

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: META, Inc.

Logistics Applications, Inc.

Dates of Filing: April 22, 1996

May 22, 1996

Case Numbers: VWA-0006

VWA-0013

This Decision involves a whistleblower complaint filed by Mr. Eugene Greer under the Department of Energy's Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. Until his employment was terminated on November 4, 1993, Mr. Greer was an audio-visual operator at DOE Headquarters employed by two DOE contractors, Omega, Inc., and its successor META, Inc. During Omega's tenure, the Office of Inspector General (IG) interviewed Mr. Greer in connection with an investigation of misuse of government property by two DOE employees responsible for supervising the audio-visual contract. Ultimately, one of the DOE employees was reprimanded. META succeeded to the Omega contract, hired Mr. Greer and later released him on November 4, 1993. Mr. Greer alleges that he lost his job because of retaliation through META by the two DOE employees who were the subject of the IG investigation.

On November 12, 1993, Mr. Greer filed a Complaint under Part 708 with the DOE's Office of Contractor Employee Protection (OCEP). OCEP investigated Mr. Greer's complaint and issued a Proposed Disposition on March 27, 1996. The Proposed Disposition concludes that Mr. Greer was retaliated against because of his cooperation with the IG investigation, and recommends that Mr. Greer receive compensatory back pay from META and be rehired by Logistics Applications, Inc. (LAI), the present audio-visual contractor. Both META and LAI filed requests with OCEP for a hearing on the Greer complaint under 10 C.F.R. § 708.9(a). OCEP transmitted META and LAI's requests to the Office of Hearings and Appeals (OHA) on April 22, 1996 and May 22, 1996, respectively, and I was appointed the hearing officer. The parties submitted additional material for the record, and sworn testimony was taken at a hearing held on July 9, 1996. META and LAI also made post-hearing submissions. On the basis of all this material and testimony, I find insufficient basis for the claim that termination of Mr. Greer's employment resulted from his cooperation in the IG investigation. The relief he requested shall therefore be denied.

I. The Whistleblower Protection Program

The Department of Energy'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. These regulations provide that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of

Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences a violation of any law, rule, or regulation, [or] . . . a substantial and specific danger to employees or public health and safety." 10 C.F.R. § 708.5(a)(1); see also Francis M. O'Laughlin, 24 DOE ¶ 87,505 (1994).

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an impartial OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE ¶ 87,505 (1994). The complainant under Part 708 has the burden of establishing "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." If the complainant makes such a showing, the contractor can avoid liability only by proving "by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure" 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993). As a practical matter, the application of these standards means that to prevail, Mr. Greer must establish that it is more likely than not that his disclosure to the IG contributed to his discharge.

II. Background

Mr. Greer alleges that he lost his job because of his involvement in the IG investigation. Specifically, Mr. Greer claims (i) there was a marked change in attitude towards him on the part of one of the DOE officials, Mr. Raymond Brown, and (ii) certain limitations were placed on Mr. Greer's duties in the wake of the IG investigation. These factors appear to be the main bases for Mr. Greer's complaint.

META claims that Mr. Greer's termination was part of a reorganization designed to remedy certain deficiencies in META's management of the audio-visual contract. According to META, the decision to terminate Mr. Greer's employment was made by Mr. Charles Craven, vice-president of the firm, with some input by Mr. Jackson Reavill. According to these two META officials, to remedy the management problems the firm decided to replace the on-site manager of the contract. META states that it did not dismiss the manager being replaced, but retained the manager in a lesser position at reduced pay. To remain within the contract's staffing and salary ceilings, META stated it believed it needed to take additional steps to reduce costs, and it released Mr. Greer, the highest paid audio-visual operator. META states that Mr. Greer's discharge yielded the required salary savings and that his release had nothing to do with his quality of work or the IG investigation. Transcript of Hearing at 23-24, 28-31, 133-34 (July 9, 1996) (hereinafter cited as Transcript).

The OCEP Proposed Disposition finds that Mr. Greer's discharge appears related, at least in part, to cooperation with the IG investigation. According to the Proposed Disposition, the two DOE officials who were the subjects of the IG investigation (Messrs. Branca and Brown) orchestrated Mr. Greer's dismissal by making negative comments about his work to META officials. However, nothing in the OCEP Proposed Disposition suggests that META intentionally did anything improper or even knew of the details of the IG investigation that took place while the contract was being administered by Omega, META's predecessor.

