January 8, 2003
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Susan Rice Gossett

Date of Filing: September 13, 2002

Case Number: VBA-0062

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 8, 2002, involving a Complaint filed by Susan Rice Gossett (Gossett or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Gossett claims that her former employer, the Safety and Ecology Company (SEC) terminated her as a retaliation for making disclosures that are protected under Part 708. 1/ In the IAD, the Hearing Officer determined that Gossett was entitled to relief. *Susan Rice Gossett*, 28 DOE ¶ 87,020, Case No. VBZ-0062 (2002). The instant determination will consider SEC's appeal of the IAD. As set forth below, I have decided that the IAD should be sustained.

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

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1/ SEC is a sub-contractor of Bechtel Jacobs Corporation, the DOE's managing contractor at the Portsmouth site in Piketon, Ohio.

employers. Thus, a contractor 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 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by SEC in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Gossett's Complaint are fully set forth in the IAD. I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Gossett was employed by an SEC predecessor, Bartlett Nuclear Services, as a radiation control technician (RCT) beginning on October 3, 1997. In March 1999, when SEC took over the Bartlett contract at the DOE's Portsmouth site, Gossett was hired by SEC. Gossett stated in her complaint that in her capacity as an RCT, she disclosed numerous safety and health concerns to her SEC supervisors and managers, to Bechtel Jacobs personnel, to DOE officials and to a member of Congress. These disclosures took place from the time she began working as an RCT until December 2000. The health and safety concerns she raised included, among others, bulging and leaking 55-gallon drums at the Portsmouth site and several contamination issues. Gossett was terminated in January 2001, and contended that the termination was a retaliation for the disclosures.

Gossett filed a Complaint under Part 708 with the DOE Oak Ridge Operations Office. After the completion of an investigation, pursuant to 10 C.F.R. § 708.22, Gossett requested and received a hearing on this matter before an OHA Hearing Officer. The hearing lasted three 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

The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. They are as follows:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure. . . and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee 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 action without the employee's disclosure. . . .

10 C.F.R. § 708.29.

The IAD determined that Gossett had clearly made protected disclosures, because the information she revealed related to substantial health and safety concerns at the Portsmouth site. The IAD further found that Gossett's termination was an adverse personnel action. Further, because that termination took place within about one month of her last protected disclosure, the IAD determined that Gossett had established by a preponderance of the evidence that the disclosure was a contributing factor to the termination. The Hearing Officer also noted that SEC officials who decided to terminate her had actual knowledge of her disclosures.

The IAD next considered whether the SEC had clearly and convincingly demonstrated that it would have terminated Gossett in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). The IAD cited SEC's reason for terminating Gossett: after three successive attempts, she failed to achieve a passing grade on an examination to requalify her for her RCT position. In this regard, the IAD rejected SEC's assertion that it had demonstrated that at the time it terminated Gossett it had a policy under which an RCT was only allowed three attempts at passing a requalification exam (the three strikes rule). In making the determination that SEC had failed to establish such a policy, the IAD noted that there was no evidence that the three strikes rule had ever been applied to any SEC employee before, and there was testimony that Gossett was the only SEC employee ever fired under the rule.

Accordingly, the IAD found that SEC should provide relief to Gossett for the termination. On August 23, 2002, after further briefing, the Hearing Officer issued a Decision setting forth the specific nature of that relief. *Susan Rice Gossett*, 28 DOE ¶ 87,028, Case No. VBH-0062 (2002)(*Gossett*).

II. The SEC Statement of Issues and Gossett Response

SEC filed a statement identifying the issues that it 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 does not challenge the finding that Gossett made disclosures that are protected under Part 708. Instead, the Statement raises the following three arguments to support its position that Gossett is not entitled to relief: (i) the OHA's interpretation of 10 C.F.R. § 708.29, regarding shifting of the burden of proof to the contractor, violates § 7(C) of the Administrative Procedure Act, 5 U.S.C. § 556(d); (ii) the IAD is not supported by substantial evidence; and (iii) the IAD violated due process in deciding an issue without first providing adequate notice to SEC. 2/ Gossett filed a response to the Statement of Issues, expressing support for the IAD.

II. Analysis

As I stated above, SEC has not convinced me that there is any reason to disturb the IAD in this case.

A. Whether OHA's Interpretation of 10 C.F.R. § 708.29 Violates §7(C)of the Administrative Procedure Act

SEC argues that OHA's interpretation and application of the burdens of proof as set forth in 10 C.F.R. § 708.29 are impermissible.

