Case No. VBH-0014

December 29, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Roy Leonard Moxley

Date of Filing:November 7, 1996

Case Number: VBH-0014

This Initial Agency Decision concerns a whistleblower complaint filed by Roy Leonard Moxley against his employer, Westinghouse Savannah River Company (WSRC), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. At all times relevant to this proceeding, WSRC was the management and operating contractor at the DOE's Savannah River Site in Aiken, South Carolina. Mr. Moxley alleges that during a period of at least two years, he made several disclosures to WSRC that its personnel practices were in violation of the Fair Labor Standards Act (FLSA). According to Mr. Moxley, WSRC demoted him in October 1996 as a consequence of his disclosure. As discussed below, I have determined that Mr. Moxley is entitled to relief because WSRC has not proven by clear and convincing evidence that it would have taken the same action against him had he not made those disclosures.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE'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, contractor-operated 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.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. (1) The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee in good faith believes reveals a violation of a law, rule, or regulation; or fraud, mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a)(1)(i), (iii), as published at 57 Fed. Reg. 7533, 7542. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an OHA investigator, an independent fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

On November 7, 1996, Mr. Moxley filed a Whistleblower Complaint against WSRC pursuant to 10 C.F.R. Part 708. On April 16, 1999, the Office of Inspections of the DOE's Office of Inspector General transferred a number of pending complaints, including this one, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine the issues raised in Mr. Moxley's Part 708 Complaint. The investigator promptly conducted an investigation, and issued a Report of Investigation on June 10, 1999. On that same day, the OHA Director appointed me the hearing officer in this case.

On September 29, 1999, I convened a hearing on Mr. Moxley's Part 708 complaint in Aiken, South Carolina. I received the hearing transcript on October 18, 1999 at which time I closed the record in the case.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "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." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the case at hand, WSRC stipulated at both the investigatory and hearing stages of this proceeding that (1) Mr. Moxley had made protected disclosures as defined in 10 C.F.R. § 708.5, and (2) he had established a prima facie case of retaliation, because his protected disclosures could, by inference, be considered a contributing factor in WSRC's decision to reclassify Mr. Moxley to a lower salary grade level due to the temporal proximity between the protected disclosures and his reclassification. In view of WSRC's stipulations, Mr. Moxley is deemed to have met his regulatory burden in this case, thereby shifting the burden to WSRC.

B. The Contractor's Burden

The regulations require WSRC to prove by "clear and convincing" evidence that the company would have reclassified Mr. Moxley to a lower salary grade level even if he had not disclosed his allegations of violations of the FLSA. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3.

III. Analysis

A. Factual Overview

WSRC has employed Mr. Moxley at the DOE's Savannah River Site since 1988. Starting no later than August 1994 and continuing through at least the last months of 1996, Mr. Moxley made a series of disclosures to Westinghouse personnel, including his supervisors and the president of the company, concerning what he perceived to be violations of the FLSA. The gist of these allegations is that lower-paid employees, who were subject to various provisions of the FLSA, such as the right to overtime for

hours worked in excess of the standard work week, were performing the same tasks and had the same duties and responsibilities as higher-paid employees, who were in some cases also exempt from the protections of the FLSA. In his initial Complaint, Mr. Moxley listed a number of actions that he alleged WSRC had taken in retaliation for his disclosures, including his October 1996 demotion from Salary Grade Level (SGL) 31 to SGL 30. Later, at Mr. Moxley's request, the parties agreed to narrow the scope of the proceeding to this single incident of alleged retaliation. See Memorandum of Telephone Conversation between Mr. Moxley, Michael Wamsted (Attorney for WSRC), and the Hearing Officer, August 9, 1999.

