

Case No. VBA-0055

October 2, 2000

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Lucy Smith

Date of Filing: July 20, 2000

Case Number: VBA-0055

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on July 11, 2000, involving a Complaint filed by Lucy Smith (Smith or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Smith claims that her former employer, Westinghouse Savannah River Company (WSRC), a DOE contractor, terminated her employment during a reduction in force (RIF), and then failed to rehire her, in retaliation for making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that WSRC had shown that it would have terminated the Complainant in the RIF, even in the absence of the protected disclosures. As set forth in this decision, I have determined that this matter should be remanded to the Hearing Officer for further consideration.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (amended regulations) (definition of retaliation).

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included fact- finding by the DOE Office of Inspector General, followed by the issuance of a Report of Inquiry setting forth the IG’s findings and recommendations on the merits of the Complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions and substantive clarifications that “apply prospectively in any complaint proceeding pending on the effective date of this part.” 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12862 (March 15, 1999). Under the

revised regulations, review of an Initial Agency Decision, as requested by Smith in the present Appeal, is performed by the OHA Director. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Smith's Complaint are fully set forth in Lucy Smith, 28 DOE ¶ 87,501 (2000). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Smith was employed as a chemist at the DOE's Savannah River Site (SRS) from September 1973 to March 1997. On March 26, 1997, Smith filed a Complaint under Part 708 with the DOE Office of Inspector General. After the completion of an investigation, Smith requested and received a hearing on this matter before an OHA Hearing Officer. There were 13 witnesses and the hearing lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

In the IAD, the Hearing Officer cited the burdens of proof under the Contractor Employee Protection Regulations. (1) They are as follows:

> The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation or refusal.

10 C.F.R. § 708.9(d).

The Hearing Officer found that Smith made a protected disclosure involving a safety concern, by inquiring as to an asphyxiation hazard in a building next to the one in which she worked (October 10 Disclosure). The Hearing Officer determined that Smith made a second safety-related protected disclosure regarding the posting of "Rad-Con" Permits outside a laboratory building (December 9 Disclosure). These permits notify employees as to hazards and safety requirements in radiological areas. Smith's disclosure regarding the Rad-Con permits related to a possible inaccurate labeling of the hazards involved. She also reported that another Rad-Con permit should have stated that personnel are required to wear safety glasses. She further voiced concerns as to accurate measurement of radiation exposure. (2)

The Hearing Officer noted that WSRC stipulated that the October 10 and December 9 Disclosures were contributing factors with regard to the decision to terminate Smith.

The Hearing Officer also concluded that none of the disclosures was a contributing factor in Smith's not being rehired by WSRC. In this regard, the Hearing Officer found that Smith failed to file the appropriate form to keep her name in the firm's "preference- for-hiring" database. The Hearing Officer determined that the fact that WSRC did not rehire Smith for any of three chemist positions that became available after she was terminated was not attributable to her protected disclosures.

The Hearing Officer next considered whether WSRC had clearly and convincingly demonstrated that WSRC would have terminated Smith even in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). In this regard, the Hearing Officer found that the chemists who were retained by WSRC had more experience than Smith. The Hearing Officer determined that WSRC had clearly and convincingly demonstrated that it would have terminated Smith even in the absence of the protected disclosure. The Hearing Officer therefore denied Smith's request for relief under Part 708.

II. The Smith Statement of Issues and the WSRC Response

Smith filed a statement identifying the issues that she wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33.

The Statement points out the following conclusion of the Hearing Officer: "I also have determined that several of Smith's disclosures were contributing factors in her termination." Smith seems to believe that this conclusion demonstrates that WSRC retaliated against her for those disclosures and that relief is warranted. She also requests an "objective review" of the Hearing Officer's determination.

In its Response to the Statement, WSRC contends that the Statement of Issues was not timely filed. In this regard, WSRC points to two Part 708 appeal cases considered by the Deputy Secretary of Energy under the prior regulations. Mark H. McCormack v. Westinghouse Savannah River Corp., 27 DOE ¶ 88,029 (1999)(McCormack); Therese Quintana-Doolittle, 27 DOE ¶ 88,035 (1999)(Quintana-Doolittle). See 10 C.F.R. § 708.8(c)(March 1992 regulations). WSRC states that in these two decisions, the Deputy Secretary required that time limitations periods be strictly observed in filing the original Part 708 complaint. WSRC maintains that such an approach should be followed here. WSRC further points out that the Complainant offered no reason for the late filing. Accordingly, WSRC contends that the instant appeal should be dismissed as untimely.

