

Case No. VBX-0014

April 25, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: Roy Leonard Moxley

Date of Filing: January 10, 2000

Case Number: VBX-0014

This Decision supplements an Initial Agency Decision, dated December 29, 1999, that I issued as the Hearing Officer in a case involving a “whistleblower” complaint. The complaint was filed by Roy Leonard Moxley under the Department of Energy’s Contractor Employee Protection Program, 10 C.F.R. Part 708. See [Roy Leonard Moxley](#), 27 DOE ¶ 87,546 (1999) (the Initial Agency Decision). In that Decision, I found that Westinghouse Savannah River Company (WSRC), a DOE contractor, had violated the provisions of 10 C.F.R. § 708.5 by reducing Mr. Moxley’s salary grade level (SGL) from SGL 31 to SGL 30 on October 1, 1996, in reprisal for his making protected disclosures related to mismanagement. The Decision further determined that Mr. Moxley was entitled to relief as provided for in Part 708, directed him to supplement the record with a statement of the relief he was seeking, and permitted WSRC to file a response to Mr. Moxley’s claim. Mr. Moxley submitted this information on January 10, 2000. WSRC submitted a response to the January 10 submission on January 24, 2000. This Supplemental Order requires WSRC to correct Mr. Moxley’s personnel file to reflect that he was reclassified to SGL 32 as of October 1, 1996.

I. The Submissions

A. Mr. Moxley’s Claim

In his January 10 submission, Mr. Moxley listed a total of 16 remedies that he felt would restore him to a status that he would now occupy had no retaliations occurred. These proposed remedies may be characterized into two groups. The first three remedies concern reclassification to a higher grade level and monetary compensation based on that reclassification. The remaining 13 remedies would require WSRC to take additional personnel or administrative action that go beyond mere compensation for its prohibited acts.

Mr. Moxley’s first three proposed remedies relate to compensation. He asks that I order WSRC to reclassify his current salary grade level from SGL 32, to which he was promoted on February 1, 1997, to SGL 35, which is what his peers in his current position earn. He then specifies that his salary as an SGL 35 employee should be \$7750 per month, effective January 1, 2000. Finally, he calculates that the total monetary compensation due him is \$375,580, composed of two figures: (1)

the difference in pay between the salary he received at SGL 30 rather than at SGL 32 for the period of October 1996 (when he was reclassified from SGL 31 to SGL 30) through January 1997 (when he was reclassified to SGL 32); and (2) the difference in pay between the salary he now receives at SGL 32 and

what he contends he should receive at SGL 35 for the period January 2000 through the date of his retirement 13 years from now.

The remaining 13 proposed remedies can themselves be broken down into categories. Three concern ordering WSRC to permit Mr. Moxley to place various documents related to this case in his permanent employment record. Three more would order WSRC employees to issue written statements to him either acknowledging that WSRC engaged in retaliatory action against him or apologizing for such behavior. Two proposed remedies would require the on-site ethics office to investigate the decision process that resulted in Mr. Moxley being reclassified from SGL 31 to SGL 30 and to investigate WSRC's Employee Concerns Office and one of its employees. The remaining five proposed remedies would all require WSRC to make promises regarding future action: that it never again retaliate against Mr. Moxley; that it not reassign him to any other work location; that it not reassign him to work "under the management span" of two specified managers; that one of those managers never again manage employees on the site; and that it guarantee Mr. Moxley a Monday-through-Thursday 10-hour-day schedule.

B. WSRC's Response

WSRC responded to Mr. Moxley's claims by stating generally that his remedies do not address the retaliation that was taken against him, but rather seek a monetary windfall, a promotion, and sanctions against numerous employees. WSRC also focused on the regulatory intent of the remedy provisions as a measure against which to consider each of Mr. Moxley's claims. After analyzing each of the 16 proposed remedies, WSRC concluded that none was appropriate, and that the correct and complete remedy would be modifying his official WSRC personnel file to reflect that he was reclassified up to SGL 32 on October 1, 1996, rather than to SGL 30.

II. Discussion

A. Forms of Relief Provided by Part 708

As both parties have pointed out in their respective submissions, Part 708 clearly defines the forms of relief that a hearing officer may order if he determines that an act of retaliation has occurred. They are:

- (1) Reinstatement;
- (2) Transfer preference;
- (3) Back pay;
- (4) Reimbursement of your reasonable costs and expenses, including attorney and expert- witness fees . . . ;
[and]
- (5) Such other remedies as are deemed necessary to abate the violation and provide you with relief.

10 C.F.R. § 708.36(a).

In discussing the comments it received when it proposed changes to Part 708 in 1999, DOE stated that the remedies "are intended to correct unwarranted employment actions. The goal of this regulation is simply to restore employees to the position they would have occupied but for the retaliation." 64 Fed. Reg. 12862, 12867. With that goal in mind, I will now consider each remedy claim that Mr. Moxley has requested.

