March 30, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Dennis Rehmeier

Date of Filing: March 1, 2011

Case Number: TBU-0114

Dennis Rehmeier (hereinafter referred to as the Complainant) appeals the dismissal of his complaint of retaliation and request for investigation (the Complaint) 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 is affirmed, and the Appeal denied.

I. Background

The Complainant was an employee of Sandia Corporation (Sandia) in Livermore, California, from 2007 until August 27, 2010, when Sandia terminated the Complainant's employment. The Complainant was Deputy Program Manager for the Sandia Counter-intelligence Program. In his position, Complainant had specific responsibility to implement the Counter-intelligence Program at Sandia's site at Livermore, California. Complaint at 1-2.

The Complainant's Counsel filed the Complaint with the Whistleblower Program Manager ("the Manager") at the National Nuclear Security Administration Service Center in Albuquerque, New Mexico (the "NNSA"). The Complaint stated that Sandia terminated the Complainant's employment and engaged in other adverse personnel actions against the Complainant in retaliation for making protected disclosures. Complaint at 2. Specifically, the Complainant alleged that these adverse actions were taken by Sandia because he raised concerns regarding the management of the Sandia Counter-intelligence Program. The Complaint identifies the Complainant's alleged disclosures as follows:

> (1) Complainant raised concerns starting in October 2009 about Sandia's under resourcing of Complainant's budget to allow his office to have sufficient analytical staff to conduct foreign national counter-intelligence in the Sandia's California office.
>
> (2) As a secondary protected activity, Complainant objected to the hiring of a counter-intelligence manager at Sandia who had less than one year employment at Sandia, and who was therefore not eligible under Sandia policies to bid for the

> position without a waiver, and presumptively not sufficient [sic] qualified for said counter-intelligence position.

Complaint at 2. The Complaint also states that the Complainant complained about improper interference in his employment by his former Sandia manager after that manager took an employment position with the DOE in December 2009. *Id.* at 3. The Complaint states that the Complainant made his disclosures internally to Sandia Human Resources, the Sandia Ombudsman, and Sandia's parent corporation, Lockheed Martin. *Id.* at 5. The Complaint states that these disclosures were protected under 10 C.F.R. § 708.5(a) because he reasonably believed that they revealed the following:

> . . . violation of law, rule, or regulation (*i.e*., executive orders and directives, and DOE order and policies); (2) a substantial and specific danger to public safety (*i.e*., threats to national security); and/or (3) gross mismanagement, gross waste of funds, and abuse of authority.

Id. at 2.

On January 18, 2011, Sandia filed a Motion to Dismiss Complaint with the Manager. In that Motion, Sandia asserted that it terminated the Complainant for violation of Sandia policies. Sandia also contended that the Complainant made no protected disclosures under Part 708, nor showed that Sandia retaliated against him. Sandia requested that the Manager dismiss the Complaint without further investigation or hearing for failure to state a claim under Part 708. Sandia Motion to Dismiss at 13.

On February 18, 2011, the Manager issued a letter dismissing the Complaint. The Manager refers to the Complainant's two alleged disclosures quoted above and concludes that "[n]one of these allegations you allege constitute protected activity as described in § 708.5 and therefore your complaint is dismissed for lack of jurisdiction per § 708.17." Manager's February 18, 2011, letter at 1.

On March 1, 2011, the Complainant's Counsel filed an appeal (the "Appeal") of the dismissal by the Manager with the Office of Hearings and Appeals. 10 C.F.R. § 708.18. On March 15, 2011, Sandia filed a "Renewed Motion to Dismiss Complaint and Appeal" (Sandia's "Renewed Motion"); on March 22, 2011, Complainant's Counsel filed an Opposition to this Motion; and, on March 29, 2011, Sandia filed a Reply to Complainant's Opposition.

