Case No. VBH-0007

September 27, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Salvatore Gionfriddo

Date of Filing: June 23, 1999

Case Number: VBH-0007

On December 28, 1998, Salvatore Gionfriddo (Complainant) filed a Complaint of Reprisal with the Director of the Federal Energy Technology Center of the Department of Energy (DOE) pursuant to 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. The Complainant alleged that he made a protected disclosure under Part 708 and his employer, Energy Research Corporation (ERC) retaliated against him by terminating his employment. (1)

On July 19, 1999, ERC filed a Motion to Dismiss the complaint. The firm claims that its agreement with the DOE is not covered by Part 708 and that it is not obligated to participate in proceedings

under this Part. The Complainant filed a Memorandum in Opposition to the Motion on August 3. Thereafter, I requested that ERC submit a complete copy of its agreement with the DOE, and the firm filed this document on August 5. ERC also provided a copy of the agreement to the Complainant. I then permitted the parties to submit another round of briefs and responses discussing all the matters related to the jurisdictional issue. These filings were made on September 7 and 14. I have reviewed all the submissions on this matter and other relevant material and have concluded that the Motion to Dismiss should be granted. Accordingly, no further action is warranted with respect to the instant Complaint of Reprisal.

The relevant facts in this case are as follows. ERC engages in the research and development of advanced carbonate fuel cells and batteries used to generate and store electric power. Fuel cells convert fuels, such as natural gas, to electricity through an electrochemical reaction. ERC August 2, 1999 Brief at 2. According to the firm, this technology was developed by ERC through funding by many sources, including a series of research and development contracts, grants and cooperative agreements that ERC entered into with federal and state agencies including the DOE, contracts with public utilities, associations and commercial organizations and internally sponsored independent research and development efforts. ERC August 2, 1999 Brief at 1.

The Complainant was employed by ERC in the fuel cell area beginning in March 1982. In September 1998, he was given an assignment to compare a short fuel cell stack with a tall fuel cell stack, and in his report concluded that "unless the trend of cell shrinkage changes drastically, the loss of compressive load for tall stacks is highly probable." June 23, 1999 Report of Investigation at 4. On October 23, 1998, ERC terminated the Complainant's employment. It is the Complainant's position that his report was a protected disclosure because the individual cell shrinkage problem, if not corrected, poses the hazards of fire and explosion, which would qualify as significant safety risks under Section 708.5(a).

In its Motion to Dismiss, ERC states that its relationship with the DOE was in the form of a "Cooperative Agreement." The firm claims that it is not covered by the DOE's Contractor Employee Protection Regulations because it is not a DOE contractor. As discussed below, I find that ERC is correct.

Part 708 provides that for jurisdiction to adhere, the underlying procurement contract must include a specific reference either to Part 708 or to the requirements of DOE. The original version of Part 708 provided that this "part is applicable in complaints of reprisal filed after the effective date of this part that stem from disclosures, . . . involving health and safety matters if the underlying procurement contract described in § 708.4 contains a clause requirement compliance with all applicable safety and health regulations and requirements of DOE (48 C.F.R. 970.5204-2)." 10 C.F.R. §708.2(a)(emphasis added). The preamble to the current Interim Final Rule states that "this provision [10 C.F.R. §708.2(a)] is no longer necessary since DOE contracts now require compliance with Part 708 when specifically applicable." 64 Fed. Reg. 12862 at 12863 (March 15, 1999).

The ERC cooperative agreement does not contain any language requiring the firm to comply with DOE requirements as set forth at 48 C.F.R. 970.5204-2 or Part 708. This fact supports the firm's position that it is not required to participate in the Contractor Employee Protection Program.

However, the Complainant points to the following language in the agreement to support its position that ERC is bound by Part 708:

The Participant shall have in place, within 60 days of execution of the cooperative agreement, a safety and health program for the DOE work being performed consistent and in accordance with applicable Federal, State and local laws, including codes ordinances and regulations.

The Participant shall take all necessary precautions in the performance of the work under this cooperative agreement to protect the safety and health of employees and the public and shall comply with all legally required safety and health regulations and requirements.

Cooperative Agreement, Part II, 8A and B.