WSRC also asserts that the Statement fails to identify any specific issues that it wishes the Director to review, as provided for in 10 C.F.R. § 708.33. WSRC believes that unless there is a clear demonstration that the Hearing Officer erred or abused his discretion, the Director must affirm the Hearing Officer's Opinion. WSRC maintains that the appeal should be dismissed because the Statement does not set forth any error by the Hearing Officer.

III. Analysis

I will summarily dispose of the two contentions raised by WSRC in its response. I am not convinced by either argument.

With regard to WSRC's timeliness argument, the two cases cited by the firm are inapposite. In Quintana-Doolittle and McCormack, the individuals filed their original Part 708 complaints several months late. Finding no good cause or other appropriate basis had been shown for the lateness, the Deputy Secretary of Energy dismissed the complaints.

In the present case, the Complainant filed her Notice of Appeal in a timely manner. However, her Statement of Issues in the appeal phase was filed four days late. I therefore do not find the cases cited by WSRC to be comparable with respect to the degree of untimeliness.

Further, I believe that the difference between the procedural posture of the instant case and the cited cases is significant. It is appropriate to hold a potential complainant to a stricter standard of timeliness in the initiation of a Part 708 proceeding than in other phases of the Part 708 proceeding. Otherwise, a contractor-employer would lack certainty as to when its period of Part 708 liability for a personnel action taken with respect to any given employee would be closed. On the other hand, with respect to the filing of a statement of issues in connection with an appeal, a respondent is on notice of the request for review by the Director, since the notice of appeal has already been filed. As a general rule, I see no significant detriment to a respondent in the case of a four-day delay in filing a Statement of Issues for review.

Finally, the current regulations authorize me to approve an extension of any deadline related to the investigation, hearing and OHA appeal process. 10 C.F.R. § 708.42. Given the de minimus period of time

at issue here, and the lack of any showing of harm by the contractor, I will use the discretion granted to me under that Section and approve an extension of time to file the Statement of Issues in the instant case.

I further see no merit in WSRC's argument that I must dismiss the appeal because the Complainant has failed to present specific issues for me to address. I believe that my authority in the Part 708 appeal process is broader than WSRC suggests. My role in this regard is not simply to consider those issues specifically identified by an appellant. It is certainly within my discretion for me to review the entire record created through the investigation and the hearing process, and if I find a material error, I believe that it is incumbent upon me to correct it. I believe a unified, consistent approach to rule interpretation and related issues best serves the interests of those parts of the DOE community with a stake in the Part 708 program. Accordingly, I reject WSRC's contention that the instant appeal must be dismissed for failure to raise specific issues to be reviewed.

I turn next to the Complainant's Statement of Issues, which as indicated above, is from a substantive viewpoint quite meager. With respect to the Complainant's allegation that she is entitled to prevail merely because her protected disclosures were a contributing factor to her termination, I find that the Complainant is simply incorrect. Even though a Part 708 complainant may establish that a protected disclosure was a contributing factor to a retaliation, this does not mean that the individual is thereby entitled to relief. As stated above, the regulations clearly allow a contractor to demonstrate that it would have taken the same personnel measures even in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). The Hearing Officer determined that WSRC made this showing. Therefore, in his view, even though the protected disclosure may have been a contributing factor to the RIF, the firm showed that it would have terminated the Complainant anyway. I therefore reject this aspect of the Statement of Issues.

However, as stated above, the Complainant has also asked me to perform an objective review of the record. Given this specific request, and my belief, discussed above, that a unified, consistent approach best serves the interests of the participants in the Part 708 program, I exercised my discretion to give the record in this case a comprehensive review. In so doing, I found a significant issue that was not given thorough consideration, and needs further development.

As I indicated above, the Hearing Officer noted that the Complainant was terminated as part of an overall reduction in force (RIF), in which one lab technician and one chemist were the positions selected for elimination. That selection was a necessary step, preliminary to the selection of the particular individuals within those job categories for termination. Thus, a key issue in this case is how the decision was made to select the positions of chemist and technician for termination. The Hearing Officer did not evaluate the process through which that selection decision was made, and whether it may have been influenced by the fact that the Complainant had made a protected disclosure. As a result, I find that at this point, the IAD does not consider whether WSRC clearly and convincingly established that the termination decision would have been the same absent the protected disclosure.

