radioactive waste. In his September 6 complaint of retaliation, Bunch states that he was a BSC manager assigned the responsibility for assuring completion of a number of documents required in support of an update or revision of the 2004 CD [conceptual design]-1. Bunch indicates that on "March 17, 2006, after numerous attempts to assure that BSC's CD-1 Revision reports were in conformance with DOE requirements (including those under part 830), I refused to concur in the release of those documents. The morning of March 30, 2006, the second day after I returned from leave, I was handed a letter . . . advising me that my last day of work would be that day."

In his complaint, the complainant sets forth in detail the subject matter of the conceptual design reports that are involved here. In this regard, he stated that he participated on a team that reviewed a "draft license application." According to Bunch, "there were a number of specific comments and suggestions developed as a result of that review and several major criticisms and comments. One was that the analysis of aircraft risks raised issues that needed to be

brought to the attention of DOE [1]. . . . The concern for Yucca Mountain was that risks were to be reduced by negotiating a flight limitation with the Air Force. Making marginal improvements just to meet a numerical limit is a practice discouraged by the NRC [Nuclear Regulatory Commission]. This view was made known to the General Manager."

A second concern cited by Bunch involved the fact that on December 19, 2005, the "DOE issued a stop work order on BSC's quality affecting engineering and pre-closure safety analysis work, because of deficiencies in BSC's requirements management system . . . . The concern that existed had to do with continuing systemic failings in managing requirements . . . . The general matter of management of substantive requirements will be a matter for DOE and NRC to address in connection with the license application."

Bunch's third concern involved "lack of configuration management." Bunch states that DOE had issued "direction" regarding the basis for design in a CD-1 revision. "However, the BSC engineering organization departed from that direction and made changes from the BSC recommended design solution (some of the changes were contrary to the DOE's direction)." Bunch contends that "the Conceptual Design Report prepared for the CD-1 Revision contained deviations from the previous submittal, without item explanation."

Bunch's fourth stated concern involved the lack of adherence to DOE-mandated Integrated Safety Management requirements. In this regard, Bunch claims that the "introduction of a disposal tunnel off of the South Portal created safeguards, security and safety concerns that were completely avoidable by alternatives that fully met DOE requirements. . . . No changes were made when this concern and the other concerns (summarized above) were brought to the attention of the engineering organization . . . Moreover, when I refused to concur in the release of the CDR [Conceptual Design Report], the document was released by my management over my objections, without . . . conveying any of my Part 708.5(c) concerns to DOE."

As stated above, Bunch claims that in retaliation for engaging in a protected activity under Section 708.5, he was fired from his position with BSC on March 30, 2006. He filed a Complaint of

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1/ Bunch asserts that airplane risks was his area of special competency.

Retaliation with the DOE on September 6, 2006. In a letter of April 17, 2007, the Director, Office of Civilian Radioactive Waste Management of the DOE (OCRWM Director) dismissed the complaint.

The April 17 Dismissal Letter

The OCRWM Director gave two bases for the dismissal. The first basis was that the complaint was untimely filed. The second basis was the complainant's failure to show that he had engaged in an activity protected under Section 708.5.

With regard to the timeliness issue, the OCRWM Director noted that Section 708.14 provides that a complaint must be filed within 90 days after the complainant knew or should have known of the alleged retaliation. The OCRWM Director determined that the complainant's September 6, 2006 complaint was untimely because it was filed 160 days after the March 30, 2006 termination. In this regard, the OCRWM Director noted that he had provided the complainant the opportunity to show why he filed the complaint beyond the 90-day time period. The complainant provided some additional information regarding the September 6 filing date in the filing of October 13. Based on the October 13 submission, the OCRWM Director indicated that the complainant had purportedly reached the conclusion that his termination was retaliatory only after reading the OCRWM Director's July 19, 2006 testimony before the U.S. House of Representatives Subcommittee on Energy and Air Quality. The OCRWM Director indicated that he could not "find any language in my testimony that would lead you to believe that you were terminated in retaliation for your protected activities. Therefore, I find that the date on which you knew or reasonable should have known of the alleged retaliation was March 30, 2006, when you were terminated." Accordingly, the OCRWM Director found that the September 6 complaint, filed 160 days after the termination, was untimely and should be dismissed.

