# Case No. VBZ-0005

October 4, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Fluor Daniel Fernald

Date of Filing: September 7, 1999

Case Number: VBZ-0005

This decision will consider a Motion to Dismiss Fluor Daniel Fernald (FDF) filed on September 7, 1999. FDF moves to dismiss a Complaint filed by Thomas W. Dwyer under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Dwyer's Complaint has been assigned Office of Hearings and Appeals (OHA) Case No. VBH-0005.

## I. Background

The Department of Energy established its Contractor Employee Protection Program 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. Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against its employee on the basis of certain activities by the employee, including certain disclosures by the “to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), . . .” 10 C.F.R. § 708.5(a)(1).

Mr. Dwyer worked for FDF from January 15, 1996, to October 16, 1997, when FDF terminated his employment. The Complainant alleges that he raised safety concerns with his employer in April 1996 and September 1997, and that he suffered retaliation, including his termination, as a result of these disclosures. On June 23, 1999, an OHA investigator issued a Report of Investigation on Mr. Dwyer's complaint, and I was subsequently assigned as the Hearing Officer in this matter.

After his October 1997 termination, Mr. Dwyer's labor union, the Fernald Atomic Trades and Labor Council, AFL-CIO, hereinafter referred to as the “Union,” filed a grievance alleging that FDF violated the applicable collective bargaining agreement between the Union and FDF by terminating Mr. Dwyer without just cause. A hearing was held before an arbitrator on May 18, 1999, and the arbitrator issued his “opinion and award” on August 17, 1999, in which he found that FDF “did not violate the applicable contract and that it discharged the grievant for cause.” Arbitrator's Opinion and Award at 47. Under the collective bargaining agreement, the arbitrator's decision is “final and binding” on both parties. Id. at 4.

On September 7, 1999, FDF filed the present Motion, arguing that the “arbitrator considered the same issues and facts under a collective bargaining agreement with employee protections virtually identical to

those in the [Contractor Employee Protection Program]. The Secretary should defer to the arbitrator's opinion and award." Motion to Dismiss at 1. FDF specifically cites a provision of the Part 708 regulations stating that a complaint may not be filed if a complainant has chosen "to pursue a remedy under State or other applicable law, including final and binding grievance-arbitration procedures, unless" the complainant has "exhausted grievance-arbitration procedures . . . and issues related to alleged retaliation for conduct protected under [Part 708] remain." 10 C.F.R. § 708.15(a)(3). FDF argues that, in light of the arbitrator's decision, no issues remain. Motion to Dismiss at 5.

A Motion to Dismiss should only be granted 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. See M&M Minerals Corp., 10 DOE ¶ 84,021 (1982). The OHA considers dismissal "the most severe sanction that we may apply," and has stated that it will be used sparingly. See Boeing Petroleum Services, 24 DOE ¶ 87,501 at 89,005 (1994). For the reasons discussed below, I do not find the grounds for dismissal in this case are clear and convincing, and therefore will deny the present Motion.

# II. Analysis

## A. Application of Recent Revisions to Part 708

FDF is correct that the current Part 708 regulations effectively bar a complaint where the complainant has pursued binding grievance-arbitration procedures and no issues related to alleged retaliation for protected conduct remain. However, this provision of the regulations has only been in effect since recent revisions to Part 708 took effect on April 14, 1999. Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12862, 12863 (March 15, 1999). Prior to the revisions, the regulations had no similar provision and, while barring complaints from those who had "with respect to the same facts, pursued a remedy available under State or other applicable law," specifically stated that the "pursuit of a remedy under a negotiated collective bargaining agreement will be considered the pursuit of a remedy through internal company grievance procedures and not the pursuit of a remedy under State or other applicable law." 57 Fed. Reg. at 7542 (1992).

The threshold issue, therefore, is the extent to which the provisions of the new regulations should be applied to Mr. Dwyer's complaint, which was pending when the recent revisions took effect. The revised regulations state that the "procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8 (1999). The preamble to the revised regulations explains,

It is well established in the law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. DOE will apply the revised procedures to pending cases consistent with the case law.

64 Fed. Reg. 12862, 12865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994), Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817 n.17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966))).

Thus, the intent of the drafters of the Part 708 revisions seems quite clear that the revised regulations apply to pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." This interpretation is consistent with the case law the drafters cited. Specifically, in Landgraf, the Supreme Court states,

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e.,

whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280 (emphasis added).

In the present case, I find that the application of the new regulations, specifically 10 C.F.R. § 708.15(a)(3), would effectively bar a complaint that Mr. Dwyer had a right to file under the previous regulations. Thus, I conclude that it would be inconsistent with the intent of the drafters and the case law to apply this provision of the new regulations to Mr. Dwyer's complaint.

## B. Application of the Prior Regulations

Accordingly, rather than applying regulations that mandate deference to final and binding arbitration decisions, I must apply regulations that are silent on the effect such prior decisions should be given in a Part 708 proceeding. This could arguably lead to the same result, since there is nothing in the prior regulations that would prohibit me from doing what the new regulations would require, i.e. affording the opinion of the arbitrator in the present case the traditional "deference given to final and binding arbitration decisions issued under collective bargaining agreements." 64 Fed. Reg. 12862, 12864.

I am not convinced, however, that this would be the appropriate method of applying regulations designed to protect whistleblowers. "While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 737 (1981). Thus, the Supreme Court has rejected the notion that an individual gives up his "independent statutory right" to file a lawsuit under the Fair Labor Standards Act, Barrentine, and Title VII of the Civil Rights Act, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), as a result of "seek[ing] to vindicate his contractual right under a collective-bargaining agreement. . . . The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." Id. at 49-50.

As noted above, prior to their recent revision, the Part 708 regulations explicitly provided a right to pursue a remedy independent of any available to a DOE contractor employee under a collective bargaining agreement. Thus I conclude that considerations similar to those cited by the Court in Barrentine and Gardner-Denver apply to the present case, and militate against the necessary finding of clear and convincing grounds for dismissal. This does not mean, however, that I will accord no weight to the findings of the arbitrator regarding the grievance filed on behalf of Mr. Dwyer.

It is wrong for courts to . . . allow the Secretary [of Labor, in enforcing the whistleblower protection provision of the Surface Transportation Assistance Act] to ignore arbitral proceedings without even examining the proceedings in question. At the same time, 'we adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the [Secretary's] discretion with regard to the facts and circumstances of each case.'

Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987) (quoting Gardner-Denver, 415 U.S. at 60 n.21; Barrentine, 450 U.S. at 743 n.22). Thus, while I will consider as part of the record of this proceeding the arbitrator's findings and accord them appropriate weight, I do not agree with FDF that those findings preclude Mr. Dwyer's right under the Part 708 regulations (prior to their recent revision) to proceed to a hearing in this matter. The Motion to Dismiss will therefore be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Fluor Daniel Fernald on September 7, 1999, Case No. VBZ-0005, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Steven Goering

Staff Attorney

Office of Hearings and Appeals

Date: October 4, 1999