WSRC considers the personnel action by which Mr. Moxley's salary grade level was changed from SGL 31 to SGL 30 a reclassification rather than a demotion. This action occurred after WSRC had completed its Professional Job Review, a lengthy personnel procedure during which approximately 5,000 professional employees' positions were reviewed and in many cases replaced with new job descriptions and salary ranges. Transcript of Hearing (Tr.) at 29-31. One result of the Professional Job Review was the modification of the "job ladder" within which Mr. Moxley was employed, that is, the group of positions through which he could be promoted. Before the Professional Job Review, SGL 31 was one of the possible salary levels at which an employee on Mr. Moxley's job ladder might have been paid. After the Professional Job Review, his job ladder was renamed "Process Computing" and the rungs on that ladder were assigned SGLs of 28, 30, 32, and 34, each of which bore a distinct job title. Exh. 72. Consequently, Mr. Moxley could no longer remain at SGL 31; he needed to be reassigned to one of the available SGLs for his job ladder. On October 1, 1996, he was reassigned to SGL 30. This reassignment, whether termed a demotion or a reclassification, is the sole incident of alleged retaliation that we considered at the hearing. Four months later, on February 1, 1997, Mr. Moxley was promoted to SGL 32.

B. Motion to Dismiss

At the start of the hearing, WSRC's attorney moved to dismiss the proceeding. He argued that a recent OHA Hearing Officer's decision dictated that I grant his motion. I denied his motion at that time, and when he renewed the motion after he had completed the presentation of WSRC's witnessed, and again at the end of the hearing. I explained to the parties that I would consider this motion when I weighed the case in its entirety.

It is well settled that a motion to dismiss in a Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. Lockheed Martin Energy Systems, Inc., 27 DOE ¶ 87,510 (1999) (Lockheed); EG&G Rocky Flats, 26 DOE ¶ 82,502 (1997). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. Boeing Petroleum Services, 24 DOE ¶ 87,501 at 89,005 (1994). WSRC has not met the Lockheed standard. Moreover, the circumstances under which I may dismiss a complaint are specifically set forth at 10 C.F.R. § 708.17(c). I have reviewed each of the six enumerated bases for dismissal and it is clear that none of them applies to the present case.

WSRC argued that dismissal was appropriate because Mr. Moxley suffered no negative action as a result of his conceded disclosures. WSRC based this assertion on the fact that Mr. Moxley's compensation was never reduced, and relied on the OHA Hearing Officer's decision in Theresa G. Joyner, 27 DOE ¶ 87,526 (1999). In that decision, the Hearing Officer found that an employee's removal from a special team did not meet the regulatory definition of "retaliation" under Part 708, because it was not "an employment-related ?negative action' with respect to the employee's ?compensation, terms, conditions, or privileges of employment.' [Citation omitted.] The employee's removal from the team did not affect her pay and benefits, and there is no evidence that the employee viewed the removal as a negative action." Id. at 89,142.

I will again deny WSRC's motion to dismiss this proceeding. Unlike the circumstances in the Joyner case, the form of retaliation about which Mr. Moxley has complained is a reclassification of his position to a lower SGL. Because his salary before the reclassification fell within the range of salaries permitted at his

new level, his salary was not affected by the reclassification. However, regardless of whether it is appropriate to consider the reclassification a demotion or not, the result of the reclassification was that Mr. Moxley was in a lower position in the salary grade scale after the reclassification (SGL 30) than before it (SGL 31). Therefore, the reclassification's effect on Mr. Moxley was a negative action with respect to a term of employment. In addition, and contrary to the facts in Joyner, the employee in the present case clearly viewed the reclassification as a negative action. Consequently, the ruling in Joyner is inapplicable in this proceeding. Therefore, I deny WSRC's motion to dismiss and will now consider the substance of Mr. Moxley's Part 708 complaint.

C. Testimonial and Documentary Evidence

The evidence presented related to the business environment at the time Mr. Moxley's salary grade level was reduced from SGL 31 to SGL 30 and the processing of his Part 708 complaint. The witnesses for WSRC were Jennifer Howell, a Principal Human Resources Representative in WSRC's Compensation Department, Stephen Kilpatrick, a manager in the organization in which Mr. Moxley worked at the time of the grade reduction, and Jeannette Brooks, an investigator in WSRC's Employee Concerns Program. Mr. Moxley presented the testimony of Julie Quattlebaum, a co- worker.