As a second basis for the dismissal, the OCRWM Director's April 17 letter noted the failure of the complainant to allege engagement in a protected activity. In this regard, the OCRWM Director cited Section 708.5, which provides that the following conduct is protected from retaliation by an employer:

> a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your

> employer, or any higher tier contractor, information that you reasonably believe reveals--
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> (1) A substantial violation of a law, rule, or regulation;
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> (2) A substantial and specific danger to employees or to public health or safety; or
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> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
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> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
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> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

The OCRWM Director stated that he had examined each of the protected acts explained in detail in the complainant's October 13, 2006 submission, and found that none of them qualified as a protected activity under 10 C.F.R. § 708.5. Accordingly, the OCRWM Director dismissed Bunch's complaint.

On May 7, 2007, the complainant filed an appeal of the dismissal by the OCRWM Director. I have reviewed that appeal, and as discussed below, I find that the OCRWM Director's dismissal should be sustained and the appeal denied.

II. Analysis

A. Whether the Complaint Timely Filed

Section 708.17(a) provides that a complaint of retaliation may be dismissed for lack of jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [he] may have for not filing within that period and the

[appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing."

In this case, the OCRWM Director asked the complainant to provide a reason for the untimely filing and, in the October 13 filing referred to above, the complainant provided his reason. He asserts that the termination letter which he was given on March 30, 2006, stated only that "business conditions are such that we must implement an Involuntary Reduction-In-Force (IROF) program." The complainant claims that he was later made aware of facts that led him to conclude that a "primary reason for the action was retaliation." In this regard, he asserts that he learned in July that no other senior manager had been terminated, and further that upon "reading the July testimony of the Director of OCRWM, I . . . concluded that I had been terminated primarily in response to my expressed concerns." Bunch indicates that he then decided to file his Part 708 complaint of retaliation. According to Bunch, the September 6 filing was well within the 90-day period and therefore timely.

I am not persuaded by this position, which is not supported by the rest of the Bunch filing. In his October 13 letter, Bunch also states that the "business conditions" statement in his termination letter was not legitimate because, since he was "Manager for Program Integration, directly reporting to the General Manager, my position would normally be funded using Indirect Funds, accounted for in the rates developed and submitted to DOE. Moreover, in my case, direct funds were available and properly chargeable by me for work requested by DOE letter of September 22, 2005. . . ; there was adequate funding available for me to meet all requested actions by DOE. I am aware of no prior plan for my removal." These statements indicate that the complainant did indeed have good reason to believe that his termination was retaliatory. Specifically, he indicates that he believed at the outset that there was sufficient funding for his position. He stated that he knew funds for his position were already allocated in 2005. Thus, he had good reason to suspect that "business conditions" might not be the true reason for his termination.

Bunch also states in his October 13 letter, "I was present at several FOCUS committee meetings to discuss plans for transitioning subcontractor work to BSC self-performed work, but at no time was I led to believe that there were any plans for reorganizing or dissolving my organization. . . ." Here, the complainant indicates that he had participated in meetings where

it was clear that there was no plan to reorganize his organization. In this regard, Bunch suggests in his October 13 filing that his termination was effectuated in a manner that did not follow normal BSC procedure. This out-of-the-ordinary termination process, which came unexpectedly and immediately after his refusal to obey a BSC directive, should certainly have alerted Bunch that the termination might have been retaliatory.

In addition, the complainant states, "As I was leaving the BSC office on March 30, I happened to see Mr. Peter Rail, who said that he had participated in a FOCUS committee meeting regarding my situation. After mulling his remarks, I sent him an e-mail (on April 2, 2006) asking him if my concerns had been made known to the FOCUS group." Thus, on the very day of his termination, the complainant heard from a colleague that his "situation" had been discussed at a FOCUS committee meeting. The complainant apparently became suspicious at that point because he immediately began to mull over his colleague's remarks. Thus, I am not persuaded that at the very time he was terminated the complainant did not already have some reason to believe employer retaliation could have occurred.

In fact, in the October 13 submission, Bunch himself summarizes his reasons for believing that the termination was retaliatory as follows: "In light of the apparent failure to follow procedure for my termination, the absence of business conditions impacting my continuance as an employee of BSC, and the legitimate concerns expressed by me prior to my termination . . . I conclude that a primary reason for the action was retaliation." Thus, based on these remarks by Bunch, I believe that he did indeed reach the conclusion contemporaneous with his termination that this action could well be retaliatory. As discussed above, Bunch was aware on the very day of his termination of each of these considerations: the failure to follow procedure; the absence of business conditions for his termination; and the types of concerns he had previously expressed. I fail to see here any reason why the purported retaliatory nature of the termination did not become known to him until July.