2/ In its list of "Questions Presented," the Statement referred to two other issues concerning the relief provided in the *Gossett* determination. It argues that the Hearing Officer erred in requiring SEC to reinstate Gossett without requiring her to initially demonstrate that she is qualified for the position involved. It further states that the Hearing Officer erred in establishing the hourly rate of complainant's counsel in connection with the relief phase of this proceeding. Since SEC provided no additional discussion on the second point, I will not give it any further consideration here. The reinstatement issue was considered in a letter of October 30, 2002. SEC did not file any appeal of the determinations reached in that letter, although it was provided with an opportunity to do so. Its arguments, had any been submitted, would have been considered in the instant determination. Accordingly, I consider that matter resolved.

Specifically, the Company refers to OHA's consistent interpretation of that Section to mean that a Part 708 complainant has met his burdens of proof under that section if he has shown (i) he made a protected disclosure, and (ii) that it was in temporal proximity to an adverse personnel action by the employer. We have held that under our Part 708 regulations, once this showing has been made by the complainant, the burden under Section 708.29 shifts to the employer to show that it would have terminated the employee even in the absence of the protected disclosure. SEC claims that under 5 U.S.C. § 556(d) (the Administrative Procedure Act or APA) and judicial interpretations of that Section, the burden of persuasion must be placed on the proponent of an order. SEC contends that under Section 708.29, OHA prematurely shifts the burden of persuasion to the contractor, merely on the basis of temporal proximity between a protected disclosure an adverse personnel action. SEC argues that this is improper, based on judicial interpretations of burdens of proof required under Section 556(d) of the APA.

The applicability of the APA to proceedings under Part 708 is an issue that can be disposed of quickly. As we found in *Janet K. Benson*, 28 DOE ¶ 87,027, Case No. VBA-0082 (2002)(*Benson*), there is no basis for concluding that the APA applies to proceedings under Part 708. The APA states with respect to adjudications that its provisions apply in cases where adjudication is "*required by statute* to be determined on the record after opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a)(emphasis added). Consequently, this provision only applies if another statute requires the adjudication proceeding. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)(*Wong*). In *Wong*, the Supreme Court stated that "the limitation to hearings 'required by statute' in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion." *Id.* at 50.

There is no statutory authority requiring that hearings be held under Part 708. The rule was issued pursuant to the broad authority granted the Agency by the Atomic Energy Act of 1954 and the Department of Energy Organization Act to prescribe such rules and regulations as necessary or appropriate to protect health, life and property. 57 Fed. Reg. 7533 (March 3, 1992). Neither of these Acts requires that the DOE hold hearings regarding the protection of contractor employees from reprisals by their employers for whistleblowing. Since Part 708 hearings are conducted based solely

on authority vested by regulation, they fall squarely within the exception noted in *Wong*. *Benson,* slip op. at 14-15. Accordingly, OHA is not required to adhere to judicial interpretations of the burdens of proof under the APA in cases involving its own Part 708 regulations.

To the contrary, under well-settled case law, an Agency's interpretations of its own regulations are entitled to deference. *See e.g.*, *U.S. v. Mead Corp.*, 533 U.S. 218 (2001); *Auer v. Robbins*, 519 U.S. 452 (1997). Our interpretation and application of the burdens of proof under Section 708.29 are by now well-settled case law, and I see no reason to depart from our precedents. *E.g.*, *Janet Westbrook*, 28 DOE ¶ 87,021, Case No. VBA-0089 (2002); *Barbara Nabb*, 27 DOE ¶ 87,519, Case No. VWA-0031 (1999). The manner in which we have applied Section 708.29 to shift the burden of proof in Part 708 cases serves to promote the DOE's overall goal in its Contractor Employee Protection Program: "ongoing commitment to whistleblower protection." 64 Fed. Reg. 12865 (March 15, 1999). The OHA's application of Section 708.29 is not only reasonable, but fits squarely within the overall purpose of Part 708.

Nevertheless, I am willing to consider whether the Hearing Officer in this case may have improperly applied the shifting burdens of proof as set out in Section 708.29. Accordingly, I have undertaken a review of that aspect of the record. I see nothing improper whatsoever. The Hearing Officer noted numerous Gossett protected disclosures during the period July 2000 through November 2000. Gossett was terminated in January 2001. The temporal proximity is obvious.

The Hearing Officer also noted numerous instances of hostility of SEC management to Gossett, which he determined were associated with her whistleblowing activities. IAD at 89,127-28. He found this pattern of hostility to provide further support for the conclusion that the protected disclosure was a contributing factor to the retaliation.