Ms. Howell's testimony focused on the Professional Job Review Program, a review of the roughly 5,000 professional positions at the Savannah River Site. The Compensation Department's task was to examine those positions for grade inequities between organizations. Tr. at 29, 46. As Ms. Howell explained, there was a concern that "people might have been doing the same work but being called different things and being in different titles and grades across organizations. And it was a business decision made to take a look at all . . . the professional positions, to make decisions about meeting legal requirements such as Fair Labor Standards Act, as well as making sure that our internal equity issues were being addressed." Tr. at 29-30. The Compensation Department had conducted similar reviews of WSRC's non-professional positions and management positions in previous years. Tr. at 28. As a result of the Professional Job Review, the grade levels of 329 employees were decreased throughout the site. Tr. at 31-32. Of the 98 jobs reviewed in the organization headed by Mr. Kilpatrick, in which Mr. Moxley worked at the time of the Professional Job Review, 22 had a grade reduction; the remainder either had grade increases or no change. Tr. at 34. As of October 1, 1996, the day on which the Professional Job Review results were made effective, the salary grade levels on the Process Computing job ladder, which contained Mr. Moxley's position, were 28, 30, 32, and 34. Prior to that date, Mr. Moxley and others had been "on an odd grade progression rather than an even grade progression. . . . [H]is grade at the time was a 31. So a decision had to be made by his management as to where to place him as far as the work that he was doing, what the business decision was to place him in . . . one of the four grades on that ladder." Tr. at 41-42. See also Tr. at 47-48 (although Compensation developed the job position descriptions, it is management that decides who is placed in which position). Because of the change in grade progressions, Mr. Moxley could not remain in SGL 31. Tr. at 63, 64. The personnel documents indicate that Mr. Kilpatrick was the manager who decided to place Mr. Moxley in an position assigned an SGL of 30. Tr. at 51.

Mr. Kilpatrick's testimony about the Professional Job Review Program confirmed that of Ms. Howell. His role in the process was to assign employees in his organization to the newly created job positions, and inform each employee of his new title, position and SGL. Tr. at 134. The process of describing existing jobs to the Compensation Department and then assigning employees to the new positions that Compensation developed took place during the spring and summer of 1996. Tr. at 158, 185. The numbers of positions for each title were established before those assignments were made, based on the type and amount of work for which each work group was responsible. Tr. at 136. Mr. Kilpatrick acknowledged full responsibility for assigning specific employees to specific job titles, but made the decisions with the input of other managers and team leaders. Tr. at 134-135. At the time he assigned Mr. Moxley to a job position with SGL 30, Mr. Kilpatrick was aware that Mr. Moxley has expressed concerns about possible violations of the Fair Labor Standards Act. Tr. at 141, 165.

Every year, according to the testimony, WSRC managers must forecast the number and type of job

positions in the last quarter of one year on the basis of their perceptions of business needs in the following year. Tr. at 167-168. Such projections include the number of employees who must be promoted to higher job titles in order to meet the organization's anticipated work responsibilities. Tr. at 160. Mr. Kilpatrick had forecast Mr. Moxley's promotion to SGL 32, in November or December 1996. Tr. at 144, 157. Regarding the factors that Mr. Kilpatrick weighed in proposing Mr. Moxley's promotion, he stated, "Your management recommendation was 1. Job availability in the organization was 2. Those were the principal things that would have influenced a person to recommend somebody for promotion on a salary forecast, but particularly recommendations from your direct manager, Mr. [James B.] Johnson." Tr. at 167-168. That promotion was scheduled to take effect in April 1997. Tr. at 156-157. However, the promotion was moved forward to February 1997 during an effort to resolve Mr. Moxley's Part 708 complaint, as discussed in the paragraph below. Tr. 159-160.

Ms. Brooks testified about her role in the investigation of the Part 708 complaint that Mr. Moxley filed with the DOE. According to her records, the DOE first asked for assistance from WSRC's Employee Concerns Program on January 14, 1997. Tr. at 128. After conducting an investigation into the complaint, she concluded that WSRC had not retaliated against Mr. Moxley. Tr. at 102. WSRC did, however, attempt to resolve Mr. Moxley's complaint through mediation. Tr. at 106. One term of the proposed settlement agreement drafted by WSRC's counsel included a promotion. Tr. at 109. Ms. Brooks was aware, however, that in a salary forecast for the next year, Mr. Moxley had already been reclassified to an SGL 32 position. Id. Mr. Moxley did not sign the settlement agreement. Exh. 71.