On the other hand, I find wholly unconvincing Bunch's assertion that he did not learn of the true reason for his termination until reading the OCRWM Director's July 19 testimony [before the U.S. House of Representatives]. In his appeal, the complainant claims that it was through reading this testimony that he first learned of the differences in "culture" and "priority" between BSC and OCRWM. I find this unpersuasive. Bunch consistently

portrays himself as BSC "senior management," and further notes that he is a "former [DOE] Deputy Assistant Secretary for Safety, Health and Quality Assurance." He is therefore a high-level employee with considerable experience and sophistication in the realms of both government service and government contracting. Further, he indicates in his October 13 submission that in October 2005, he understood that "a strong motivation [for BSC to satisfy DOE] was to enable BSC's financial profitability." Thus, it is simply not plausible for a knowledgeable employee, such as Bunch, to maintain that it was not until he read the OCRWM Director's testimony that he could piece together the entire picture of differing priorities of the DOE and BSC. He should have known all along that the goals of the two organizations were not necessarily identical in every respect and, in this regard, that BSC is a for-profit organization while the DOE is not. In fact, Bunch does state that in November 2005 he was assigned to lead an effort to prepare a revised CD-1 package consistent with redirection from the DOE. He noted that responding satisfactorily to that redirection was regarded as essential. In this regard, he stated "I understood that a strong motivation for that was to enable BSC's profitability." Thus, in 2005, Bunch was already well-aware that a key factor for BSC was profitability. It was thus obvious to him, even in 2005, that the goals of DOE and BSC were not identical. He certainly did not need the OCRWM July 2006 testimony to learn that BSC culture and DOE culture were not uniform.

Bunch also argues that his filing should be accepted even if it is considered untimely. In the October 13 filing, Bunch claims that "it is unreasonable to expect filing by a senior manager who attempts to 'work within the system,' until a more complete basis is developed." In his May 7 appeal, he states there "is no requirement that a pre-emptive filing must be made, even before sufficient facts are acquired. Important facts and circumstances arose in July 2006, when the result of the SCWE survey were made known to me by former co-workers who were familiar with the prevailing negative attitude in BSC towards those who raised concerns, and when I learned that no other person appeared to have been terminated after me, even though the termination letter cited business conditions as the cause. This could not have been known on March 30. . . .[The reference to text in the testimony on July 2006 was to note the contrast between OCRWM's determination to 'develop the culture and processes expected of an NRC licensee' with my growing awareness of the culture and processes with BSC. Before that point it was not abundantly

clear that OCRWM top management's priority for safety was difference from BSC's top management apparent lack of priority]."

The complainant sets out an incorrect standard here for when a claim must be filed. He contends that prior to July 30, the motive for retaliation was not "abundantly clear to him." He asserts that senior management should be entitled to delay filing a Part 708 complaint until "a more complete basis is developed," indicating that such individuals should be accorded the opportunity to "work within the system." Section 708.14 simply does not provide this type of approach. The standard of "abundantly clear," "complete basis," or time to "work within the system" is not applicable. The standard under Part 708 is "knew or should have known." As discussed above, I find that the complainant had sufficient knowledge for purposes of this proceeding that his termination could have been retaliatory that he should have come forward with his complaint within 90 days of that termination. Waiting until the facts are clearer is simply not within the regulatory framework here. ***Donald E. Searle,*** Case No. TBU-0065 (May 16, 2007)(complainant not required to have any actual or official corroborative evidence of motive in order to file a complaint under Part 708.) [2]

Bunch also asserts that if this complaint proceeding does not go forward, there could well be some negative impact on BSC employees. He raises concerns regarding the possible impact of alleged BSC performance shortcomings on "representations before NRC as well as DOE." These concerns, while they may be genuine enough, are beyond the purview of Part 708. These regulations provide a remedy only when a contractor employee is subjected to retaliation for engaging in protected behavior. The issue of whether the alleged disclosures made by a complainant are true, and therefore whether a contractor should be required to take corrective action related to the subject of the alleged disclosures, is not considered in a Part 708 complaint of retaliation proceeding. Similarly, whether other employees may be adversely affected, is not a matter considered in connection

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2/ Contrary to Bunch's assertion, there is an opportunity for an employee to "work within the system" to resolve his concerns. Section 708.20 specifically allows an employee and the DOE contractor some time to attempt to mediate a complaint. However, this option is only available once a complaint has been filed. Thus, it is not an avenue which would permit an individual to delay filing his Part 708 complaint.

with a employee's filing of a complaint of retaliation under Part 708.

In sum, I find that the complainant improperly delayed filing his Part 708 complaint, and he has failed to provide any good reason for this delay.