The conclusion of the Proposed Deposition is based largely upon inference. I must examine whether that inference is warranted. In doing so, I will review the circumstantial evidence upon which OCEP apparently relied. The proposed disposition relied primarily upon circumstantial evidence that (1) the two DOE officials knew that Mr. Greer cooperated with the IG investigation, (2) META was aware that one of the DOE Officials had a low opinion of Mr. Greer, (3) a notation was made on Mr. Greer's termination letter implying that DOE employees had some input to Mr. Greer's dismissal, and (4) terminating Mr. Greer was not the most logical option available to META.<1>

III. Analysis

In whistleblower cases it is often impossible for the complainant to find a "smoking gun" that proves an employer's retaliatory intent. Thus complainants must generally meet their burden of proof through circumstantial evidence. A retaliatory intent has been found, for example, where the retaliatory action took place within such a brief period of time from the date of the disclosure that a reasonable person could conclude that the disclosure must have been a factor in the personnel action. See Ronald A. Sorri, 23 DOE ¶ 87,502 at 89,010 (1993); David Ramirez, 23 DOE ¶ 87,505 at 89,029 (1994). Furthermore, I recognize that the testimony of contractor officials who have been accused of retaliating must be viewed with some skepticism and must generally be supported by corroborative evidence if it is to be relied upon in these proceedings. However, this does not mean that the testimony of contractor officials should be ignored. The weight to give circumstantial evidence and the testimony presented at the hearing must depend upon the circumstances of each case and the hearing officer's view of the value of the evidence and the credibility of the witnesses.

Based upon the record, including testimony received at the hearing held in this case, there is no doubt that Mr. Greer perceived a change in Mr. Brown's attitude towards him during the period leading to his dismissal.<2> Nor is there any doubt that Mr. Greer sincerely believes that DOE officials communicated their opinions of him to META and thereby contributed to his dismissal.<3> Transcript at 19-21, 155-61; Exhibit 6. However, there is simply no evidence to support that belief. As explained below, I am unwilling to find it sufficient that Mr. Greer was discharged following his cooperation with the IG investigation. Mr. Greer was discharged in November 1993, while his last interview with the IG was in November 1991 and Mr. Branca received a reprimand in the Fall of 1992. Thus, Greer's discharge occurred two years after he was interviewed by the IG and one year after Mr. Branca was reprimanded. While the delay between the disclosure and the retaliatory action alleged in this case does not necessarily rule out a connection, it does significantly reduce the value of this circumstantial evidence.

META's evidence in this case was presented primarily through the sworn testimony of Messrs. Craven and Reavill, the two META officials who made the personnel decision. In evaluating their testimony, I must emphasize that neither META nor its officials are alleged to have intentionally retaliated against Mr. Greer. It is alleged only that META was manipulated by the two DOE officials allegedly involved, Messrs. Brown and Branca. META should therefore have an excellent claim for reimbursement from DOE if Mr. Greer were awarded back pay. Under these circumstances, Messrs. Craven and Reavill would have no reason to distort their testimony out of fear of an adverse financial impact on their employer. These META officials presented consistent testimony and nothing in their demeanor leads me to question their veracity. Consequently, I find the testimony of Messrs. Craven and Reavill to be generally reliable.

These two META officials, as well as the two DOE officials allegedly involved, Messrs. Brown and Branca — all testified under oath that, except with respect to one incident discussed below, there had been no communications between DOE and META officials concerning Mr. Greer. Transcript at 48, 57-59, 69, 123-27, 130-32, 148; see also Exhibits 11 & 19. Nor is there any evidence in the record of such communications, subtle or otherwise.<4> Under the circumstances it is not possible to conclude that the DOE officials swayed META's thinking concerning Mr. Greer's employment. I therefore must reject the Proposed Disposition as well as Mr. Greer's request for relief.

A brief review of this case and of the factors relied upon in the Proposed Disposition will be useful. I certainly agree with OCEP's finding that the DOE officials must have at least assumed that Mr. Greer had been interviewed by the IG, as the matter under investigation involved matters for which Mr. Greer was responsible.

The Proposed Disposition found that META was aware that Mr. Brown had a low opinion of Mr. Greer. The basis for this finding was in connection with an incident in which Mr. Greer apparently attempted to choke another employee (no injuries resulted). Mr. Brown told Mr. Craven that he thought Greer should have been disciplined more strongly. Transcript at 27-28, 69. This incident was a potentially serious matter

about which Mr. Brown had a legitimate reason for concern, and I am unwilling to attribute any improper motive to his comments concerning it. According to the record, this was the only time in which either DOE official expressed any opinion concerning Mr. Greer to either META official involved in the 1993 personnel decision to release him. Since the choking incident would have been an excellent pretext for discharging Mr. Greer, the fact that META did not do so at that time indicates that the firm was not looking for an excuse to terminate his employment.