Finally, Ms. Quattlebaum testified that she and Moxley had substantially the same job during the relevant period, Tr. at 191, and that she had filed a complaint with WSRC's Employee Concerns Program regarding her reclassification as a result of the Professional Job Review. Tr. at 196. She reported that Employee Concerns personnel had investigated her being downgraded from SGL 31 to SGL 30, and found some "inconsistencies" in the handling of her reclassification. Tr. at 197. The Employee Concerns investigator told her that she would be getting a promotion to an SGL 32 position, id., which became effective in February 1997. Tr. at 195.

D. Evaluation of Evidence

Because WSRC has conceded that Mr. Moxley made disclosures protected under Part 708 and made a prima facie showing of retaliation, the sole issue before me is whether WSRC has shown, by clear and convincing evidence, that it would have taken the same action against Mr. Moxley-- his reclassification from SGL 31 to SGL 30-- if he had not made those protected disclosures. After considering all the evidence presented in this proceeding, I conclude that WSRC has not met that burden.

It is clear that WSRC conducted a Professional Job Review, which resulted in the reclassification of Mr. Moxley's position from SGL 31 to SGL 30. The decision to place Mr. Moxley in an SGL 30 position rather than, for example, an SGL 32 position rested with Mr. Kilpatrick. At the time of his decision, Mr. Kilpatrick had knowledge of Mr. Moxley's protected disclosures, which Mr. Moxley had made on a fairly continual basis. These facts are not in dispute. However, in order to prevail, WSRC must produce evidence that convinces me that Mr. Kilpatrick's decision would have been the same if Mr. Moxley had not made his disclosures. In discussing the testimony WSRC presented at the hearing, I will address in particular the evidence that I view as essential to the company's position.

Through Ms. Howell's and Mr. Kilpatrick's testimony, WSRC established that Mr. Moxley's reclassification occurred as the result of two related business functions: the Professional Job Review, by which Mr. Moxley's position and salary level was eliminated, and new positions were developed; and his manager's judgment call regarding into which new position to place Mr. Moxley. The Professional Job Review affected the job descriptions and salary scales of some 5,000 employees. In many cases, the employees had to be reassigned to new SGLs because their current SGLs were no longer available to them within their job ladders. Throughout the Savannah River Site, 329 employees, including Mr. Moxley, suffered a lowering of their SGLs as a result. The evidence convinces me that this site-wide personnel

action was undertaken for reasons entirely unrelated to Mr. Moxley's protected disclosures.

The evidence regarding the second, related personnel action-- the decision to assign him to an SGL 30 position-- is less complete, however. Mr. Kilpatrick testified about the numerous factors, including past performance, that he would generally consider in assigning an employee to a particular job position. Tr. at 147, 150. There is evidence in the record regarding Mr. Moxley's performance evaluations and those of his co-workers, which Mr. Kilpatrick stated was one factor he considered in general. See IG Ex. 5 (Krieger Statement) (listing performance ratings for 19 SGL 31 Computer Analysts for four years). My review of those performance ratings does not convince me that an employee with Mr. Moxley's ratings would fall clearly into either the group of employees that were reclassified to SGL 30 positions or the group reclassified to SGL 32 positions. Moreover, in a related context, Mr. Kilpatrick stated that management recommendations and job availability in the organization were primary factors to consider. Tr. at 167-168 (factors considered in promoting employees). Although WSRC has presented evidence regarding the factors Mr. Kilpatrick should have considered when he reclassified Mr. Moxley to an SGL 31 position, such as recommendations and job availability, it presented no evidence of the factors that Mr. Kilpatrick did in fact consider. The only evidence presented concerning this topic was Mr. Kilpatrick's testimony, which was admittedly general in nature, and demonstrated virtually no recollection of Mr. Moxley's particular situation. Tr. at 172, 176-178. Faced with the absence of testimony or documentary evidence about what affected Mr. Kilpatrick's decision to assign Mr. Moxley to an SGL 30 position rather than an SGL 32 position effective October 1, 1996, I am not convinced that Mr. Kilpatrick would have made the same decision if Mr. Moxley had not made his protected disclosures.