B. Whether the Part 708 Complaint Is Precluded Because the Complainant Failed to Establish that He Engaged in Protected Activity

The second basis on which the OCRWM Director dismissed the instant Part 708 complaint was that the complainant had not engaged in an activity described in Section 708.5. I have thoroughly reviewed the record in this case and I find that the OCRWM Director was correct. In his May 7 appeal, the complainant indicated that he refused to "concur in documents that [he] regarded as contrary to both NRC and DOE regulations." This refusal is not a protected activity under Section 708.5. As stated above, Section 708.5(c) provides that the following conduct is protected from retaliation by an employer:

> Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

Bunch's refusal to concur in the conceptual design report simply does not fall within the purview of this subsection. As an initial matter, even if Bunch believed that the conceptual design report violated NRC or DOE regulations, his concurrence with the report would not in and of itself violate a federal health or safety law, or cause him to have a fear of serious injury to himself or others. Concurrence per se is not an activity that violates a federal health or safety law, or causes harm to the complainant or others. In fact, this regulation was designed in order to allow workers to refuse to engage in an activity that could cause them or others immediate bodily harm, and not to

protect an employee who does not believe that his supervisor's decisions or directives are lawful. [3]

In this regard, Section 708.6 indicates that "participation in an activity, policy or practice may cause an employee to have a reasonable fear of serious injury that justifies a refusal to participate if: (a) a reasonable person, under the circumstances that confronted the employee, would conclude that there is a substantial risk of a serious accident injury, or impairment of health or safety resulting from participating in the activity, policy, or practice; or (b) an employee, because of the nature of his or her employment responsibilities, does not have the training or skills needed to participate safely in the activity or practice." Clearly, Bunch could not have reasonably believed that he or others would have faced a substantial risk of accident, injury or health impairment if he merely signed the conceptual design report. There were other methods by which he could make his concerns about the report known to the DOE.

Moreover, Sections 708.5 and 708.6 do not provide an employee with the right to make a unilateral decision not to participate. In "refusing to participate," a complainant must also comply with Section 708.7, which provides that before refusing to participate a complaint must ask his employer to correct the violation or remove the danger, and his employer must have refused; and further the complainant, by the 30th day after refusing to participate, must have reported the violation or dangerous activity to a DOE official, member of Congress, another government official with the responsibility for the oversight of the conduct of operations at the DOE site, his employer, or any higher tier contractor, and stated the reasons for refusing to participate. Bunch does not allege that he met the requirements of Section 708.7. I therefore find that his refusal to concur in the concept design report does not provide Bunch protection under Section 708.5(c). [4]

3/ One way for a contractor employee to handle a situation in which he believes that his employer has asked him to do something that is illegal is to raise this issue with the DOE. This approach could provide the employee with some protection from retaliation under Part 708.

4/ This is not to say that Bunch is required to sign a document that he reasonably believes is illegal. The circumstances of

(continued...)

Finally, the October 13 submission and May 7 appeal do not indicate that Bunch himself actually made any *disclosures* of information to his contractor that would qualify for protection under Section 708.5(a) or (b). For example, in his May 7 appeal, he enumerates four categories of alleged violations of "law, rule, or regulation" that were identified in the October 13 filing. While he explains which rules and regulations he believes were violated by the conceptual design report, he does not state that he ever actually informed anyone of his beliefs. He certainly does not indicate the name of the person he informed, or indicate the time, place and circumstances of any discussion in this regard. This is evident from Bunch's own descriptions of the purported disclosures, which were cited virtually in their entirety above. For example, in his list of "Protected Acts" set forth in his complaint, Bunch states "concerns were brought to the attention of the engineering organization." He indicates that another concern "was made known to the General Manager." Neither of these assertions indicates that Bunch himself made any disclosure whatsoever. In sum, I can find no reason to conclude that Bunch engaged in any activity protected under Section 708.5(a)(1),(2) or (3); or Section 708.5(b). I therefore find that the OCRWM Director correctly found that Bunch did not engage in protected activity under Part 708.

III. Conclusion

For the reasons set forth above, 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. I further find that his complaint should be dismissed because he has not shown that he has engaged in an activity that is protected under Section 708.5. Accordingly, the OCRWM Director's determination was correct, and the instant Part 708 complaint should be dismissed.

4/ (...continued)
this case indicate that he is not entitled to protection from adverse personnel actions under Part 708 if he refuses to do so. However, there may well be other protections available to him.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Delbert F. Bunch (Case No. TBU-0068) 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 23, 2007