B. Monetary Claims

The first three of Mr. Moxley's claims relate to adjustment of pay, both back pay and future pay, as

remediation for the retaliatory act of reclassifying him in October 1996 from SGL 31 to SGL 30. The back pay aspect of these claims is the request for SGL 32 pay for the four-month period from October 1996 until February 1, 1997, when he was promoted to an SGL 32 position and given a raise of \$295 per month. Although the Initial Agency Decision determined that reclassifying Mr. Moxley to SGL 30 rather than to SGL 32 in October 1996 was an act of retaliation, it did not consider his failure to receive a raise at that time, and Mr. Moxley has not shown that he should have received such a raise. The fact that he received both a promotion to an SGL 32 position and an accompanying raise in February 1997 does not support Mr. Moxley's claim for back pay, because the February 1997 personnel action was taken for reasons independent of the October 1996 reclassification. See Roy Leonard Moxley, 27 DOE at 89,239 (Initial Agency Decision at 6). Moreover, in its response, WSRC points out, and substantiates through contemporaneous records, that during the massive reclassification in October 1996, many employees who were reclassified up one SGL did not receive raises, though some did. Of the 98 employees under Mr. Kilpatrick's management, 24 were reclassified up one SGL at that time, but only six of them received pay raises as well. The remaining 18 received the same pay despite the SGL increase. From this evidence, it is clear that SGL reclassifications were not necessarily linked to raises. There is simply no evidence in the record that demonstrates that had Mr. Moxley been reclassified to SGL 32 in October 1996, he would have received an accompanying raise at that time. Therefore, I will not grant his claim for back pay.

Calculations of Mr. Moxley's remaining monetary claims are predicated upon my ordering WSRC to reclassify Mr. Moxley to SGL 35, effective January 1, 2000. In his submission, he gives the following justification for this claim:

The mind set of WSRC management against me because I made protective disclosures caused me to be demoted in October 1996. This demotion and mind set has carried over and has caused future raises and promotions to be delayed or non-existent. I should be classified as a SLG 35 as others in my present job assignment. My present SGL 32 and not a SGL 35 are a result of the 1996 retaliation.

In this case the retaliation, as limited by Mr. Moxley before the hearing, was WSRC's reclassification of Mr. Moxley to SGL 30 rather than to SGL 32. The appropriate remedy for this retaliation would therefore be reclassification at SGL 32 as of October 1, 1996. Although it is logically possible that WSRC's "mind set" is still set against Mr. Moxley because he made disclosures protected by Part 708, it would be extremely speculative to conclude from the record that this "mind set" is the reason that Mr. Moxley has not received all the promotions and raises that he feels he has deserved. More than three years have passed since the October 1996 retaliation took place. In the intervening period, Mr. Moxley has received a promotion and a raise, and has transferred to an organization not under the direction of Mr. Kilpatrick, the manager who approved the retaliatory personnel action. There is no evidence in the record that demonstrates that Mr. Moxley would have received a promotion to SGL 35 by January 2000 had the retaliation not occurred. Under these circumstances, to attribute the course of Mr. Moxley's employment history since then to continued retaliation for his protected disclosures goes well beyond the scope of the complaint in this case, which Mr. Moxley himself limited to the October 1996 reclassification. Consequently, I will not order that Mr. Moxley be reclassified at SGL 35.

C. Non-Monetary Claims

Mr. Moxley also requests as remedies that WSRC be ordered to take or refrain from a number of personnel-related actions in the future. He contends that each of these proposed remedies would "abate the violation and provide relief" as permitted in 10 C.F.R. § 708.36(a)(5). I have described them in section I.A. above. After considering each of these claims, I reject them as being beyond the scope of relief appropriate in this case. None of these remedies, if granted, would further the goal of the regulations by restoring Mr. Moxley to the position he would have occupied but for the retaliation. Some of these, such as dictating the terms of Mr. Moxley's future employment, would instead provide him with extraordinary protections that he would not have obtained under any normal circumstances. Part 708 protection is not intended to insulate the whistleblower from all future actions that his employer might take. Other remedies Mr. Moxley proposes, such as demoting Mr. Kilpatrick from his management position, and requiring the

Ethics Office to investigate the Employee Concerns Office, would not only not restore Mr. Moxley to his pre-retaliation position but appear to be punitive. Remedies that require apologies for and acknowledgments of the retaliation and remedies that order placement of documents related to this proceeding in Mr. Moxley's official personnel file would not "abate the violation and provide relief," but would merely memorialize that the retaliation occurred, and that relief has already been provided in the Initial Agency Decision.

For similar reasons, I need not order WSRC to promise that it will not retaliate against Mr. Moxley in the future. The intent of Part 708 is to prevent retaliation against whistleblowers by defining protected conduct and establishing remedies, and the regulations plainly state that DOE contractors have an affirmative duty not to retaliate. See 10 C.F.R. § 708.43. The regulations thus provide the assurance that Mr. Moxley seeks. Therefore, I will not order WSRC to promise that it will not retaliate against Mr. Moxley in the future. If Mr. Moxley feels he is retaliated against in the future, because of protected conduct or disclosures, he may pursue Part 708 protection once again.

III. Conclusion

Based on the entire record in this proceeding, including the submissions filed by Mr. Moxley and WSRC concerning the remedy issues at stake, I find that the sole appropriate remedy for WSRC's reclassification of Mr. Moxley from SGL 31 to SGL 30 on October 1, 1996, is to require WSRC to correct Mr. Moxley's official personnel file to reflect that he was reclassified to SGL 32 on that date.

It Is Therefore Ordered That:

(1) Westinghouse Savannah River Company shall modify its official personnel file on Roy Leonard Moxley to reflect that he was reclassified to SGL 32 on October 1, 1996.

(2) This is a Supplemental Order to the Initial Agency Decision issued on December 29, 1999. This Order, together with the Initial Agency Decision, shall become the final decision of the Department of Energy unless, within 15 days of the receipt of this Order, a party files a notice of appeal with the Director of the Office of Hearings and Appeals, requesting review of this Order or the Initial Agency Decision or both.

William M. Schwartz

Hearing Officer

Office of Hearings and Appeals

Date: April 25, 2000