The Complainant maintains that these two paragraphs are sufficient to bring ERC within the coverage of Part 708. It points to 10 C.F.R. § 708.2 (prior regulations), which, as cited above, provides that the Contractor Employee Protection Program is applicable to complaints of reprisal where the underlying contract "contains a clause requiring compliance with all applicable safety and health regulations and requirements of DOE," or if the underlying contract "contains a clause requiring compliance with this part." The Complainant contends that the two paragraphs of the cooperative agreement cited above requiring ERC to comply with "all legally required safety and health regulations" require the firm to comply with Part 708.

I do not agree. Section 708.2 plainly provides that the underlying procurement contract must contain a clause requiring compliance with requirements of DOE. The cooperative agreement in the instant case contains no such language. It requires compliance with generally applicable health and safety rules. This language is not sufficient to put ERC on notice that it must comply with any particular or unusual requirements that DOE may have adopted in the area of contractor employee protection. It merely provides that ERC must comply with all applicable health and safety regulations. This general language refers to obligations to provide a safe and healthy working environment, as required by applicable laws and regulations. Any employer would be required to do as much. It does not mean that ERC is bound to provide other unspecified benefits, such as the protections afforded by the DOE Contractor Employee Protection Program.

In this regard, DOE contracts with firms that must comply with Part 708 are quite clear on this point, and thereby significantly different from the ERC/DOE cooperative agreement. For example, under the prior regulations, those in effect in 1994 when the ERC agreement was signed, a contract included language such as the following:

WHISTLEBLOWER PROTECTION FOR CONTRACTOR EMPLOYEES (DEC 1992) (DEAR 952.222-70)

(a) The Contractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 C.F.R. Part 708, with respect to work performed on-site at a DOE-owned or leased facility, as provided in Part 708. (2)

There could be no doubt on the part of a firm that signed a contract containing this type of provision that it was to comply with Part 708. This language is entirely different from the broad, general language of the ERC agreement, requiring it to obey applicable health and safety laws and regulations.

In sum, the fact that the agreement between the DOE and ERC did not contain the necessary regulatory language requiring compliance with Part 708, while not necessarily conclusive, is in my view a strong indication that the firm is not bound by the requirements of that Part.

There is other evidence supporting this determination. After reviewing the cooperative agreement, I have concluded that the omission of the regulatory language was not inadvertent. As discussed below, the absence of the key language specifically mentioning Part 708 is consistent with the very nature of the instant agreement between ERC and the DOE.

Part 708 is also referred to as the "DOE's Contractor Employee Protection Program." As this title suggests, the regulations generally apply to contractors and their employees. 10 C.F.R. §§ 708.2 and .3. (3) In the present case, the cooperative agreement between the DOE and ERC does not seem to qualify as a contract for purposes of Part 708. There is persuasive evidence to the effect that contracts and cooperative agreements are distinct and different devices, and that these differences are not just technicalities. See 31 U.S.C. §§ 6303, 6305. The Federal Acquisition Regulations specifically state that "Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301 et seq." 48 C.F.R. 2.101 (definition of contract). Those sections of Title 31 are also known as the Federal Grant and Cooperative Agreement Act.

The document memorializing the agreement between ERC and the DOE specifically cites the Federal Grant and Cooperative Agreement Act as the authority for the agreement. The instrument is not entitled or referred to as a "contract" between the DOE and ERC. The heading of the agreement refers to a "Notice of Financial Assistance Award." In the DOE/ERC agreement itself, there are no references to the arrangement between the DOE and ERC as being anything other than a "Cooperative Agreement." The arrangement is not referred to as a contract between DOE and ERC. Moreover, the ERC Cooperative Agreement consistently refers to ERC as "the Participant," or a "recipient," but never as "the Contractor." In contrast, the Part 708 regulations consistently refer to the firm involved as a contractor.

Thus, the characteristics of the DOE/ERC agreement itself indicate that the arrangement is not the type that should fall within the scope of regulations intended to apply to DOE contractors. This is consistent with the fact that, as discussed above, the cooperative agreement contained no requirement that ERC participate in Part 708. It lends support to my determination that the absence of a reference to Part 708 in the agreement was by design, and that ultimately ERC is not bound by that Part.

The Complainant raises several additional arguments in support of its position that ERC does fall within Part 708. They are not persuasive and can be dealt with summarily.

The Complainant maintains that the facts surrounding the relationship between the DOE and ERC show considerable involvement between the two entities. (4) For example, the Complainant points out that under the terms of the agreement, the DOE will monitor all aspects of the project and review technical reports and information required to be delivered by the Participant to the DOE. The agreement also allows the DOE to make visits to the ERC's site, as necessary. It further provides that ERC will present briefings to the DOE at the DOE's site in Morgantown, West Virginia or at other designated locations. Cooperative

Agreement, Part II, 2(a); Part IV, Attachment A, page 10. The Complainant contends that this level of involvement brings ERC within the coverage of Section 708.3, which provides:

This Part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE directly related to activities at a DOE owned or -leased site.