Most important, the testimony of Ms. Howell and Mr. Kilpatrick as well as documentary evidence demonstrate that some similarly situated employees who were not whistleblowers were reclassified to positions with lower SGLs in the same manner as Mr. Moxley, within his own work group and throughout the Savannah River Site. However, the evidence also demonstrates that similarly situated employees were also reclassified to positions with higher SGLs as well. If the evidence had established that all employees similarly situated to Mr. Moxley had been downgraded as he was, then I could have concluded that his downgrading would have occurred even if Mr. Kilpatrick had not been aware of the protected disclosures. However, that is not the evidence here. WSRC has presented no evidence to explain why Mr. Moxley in particular was part of the group that was downgraded rather than part of the group that was promoted. This lack of evidence arises, in my opinion, from Mr. Kilpatrick's inability either to recall specifics about Mr. Moxley's reclassification or to produce documentation that supports his decision. I am not surprised at Mr. Kilpatrick's failure to recollect, particularly given the relatively ministerial nature of the decision and the great number of similar decisions he was compelled to make within a fairly short period during 1996. Nevertheless, the burden rests upon WSRC to demonstrate that Mr. Kilpatrick would have taken the same action even if he had no knowledge of Mr. Moxley's disclosures. The lack of evidence on this point must be held against the party that bears this burden, in this case, WSRC. Without documentation or at least very strong oral testimony concerning the factors that drove Mr. Kilpatrick's decision, I am not convinced that he would have made the same decision absent Mr. Moxley's protected disclosures.

After considering all the evidence presented in this proceeding, and all the arguments raised by both parties, I cannot find that WSRC has established by clear and convincing evidence that Mr. Kilpatrick, and therefore WSRC, would have reached the same decision concerning Mr. Moxley's reclassification even if he had made no disclosures protected under Part 708. Accordingly, I will grant Mr. Moxley's request for relief under 10 C.F.R. Part 708.

IV. Remedy

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order reinstatement, transfer preference, back pay, reimbursement of reasonable costs and expenses, and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36. I recognize that a number of these forms of relief may not apply in this case.

For example, Mr. Moxley continues to work for WSRC, so reinstatement is not relevant. However, I will permit the parties to submit briefs on the issue of remedy before I determine the appropriate remedy in this case. I direct Mr. Moxley to submit a detailed statement setting forth the precise remedy he is seeking, including explanations of any mathematical calculations, within 15 days of his receipt of this Initial Agency Decision. WSRC will then have 15 days from its receipt of Mr. Moxley's statement to respond to his remedy request. The parties are free, of course, to seek mediation regarding the issue of remedy. If they choose this course of action, I will hold the remedial phase of this case in abeyance for 30 days pending mediation on the issue.

It Is Therefore Ordered That:

(1) The request for relief submitted by Roy Leonard Moxley under 10 C.F.R. Part 708, OHA Case No. VBH-0014, is hereby granted as set for in paragraph (2) below.

(2) Within 15 days of receipt of this Initial Agency Decision, Mr. Moxley shall submit to the Office of Hearings and Appeals and to Westinghouse Savannah River Company a detailed statement setting forth the precise remedy he is seeking. Westinghouse Savannah River Company shall, within 15 days from its receipt of Mr. Moxley's statement, submit a responsive document to the Office of Hearings and Appeals and to Mr. Moxley. Should the parties elect to seek mediation to resolve the remedial phase of this case, they shall notify me immediately and I will hold this proceeding in abeyance for a period of 30 days.

(3) This is an Initial Agency Decision, which becomes the final decision of the Department of Energy unless, within 15 days of the issuance of a Supplemental Order with regard to remedy in this case, a party files a notice of appeal with the Director of the Office of Hearings and Appeals, requesting review of the Initial Agency Decision.

William M. Schwartz

Hearing Officer

Office of Hearings and Appeals

Date: December 29, 1999

(1)On March 15, 1999, the DOE published an Interim Final Rule revising the regulations governing the Contractor Employee Protection Program. See 64 Fed. Reg. 12862 (March 15, 1999) (amending 10 C.F.R. Part 708, effective April 14, 1999). Section 708.8 of the revised regulations provides that the new procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." Therefore, under the revised Part 708 regulations, the DOE's Office of Hearings and Appeals (OHA) assumed investigatory jurisdiction over all pending and future complaints, including the one under consideration. Because there is a presumption against retroactivity where new rules affect substantive rights of parties, the version of 10 C.F.R. § 708.5 in effect at the time Mr. Moxley filed his complaint is applicable in this case. That version is described below.