Once the temporal proximity showing has been made, the finding of the pattern of hostility is not necessary to the overall conclusion that the complainant has made the contributing factor showing. The conclusions in the IAD regarding the pattern of hostility are dictum in this case. *See Benson*, *slip op. at 16, n.6.* The same is true of the Hearing Officer's finding that the terminating officials had knowledge of her disclosures. The temporal proximity of the termination and Gossett's protected activities is ample

evidence to sustain Gossett's burden of proof of contributing factor under Section 708.29.

B. Whether the IAD Is Supported By Substantial Evidence

SEC argues that with respect to retaliation, the employer's motive is a key issue. The firm contends that there is no substantial evidence to support a finding of retaliatory motive or "improper animus" by SEC decision makers. The Statement then describes in detail the actions that the Hearing Officer referred to as "hostile" in his discussion of the contributing factor issue. The Statement proceeds to give alternate explanations for each of those actions in order to establish that they were not in fact motivated by SEC hostility towards Gossett.

SEC's protracted exploration of the motives of its managers is simply irrelevant. The Complainant is not required under Part 708 to establish that a retaliatory motive existed. Moreover, the employer is not necessarily relieved of liability under Part 708 even if it provides evidence that it bore no animus towards a Part 708 complainant. *Jagdish Laul*, 28 DOE ¶ 87,006, Case No. VBH-0010 (2000). *See also*, *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

In assessing whether a disclosure was a contributing factor to an adverse personnel action, we do not need to probe an employer's state of mind, or consider whether a particular action was motivated by hostility. It is true that the term retaliation, as it is most commonly used in everyday speech, may have some extremely negative connotations, including revenge and hostility. However, under Part 708, the term is more neutral, and does not involve the subjective mind-set of the person taking the adverse personnel action. Under Part 708, retaliation is an objective concept. It means "an action. . . taken by a contractor against an employee with respect to employment(e.g., discharge, demotion or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information. . . ." 10 C.F.R. § 708.2. Thus, hostile motivation by the employer is not an element that is necessarily involved under Part 708.

If a complainant were able to show animus, that evidence could be relevant in establishing whether the protected disclosure was a contributing factor to the adverse personnel action, and in considering whether the employer would have taken the retaliatory action in the absence of the protected disclosure. However, the

obverse of that proposition is not true. The absence of hostility does not relieve an employer of liability under Part 708 for its actions. Thus, even if SEC had shown that its managers did not act with hostility towards Gossett, it would not mean that Gossett had failed to meet her burden of proof under Section 708.29.

The Statement also reargues the IAD's determination that SEC failed to show that it had a three strikes rule. It claims that there is no substantial evidence to support the IAD's finding. In this regard, the Statement admits that the three strikes policy was unwritten, but states that the relevant question is rather whether the policy "has been consistently applied." The Statement argues that it has made a showing that the policy has been consistently applied, because no RCT has ever been permitted to take the examination more than three times. The Statement also refers to the assertion in the IAD that SEC did not warn three other RCTs who had twice failed the requalification examination that they would be terminated upon a third failure. The Statement then explains why warnings were not warranted for those other RCTs, and why, in its view, the other RCTs were not given better treatment than Gossett.

I agree with SEC's assertion that it is not required to show that the three strikes rule was memorialized in writing. I also agree with its contention that it is permitted to rely on the testimony of its employees that the three strikes rule was an oral policy that was consistently applied. Nevertheless, the firm's explanations do not demonstrate any error that would cause me to reverse the IAD. SEC has still not established that it had a three strikes policy that was consistently applied.

To support its position, SEC exhaustively reargues the significance of the hearing testimony of a number of its key managers in an attempt to establish that their statements support the contention that the rule was clearly in effect at the time that Gossett was terminated. After reviewing the record, I find that SEC's evidence on this point falls short of the mark, and that the Hearing Officer's determination was correct. In my view, the absence of a written SEC policy on such a serious matter tends to detract somewhat from the overall credibility of SEC's position that the three strikes rule was ever squarely and firmly in effect. However, I believe that the firm could establish through solid testimony that it consistently applied the three strikes policy. Nonetheless, SEC's protestations to the contrary notwithstanding, the hearing testimony was far from clear on whether SEC had an unwritten three strikes policy. For example, Brad Andrie, an SEC manager, testified that the three strikes policy was well-known

among RCTs. Transcript of October 25, 2001 Hearing at 104. However, the company did not bring forth RCTs to support that assertion. Andrie's pronouncement, with nothing more, is hardly convincing evidence on this point, inasmuch as there was contradictory evidence in the record. The very fact that senior site manager Joe Shuman and SEC RCT training coordinator Billie Childers purportedly needed to make several phone calls to determine if such a policy existed or was ever applied, contradicts Andrie's position. *Id.* at 103. It is hard to believe that a company policy regarding RCT requalification examinations would be well-known by RCTs, but not well-known by senior company officials, particularly the RCT training coordinator.