The Complainant contends that the fact that ERC must deliver reports to the DOE at a DOE site establishes that its work is directly related to activities at DOE at a DOE site. The Complainant cites META, Inc., 26 DOE ¶ 87,501 (1996)(META) as support for this position.

The Complainant seeks to draw significance for Part 708 purposes from matters which are unrelated to the jurisdictional issue. I do not believe that the considerations at issue in META are applicable to the instant case, since META was clearly a subcontractor, and thus had a relationship with the DOE that was of the type that normally falls within the scope of Part 708.(5) Once a firm has agreed to be bound by Part 708, it is certainly appropriate to examine whether the work performed is of the type that will otherwise require it to comply with that Part.

In the instant case, there is no need to consider in detail the nature of any work performed by ERC at a DOE site. Since there is no agreement referring to Part 708, the nature of ERC's contacts with the DOE is irrelevant for purposes of that Part. (6)

The Complainant also asserts that ERC has admitted that part of its funding is based on "a series of research and development contracts, grants and cooperative agreements with the Department of Energy as well as other government and commercial contracts." Complainant's September 7, 1999 Submission at 4. The Complainant therefore contends that since part of ERC's "funding is based on contracts, it clearly falls within the definition of contractor in Part 708." Id. At the very least, the Complainant contends that it is entitled to an evidentiary hearing to ascertain whether ERC has entered into any contract with the DOE in which it has agreed to be bound by Part 708.

This argument, too, is unavailing. The Complainant's protected disclosure related solely to fuel cell matters covered by the cooperative agreement. Any arrangements that ERC may have entered into which do not involve fuel cells are irrelevant in this case. I further see no reason to believe that ERC has entered into other agreements to perform work involving fuel cells that do refer to Part 708.

Accordingly, for the reasons set forth above, I find that ERC's Motion to Dismiss should be granted.

It Is Therefore Ordered That:

(1) The Complaint of Reprisal filed by Salvatore Gionfriddo on June 23, 1999, be and hereby is dismissed.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of its receipt, a Notice of Appeal is filed with the OHA requesting review of the Initial Agency Decision by the Director of the Office of Hearings and Appeals.

Virginia A. Lipton

Hearing Officer

Office of Hearings and Appeals

Date: September 27, 1999

(1)On March 15, 1999, the DOE published as an Interim Final Rule a revised regulation governing the Contractor Employee Protection Program. 64 Fed. Reg. 12862 (March 15, 1999). It became effective on April 14, 1999. Section 708.8 of the new procedures states that they "apply prospectively in any complaint

proceeding pending on the effective date of this part." The Complainant argues that the Interim Final Rule is applicable in this case. Unless otherwise indicated, in this Initial Agency Decision I will refer to the Interim Final Rule. Part 708 was originally published at 57 Fed. Reg. 7533 (March 3, 1992). This version was in effect in 1994, when ERC entered into the relevant agreement with the DOE. I find considerable merit in ERC's position that it is unfair at this point to apply the new rule in a manner that would work to the detriment of the firm. However, I believe that the Motion to Dismiss is meritorious under either version of the Rule.

(2)See OHA Case No. VWA-0040, Investigatory Report, Exh. 2.

(3)Section 708.3 provides in relevant part:

This part applies to a complaint of retaliation filed by an employee of a contractor that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site, if the complaint stems from a disclosure, participation or refusal described in § 708.5.

Section 708.2 defines "Contractor" as "a seller of goods or services who is a party to:

(1) A management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE-owned or -leased facilities ....

(4)In its September 14 Memorandum, the firm argues that there is no evidence concerning what took place during ERC's visits to DOE and implies that evidence should be taken on this point.

(5)META never argued that its contract did not include language requiring it to comply with Part 708.

(6)Further, under the Federal Grant and Cooperative Agreement Act, substantial involvement is contemplated between the Agency and the entity carrying out the activity set forth in the cooperative agreement. 31 U.S.C. § 6305(2). Thus, the ties between the DOE and ERC, as discussed in the text above, are fully consistent with that Section of the Act, and lend support to the position that the arrangement was a cooperative agreement.