To facilitate my discussion of this additional issue, I will first describe Smith's workplace organization. During the relevant period, WSRC's Waste Management Laboratory (WML), WML was organized into two separate laboratory organizations, the Effluent Treatment Facility laboratory (ETF lab) and the In-Tank Precipitation Facility laboratory (ITP lab). See Hearing Exhibit W-11. Each laboratory was staffed with one supervisor, two chemists and several technicians. Id. (3) At the time of the RIF, Smith and Kenneth Cheeks were the chemists working at the ITP lab. Thelma Hill-Foster and Linda Youmans were chemists at the ETF lab. Transcript of Hearing (Tr.) at 78.

Early in January 1997, Woody Melton, the Manager of the WML, was notified that WSRC's High Level Waste Division (HLWD) planned to reduce WML's personnel staffing because of a $100,000 cut in funding for each lab. Tr. at 74-77; Hearing Exhibits W-11, W-16 (December 30, 1996 Baseline Change Proposal outlining budget reduction and WSRC divisions to be affected). On January 8, 1997, Melton was asked about the impact on WML if 4 positions (including chemists) were eliminated from the labs. Hearing Exhibit W-11 at 1. The next day, Melton was informed that Dave Amermine, the HLWD deputy

manager, decided to reduce WML by four positions - three lab technicians and one chemist. Id. at 2.

The testimony at the hearing indicated that on January 10, 1997, Melton, along with his supervisor, Jim Collins (Collins), Pat Padezanin (Padezanin), WSRC Manager of Analytical Laboratories, and Lori Chandler (Chandler), Melton's previous supervisor in December 1996, met to discuss the issue of personnel cuts. (4) Tr. at 76- 77, 178, 195. After some discussion with other officials, Padezanin, who was the most senior of the group, concluded that only two employees, a chemist and a laboratory technician, would have to be laid off from WML to meet the budget constraints. Tr. at 175-76. This reduction contemplated that three chemists would provide support to both labs, rather than two chemists supporting each lab. Tr. at 237, 325-27.

These individuals then discussed what criteria would be used to select the one chemist for termination. Tr. at 178. The criteria selected were: performance, current contribution to the organization, potential contribution to the organization and time in position. Id. The managers then considered Smith, Cheeks, Hill- Foster and Youmans. Based on the criteria, they selected Smith for termination. Tr. at 179-80.

There is testimony to support the proposition that once the one position in the chemist category was selected for elimination, it was a virtual certainty that the Complainant would be the employee terminated. For example, Collins testified as follows:

> Q: And was anybody else's name mentioned as a possible candidate for reduction other than Lucy?
>
> A: No that I'm able to recall, no.
>
> Q: So it was sort of from the beginning of the meeting to the end of that meeting that Lucy was going to be the one that had to go? A: That was my understanding, yes.

Tr. at 247. See also, Tr. at 229 (Padezanin testimony).

Given the implication that, if a chemist's position was selected for elimination, the Complainant would be terminated, I believe it is critical for the Hearing Officer to evaluate the evidence regarding the choice of a chemist position for elimination. In order for the contractor to meet its burden of proof, it must establish that the targeting of the chemist's position was based on objective business criteria, and that elimination of the chemist's position was clearly the most viable alternative. I believe the Hearing Officer had substantial justification for his determination that WSRC had clearly and convincingly shown that, based on Smith's qualifications and experience, it would have selected Smith for termination even absent the protected disclosures. However, the Hearing Officer should also have specifically considered whether WSRC demonstrated by clear and convincing evidence that it would have selected a chemist position for elimination absent the disclosures.

I note from the transcript that the witnesses Melton, Padezanin, Collins and Chandler were knowledgeable about the selection of Smith as the chemist who would be riffed, and could describe in considerable detail how they applied the selection criteria. (5) Tr. at 88-92, 179-80, 277-80. However, the record as to how the chemist position itself was selected is thin. For example, Melton stated: "it became obvious that we could cut one of the technicians at ETF, since there were two technicians on days. . . We looked at how we could continue to support operations. . . we decided that we would go down by one chemist and one technician." Tr. at 84-85.

Collins stated: "Given the fact that there were two chemists at each of the facilities, ITP and ETF, . . . our best option was to look at reducing the head count in that particular area and going with a floater or roamer chemist. . . between the two facilities." Tr. at 237. Collins also referred to "being able to continue support for that particular customer." Tr. at 248. Collins further agreed with the assertion that "the way it was going to end up was one of [the chemists] was going to be eliminated. . . .That was the way the meeting started and the way it ended." Tr. at 246.

Padezanin stated that "what we needed to be able to do was continue to provide the same level of support to the customer. . . that goal. . . led us to conclude that it needed to be one chemist and one technician. . . We discussed all options." Tr. at 206.