SEC claims that it has demonstrated that the policy was consistently applied because it has established that no RCT has ever been permitted to take the examination more than three times. I am unimpressed by this reasoning. First, SEC has not even shown that this assertion is true. Secondly, even if SEC had established that no RCT had ever taken the test four times, there are a number of other possible explanations unrelated to a three strikes policy. For example, the RCTs that failed three times may have simply opted to find other work. 3/ In any event, SEC's necessary showing here about the three strikes policy is not that no RCT ever took the examination more than three times, but rather that RCTs were consistently denied an opportunity to take the examination a fourth time. The company has not brought forward such evidence.

I believe that SEC should, at a minimum, have produced unambiguous testimony that the three strikes policy was in effect. In the absence of a written policy to this effect, one possible way to do this might have been to provide direct testimony from RCTs that the policy was well-known to them. SEC should also have shown that employees were precluded from taking the examination more than three times. I recognize that it is the firm's position that no other RCT ever needed to take the examination more than three times, and that Gossett was the first person to actually have been terminated under the rule. However, under Part 708, the contractor's obligation here is clear. It must show that the three strikes policy was in effect. This, it has not done. In view of the high level of proof required in Part 708 cases, if that policy had never been applied in the past, SEC may simply be unable to provide clear and convincing evidence that the policy would have

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3/ This is apparently what happened in the case of Lou Ann Riggs, who found a position with another company.

been applied to Gossett. *See*, *Bernard F. Cowan*, 28 DOE ¶ 87,023 at 89,179, Case No. VBH-0061 (2002)(single instance of a three-day suspension does not indicate the contractor's normal practice was to impose three-day suspensions on employees who improperly used company information system).

Given the overall weak record by SEC on this issue, I find that the firm has fallen well short of showing clearly and convincingly that it had a three strikes policy, and that it would have terminated Gossett under that policy in the absence of the protected disclosures.

C. Whether the IAD Violated Due Process By Deciding a Claim Without Providing Adequate Notice to SEC

SEC points out that prior to being discharged, Gossett filed a Complaint with the DOE field office employee concerns manager claiming that she had been frequently reassigned. SEC contends that during the hearing, the Hearing Officer asked no questions about the reassignments and that Gossett's post hearing brief did not refer to this issue. Yet, as SEC points out, the Hearing Officer did note in the IAD that the "pattern of repeated reassignments constitutes an adverse personnel action, since it served to intimidate and harass Gossett as well as undermine her authority and stature as an RCT." IAD at 89,129. SEC complains that it had no notice that the reassignment of Gossett was an issue in this case and that it was therefore unfairly deprived of the opportunity to provide evidence on this point.

This objection is frivolous. As an initial matter, SEC was well aware that Gossett had been reassigned, since it was the entity that reassigned her. The reassignments were part of the record in this case, as evidenced by the fact that the Hearing Officer referred to them in the Appendix to the IAD. SEC did not dispute the fact that Gossett was reassigned. 4/ It now simply objects to the Hearing Officer's conclusion that the reassignments were adverse personnel actions.

4/ SEC claims that the Hearing Officer never analyzed whether some of the reassignments took place prior to a protected disclosure. SEC does not point to any particular reassignment that may have taken place before any of her disclosures. I will therefore not give an further consideration to that possibility, which, in any event, is irrelevant.

The Gossett reassignments are obviously personnel actions. It is surely not unreasonable for an employee to object to recurrent reassignments. In the context in which they occurred, the reassignments in this case should therefore be considered as adverse personnel actions under Part 708. SEC has not even alluded to any reason to consider them otherwise.

In any event, there was another clearly adverse personnel action in this case, one which is undisputed: the termination. Thus, there would be no change in the outcome here even if the Hearing Officer had not made reference to the reassignments. In this regard, the Hearing Officer did not direct SEC to take any special remedial actions as a result of the reassignments. The firm has not even suggested any harm that it experienced as a result of the Hearing Officer's reference to the reassignments.

Finally, I see nothing to preclude a Hearing Officer in a Part 708 proceeding from weighing and balancing any relevant material in the record in connection with reaching his determination. No special notice to a party is required. SEC's suggestion to the contrary is mere cavil. I therefore find that SEC's claim of error due to the Hearing Officer's purportedly "surprise" reference to the reassignments is a hollow one.

IV. Conclusion

As discussed above, I see nothing in SEC's Statement of Issues that would cause me to overturn the IAD in this case.

It Is Therefore Ordered That:

(1) The Appeal filed by Safety and Ecology Corporation on September 13, 2002, is hereby denied.

(2) This Appeal 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. §708.35.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 8, 2003