II. Analysis

We have reviewed the Complaint, the Manager's Dismissal, and the Complainant's and Sandia's filings in this proceeding. Based on the information contained in the Complaint, we find no error in the Manager's determination that the Complainant's "allegations" are not disclosures protected under § 708.5(a), and, therefore, the Complaint must be dismissed pursuant to § 708.17. Specifically, we find that dismissal for lack of jurisdiction or other good cause was

appropriate because the Complainant's contention that his allegations were protected disclosures under § 708.5(a) is "without merit on its face." 10 C.F.R. § 708.17(c)(4).
As an initial matter, we note that the Complainant contends in his Appeal that the Manager did not fulfill her responsibilities in the initial processing of the Complaint. Specifically, the Complainant maintains that the Manager should not have dismissed the Complaint without undertaking an investigation and giving the Complainant an opportunity to respond to Sandia's Motion to Dismiss. These arguments are without merit. The Employee Concerns Director or head of field element can dismiss a complaint on his or her own initiative or at the request of a party. 10 C.F.R. § 708.17(a). There is no requirement that the cognizant official allow a complainant to submit comments prior to a dismissal sua sponte or prior to a dismissal based on a contractor response or motion. Similarly, there is no requirement that the cognizant official investigate a complaint. That function resides with the Office of Hearings and Appeals. 10 C.F.R. § 708.21(a)(2). Based on the foregoing, we find no error in the Manager's processing of the Complaint.[1]

The Complainant also contends in his Appeal that the Manager failed to provide an adequate basis for her dismissal of the Complaint. Section 708.17(b) requires that the field element provide "specific reasons" for the dismissal. In this case, the Manager stated that the Complainant's allegations do not rise to the level of protected disclosures. This clearly indicates a basis for dismissal pursuant to § 708.17(c)(4), which applies to a complaint that is "frivolous" or "without merit on its face." This is a sufficient basis upon which to file an Appeal.[2] Accordingly, we will proceed to a consideration of the Complainant's substantive arguments.

In his Appeal, the Complainant contends that the Manager erroneously concluded that the concerns that he raised to Sandia and Lockheed Martin management were not protected disclosures under Part 708. We do not agree with this contention. In his Complaint, the

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[1] This conclusion is not inconsistent with two OHA decisions cited by the Complainant. *See Clarrisa V. Alverez*, TBU-0084 (2009); *Clint Olson*, TBU-0027 (2004). In *Alverez*, the field element (i) failed to identify the subsection of § 708.17(c) providing the basis for dismissal, and (ii) erroneously cited the lack of evidentiary support for the allegations as the basis for dismissal. In *Olson*, the field element failed to give the complainant an opportunity to clarify ambiguities in the complaint. Those circumstances are not present in the instant case. Here, the specific subsection of § 708.17(c) used as the basis for dismissal is readily identifiable from the Manager's findings. Moreover, the field element based the dismissal on the lack of sufficiency of the Complainant's allegation, rather than any examination of the evidentiary support for those allegations. Finally, there were no ambiguities in the Complaint requiring "clarification."

[2] Although the Appellant contends that OHA precedent requires that this matter be remanded to the field element for a more specific description of the basis for dismissal, the cited decisions do not support that result. *Greta Kathy Congable*, TBU-0110 (2010) (portion of dismissal based on actual accuracy of protected disclosure reversed); *Cor*, TBU-0045 (2006) (dismissal based on assessment of merits of assertions reversed); *Caroline C. Roberts*, TBU-0040 (2006) (dismissal upheld, although field element should have been more specific in basis for dismissal); *Kuzwa*, TBU-0028 (2004) (dismissal reversed where complainant's allegations fell within Part 708); *Charles L. Evans*, TBU-0026 (2004) (dismissal based on validity of retaliation claim reversed).

Complainant asserts that, starting in October 2009, he "raised concerns" that Sandia's "under resourcing" of his budget would not allow his office to have sufficient analytical staff to conduct foreign national counter-intelligence in Sandia's California office. He states that in September 2009, the counter-intelligence analyst assigned to Sandia's Livermore facility resigned, and that Sandia refused, on grounds of inadequate budget, to fill this position. Complaint at 1, 3. The Complainant further asserts that he believed that effective performance of Sandia's counter-intelligence operations at Livermore was heavily dependent upon maintaining uninterrupted expert services from this intelligence analyst position, and that the failure to fill this position created a "substantial and specific danger" to public safety because he believed that Sandia's Livermore, California, facility was vulnerable to foreign intelligence threats. As a basis for this belief, the Complaint refers to a high percentage of foreign nationals in the population of the Livermore, California, area and to the increase in access by foreign nationals to Sandia's Livermore site resulting from the development of the Livermore Valley Open Campus (LVOC). *Id.*