Chandler stated that "It was decided there would be one exempt and one non-exempt [employee]. And the non-exempt. . . happens to be a lab technician in the lab. . . . And then we looked at. . . who would be let go from the exempt standpoint. Basically, we looked at all four of the chemists who were in that group at the time." Tr. at 274. Chandler repeated this same reasoning later in her testimony: "We had to go down by two head count. One was exempt, one was non-exempt." Tr. at 283.

The testimony itself indicates no support or reasoning for the ultimate determination that elimination of a chemist position was the best option. Most of the testimony on the point of how the chemist position was selected for the RIF is a mere restatement of the outcome. For example, Chandler does not give any reasons why the RIF was based on the selection of one "exempt" and one "non- exempt" position. I also see no support for the Collins/Padezanin rationale. Neither of these witnesses explained why the customer service goal could not be accomplished through the termination of other combinations of employees, or why the option chosen furthered that goal better than other options. Although Padezanin stated that the committee "discussed all the options," she does not describe that discussion. Tr. at 206.

Further, Chandler's rationale appears to be a personnel-oriented solution, and therefore aimed at two particular position classifications. This does not seem wholly consistent with the assertions of Padezanin and Collins that elimination of the chemist and technician positions best served customer needs.

I note that in addition to two chemists, the ETF lab staff included two day technicians and 8 shift technicians. The ITP lab was staffed with one day technician and 8 shift technicians, in addition to two chemists. Thus, a possible option here would have been to terminate two technicians, one from each lab, rather than a chemist and a technician. Yet, there is no discussion at the hearing as to the effect of terminating two technicians, instead of a chemist and a technician.

In this regard, in a memorandum of January 9, 1997, Melton states that if WML were "forced to downsize by two, the ITP day-technician and one of the ETF day-technician positions would be eliminated." Exhibit W-11 at 1. Moreover, the memorandum offers several other proposals for supporting the lab with all four chemists, but with fewer technicians. Id. at 3; Id. Proposal B. I note that the witnesses did not explain why these other possibilities were rejected. In particular, there is no testimony as to why a floater chemist was preferable to maintaining all four chemists, with fewer lab technicians.

In sum, a key element in a finding that WSRC would have terminated the Complainant absent the protected disclosures is that the selection of the chemist position for elimination was the most appropriate option. The Hearing Officer shall make a specific determination on this aspect of WSRC's burden of proof.

Accordingly, this matter will be remanded to the Hearing Officer for further proceedings. If he finds it necessary, the Hearing Officer shall conduct further fact finding with respect to the issue of how the WSRC Managers decided that a chemist position needed to be eliminated from WML in order to accommodate the budget cut. In the alternative, the Hearing Officer may review the current record without further development and assess whether WSRC has met its burden of proof on this issue. With or without further fact-finding, the Hearing Officer shall issue a determination fully considering whether WSRC has shown by clear and convincing evidence that it would have eliminated a chemist position from the WML even in the absence of the Complainant's protected disclosures.

It Is Therefore Ordered That:

The Appeal filed by Lucy Smith on July 20, 2000 (Case No. VBA- 0055), of the Initial Agency Decision issued on July 11, 2000, is hereby granted in part. The Complaint proceeding is remanded to the Hearing

Officer for further action consistent with the above determination.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 2, 2000

(1)With respect to the burden of proof, the Hearing Officer cited to the prior version of Part 708. In connection with my review of the burden of proof, I shall therefore also refer to that earlier version. 57 Fed. Reg. 7533 (March 3, 1992). However, the procedures applicable to this appeal proceeding are set forth in the current version of Part 708, effective April 14, 1999. 64 Fed. Reg. 12862 (March 15, 1999). I shall cite to the current regulations when applicable.

(2)The Hearing Officer found another protected disclosure had been made, but that it was not a contributing factor in the Complainant's selection for termination. In any event, since there were two disclosures that were found to have been contributing factors to her dismissal, the fact that there may have been an additional disclosure is not necessarily relevant to this proceeding.

(3)The ITP Lab was staffed with one day technician and eight shift technicians. The ETF Lab was staffed with two day technicians and eight shift technicians. Id.

(4)A fifth attendee at the meeting, Stephen Lee, who was involved with the budget for the laboratory, did not testify at the hearing. Tr. at 82

(5)These witnesses, who attended the January 10 selection meeting, knew of the Complainant's safety disclosures, although they denied discussing them at the meeting. E.g., Tr. at 61, 102, 204, 244.