

Case No. VBH-0035

September 22, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Theresa G. Joyner

Date of Filing: August 24, 1999

Case Number: VBH-0035

This Initial Agency Decision concerns a whistleblower complaint filed by Theresa G. Joyner, a former employee (hereinafter the employee) of NCI Information Systems, Inc. (NCI) (hereinafter the contractor). As explained below, the employee's request for relief is denied.

I. Background

The Department of Energy (DOE) Contractor Employee Protection Program governs this matter. The DOE recently revised the regulations governing this program. See 64 Fed. Reg. 12862 (March 15, 1999) (amending 10 C.F.R. pt. 708) (the whistleblower regulations). Under the regulations, the DOE's Office of Hearings and Appeals (OHA) conducts investigations, issues initial agency decisions, and hears appeals.

The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in certain protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial violation of a law, rule, or regulation. If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that 1) the employee made a protected disclosure and 2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by

clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If the employee prevails, the OHA may order employment-related relief such as reinstatement and backpay.

In this case, the contractor performed work for the DOE on site. The DOE funded the contract incrementally. Over the period 1995 to 1997, the DOE reduced the incremental funding, resulting in NCI layoffs in 1995, 1996, and 1997.

During the period 1995 to 1997, the employee worked in the contractor's abstracting and indexing (A&I) group, which abstracted and indexed various technical reports. In addition to the A&I work, the employee sometimes worked on other projects. As of May 1997, the employee was one of the three remaining employees in the A&I group.

In April 1997, the DOE decided not to provide any further funding under the contract for the A&I work, and the DOE notified the contractor. On May 1, 1997, the contractor sent a layoff notice, effective May

23, 1997, to the three employees. The notice cited the DOE's decision not to fund any further A&I work.

On May 12, 1997, the employee filed a Part 708 complaint, seeking relief against the DOE for its elimination of the A&I work. Specifically, the employee challenges the DOE's decision to perform A&I work in-house and through another contractor. The employee's complaint also seeks relief against the contractor for the layoff and for various matters that occurred prior to her layoff.

A DOE office investigated the complaint and issued a report. The report concluded that the complaint was not meritorious. The report addressed the two alleged retaliations for which the complaint was timely, (i) the cessation of the A&I work and the resultant layoff, and (ii) the employee's removal, two months earlier, from a committee preparing an energy quality award application. The report found that, even assuming that the employee had made a protected disclosure, the employee had not demonstrated that the protected disclosure was a contributing factor to the complained of actions. The report advised the employee and the contractor of their right to a hearing. Neither party requested a hearing. Accordingly, the OHA Director appointed me to review the investigatory report and issue an initial agency decision.

II. Analysis

The employee's principal complaint, i.e., that the DOE should have continued to fund the contractor's A&I work, is not the proper subject of a Part 708 complaint. Part 708 applies to contractor employee complaints about contractor retaliations; part 708 does not apply to contractor employee complaints about DOE decisions. See George E. Parris, IG Complaint No. HG97-0006 (October 15, 1998) (decision by Deputy Secretary affirming dismissal of complaint).

Moreover, to the extent that the employee's complaint is directed at the contractor's layoff decision, the employee is not entitled to relief. The employee herself maintains that the layoffs resulted from the DOE's elimination of the A&I work. Indeed, the term of the contract ended two months later. The employee has not argued that, in the absence of the protected disclosure, the contractor would have retained the employee despite the elimination of the A&I work. Accordingly, the contractor has met its burden of demonstrating that the layoff would have occurred in the absence of the protected disclosure.

Finally, the employee is not entitled to relief with respect to her removal from a team preparing an energy quality award application. The employee has failed to establish that her removal was a "retaliation" under part 708. Under part 708, a retaliation is an employment-related "negative action" with respect to the employee's "compensation, terms, conditions, or privileges of employment." 64 Fed. Reg. 12862, 12871 (1999) (to be codified at 10 C.F.R. § 708.2 (definition of "retaliation")); see also 10 C.F.R. § 708.4 (1999) (former definition of "discrimination"). 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. In fact, one of the employee's complaints was that the contractor assigned her non A&I work. See Investigatory Report, Ex. A-1 at 1 & 2; Ex. A-2 at 1,3. Accordingly, the employee has not met her burden of demonstrating that her removal from the team was a retaliation under part 708.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by Theresa G. Joyner, OHA Case No. VBH-0035, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Janet N. Freimuth

Hearing Officer

Office of Hearings and Appeals

Date: September 22, 1999