The Complaint does not indicate that the Complainant disclosed to Sandia and Lockheed Martin management his reasons for believing that the funding for counter-intelligence staffing at Sandia's Livermore facility was inadequate. However, even if he presented the information described in the Complaint as the basis for his concern that he had insufficient analytical staff to counter foreign intelligence threats, his statements would not rise to the level of a "substantial and specific danger" to public safety. In an analogous case decided under the Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the Merit Systems Protection Board (the Board) addressed the question of whether a party expressing concerns about funding for protective services had made disclosures that revealed a "substantial and specific danger" to public safety. *Chambers v. Dep't of the Interior*, No. 2011 M.S.P.B. 7 (2011).

In *Chambers*, the appellant had filed a Complaint alleging that the agency retaliated against her for disclosing on a number of occasions that the agency's decision to reduce park police patrols had endangered persons using public parks and parkways. The Board analyzed these disclosures using the following factors: "(1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm – potential consequences." *Chambers, slip op.* at 13, *citation omitted*. Based on this analysis, the Board found that some of Chambers' disclosures were protected disclosures under the WPA while others were not protected disclosures. The Board found that disclosures were protected when they revealed specific threats to public safety that were likely to occur. For example, the Board found that Chambers' disclosure that residents were complaining of increased drug-related activity in certain urban parks was a protected disclosure because it described a specific, serious consequence that Chambers reasonably believed had already resulted from fewer park police patrols. *Id*. However, the Board rejected protected disclosure status for Chambers' statement that inadequate park police staffing will result in the loss of life or destruction of a national monument. It found these concerns to be "too speculative," stating that:

> These statements are divorced from any additional information by which the appellant's predictions can be judged. There may well be a staffing level below which reasonable predictions of likely harm could be made, but there is nothing in the appellant's statements to indicate that she reasonably believed that level had been reached.

Id. at 15.

In the present case, the allegations of harm described in the Complaint are similarly speculative. The Complaint does not identify specific foreign intelligence activities at Sandia's Livermore facility, nor why the Complainant believed that they were likely to increase in the absence of an intelligence analyst employed at the site. Nor does the Complaint suggest that there is more specific information that can only be disclosed in a classified setting. The Complaint merely alleges that the "effective performance" of Sandia's counter-intelligence program at Livermore was "heavily dependent" on the intelligence analyst position. We find that a person could not reasonably believe that the failure to fill the vacancy was information that indicated a "substantial and specific" danger to employees or to public health or safety.

Similarly, a person could not reasonably believe that the ongoing vacancy of the intelligence analyst position at Livermore evidenced the failure of Sandia to fulfill specific counter-intelligence obligations to the DOE. Accordingly, the assertions in the Complaint, even if proven, would not show that the Complainant reasonably believed that Sandia's decisions concerning the staffing of counter-intelligence operations at Livermore had violated Sandia's obligation to provide adequate counter-intelligence services to the DOE, or that Sandia had committed an act of gross mismanagement or abuse of authority in allocating counter-intelligence funds received from the DOE.

We also reject the Complainant's assertion that he made a protected disclosure when he objected to the hiring of a counter-intelligence manager at Sandia who had less than one year of employment at Sandia. Even if Sandia's company policy stated that this individual was not eligible to bid for the position without a waiver, this type of contractor personnel policy is not a "law, rule, or regulation" for purposes of § 708.5(a)(1). Nor would the failure of an applicant to meet this company requirement provide a reasonable basis for concluding that Sandia was hiring someone insufficiently qualified for the counter-intelligence position. Finally, with respect to the allegations of improper conduct by the Complainant's former Sandia manager after that manager became employed by the DOE, we note that Part 708 provides no relief concerning actions by DOE officials.

Accordingly, we find that the Manager acted correctly in finding that none of the allegations in the Complaint constitute protected activity as described in § 708.5. Accordingly, we find that the determination of the Manager should be sustained, and that the instant appeal should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Dennis Rehmeier, Case No. TBU-0114, 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, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 30, 2011