The conclusion of the Proposed Disposition, i.e., that the DOE officials influenced META, is based largely upon the following handwritten notation that Mr. Craven made on Mr. Greer's termination letter: "NOTE/ADDENDUM: Mr. Greer will provide information regarding DOE's evaluation of his performance that contributed to this action. I will reconsider this action after I receive this Information." Exhibit 33. OCEP construed this to be an admission by Mr. Craven that he was influenced by DOE personnel. However, Mr. Craven has explained that when he told Mr. Greer that he would be dismissed, Greer argued that the real reason for his dismissal was the IG investigation. Mr. Craven states that he was taken aback by this comment which raised the specter of a new IG investigation and allegations by Mr. Greer of reprisal. Mr. Craven explained that while he did not think there was anything to the allegation, he wrote the notation on the letter and told Mr. Greer to "write me a letter, and tell me exactly what DOE official and how this reprisal came about." Transcript at 33. Mr. Craven also testified that he did not intend this notation to mean that he accepted Mr. Greer's contention that his dismissal had anything to do with the IG investigation. Transcript at 33, 60. It appears to me that Mr. Craven would have had no reason to ask Mr. Greer to explain his allegation if he believed there was any merit to it. I therefore find Mr. Craven's explanation of the notation, rather than the inference of the Proposed Disposition, to be reasonable and credible.

The Proposed Disposition also finds that it might have been more logical for META to have discharged some other employee, and infers improper influence because Mr. Greer was selected for dismissal.<5> According to the Proposed Disposition, META could have discharged a higher paid employee who was performing different functions, or a lower paid employee performing the same functions (but who was not so highly rated) and then reduced Greer's pay to obtain the desired cost savings. Also noted is the fact that Mr. Greer was not rehired six months later, when Mr. Henderson retired and META hired a different individual in Mr. Greer's job classification at a higher salary.

At the hearing, Mr. Craven explained the personnel decisions that he made as follows: (1) Discharging an employee in another job classification would not have been appropriate because only in the audio-visual operator classification was there an excess employee. (2) Downgrading Mr. Greer and discharging another employee would have simply increased the number of dissatisfied META employees, because then both the discharged employee and Mr. Greer (because of his downgrading) would have been unhappy. (3) Although the audio-visual operator META hired in April 1994 worked in the same job classification as Mr. Greer, she had additional skills which were needed because of changing requirements under the contract and which warranted a higher salary. Transcript at 49, 63-66, 71-72; see also Exhibits 11, 19, 29 & 30. I find this testimony believable and a reasonable response to the speculation in the Proposed Disposition on this issue.

Another matter raised in the Proposed Disposition concerns a statement made to the OCEP investigator in this case by the DOE Contracting Officer. The statement is that the Contracting Officer could not "understand" why Mr. Greer was selected for termination based upon economic considerations. During his testimony, the DOE Contracting Officer explained that he meant only that he did not know why Mr. Greer had been selected to be dismissed, and that he did not mean to suggest — as the Proposed Disposition infers — that META's rationale was invalid. Transcript at 84.

IV. Conclusion

In summary, the circumstantial evidence relied upon by OCEP is outweighed by the sworn testimony of

the two META officials responsible for terminating Mr. Greer's employment that no DOE official had any say at all in that decision. Both of these individuals, Messrs. Craven and Reavill, testified that their decision had nothing to do with Mr. Greer's performance, but was based solely upon the need to cut one person as part of a reorganization, and that terminating Mr. Greer yielded the desired cost savings. I find this testimony convincing and reasonable. They also testified that while the DOE officials communicated with them concerning the performance of the project manager, they seldom discussed other META employees. The only time in which either discussed Mr. Greer was in connection with the choking incident. Mr. Brown had legitimate reasons underlying his concern about that incident and no improper motive can be attributed to Mr. Brown's comments concerning it. I find their testimony to be credible. Affirming this testimony, both DOE officials independently also testified that they had no direct say in the decision to terminate Mr. Greer's employment.

Consequently, the weight of the evidence in this case is that Mr. Greer's discharge was the result of a reorganization by META of its audio-visual contract operation and that DOE personnel played no role in that decision. Accordingly, I find Mr. Greer has not proven, by a preponderance of the evidence, that his dismissal resulted in any way from his cooperation with the IG investigation. I therefore cannot find that a violation of 10 C.F.R. § 708 has occurred. The Proposed Disposition issued by OCEP in this case is therefore not accepted.<6>

It Is Therefore Ordered That:

- (1) The request for review filed by META, Inc., (Case No. VWA-0006) is hereby granted as set forth in Paragraph (2) below.
- (2) Eugene Greer's request for relief under 10 C.F.R. Part 708 is hereby denied.
- (3) The request for review filed by Logistics Applications, Inc., (Case No. VWA-0013) is hereby dismissed.
- (4) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complaint in part unless within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Richard T. Tedrow

Hearing Officer

Office of Hearings and Appeals

Date:

<1>It is undisputed that even though Mr. Greer did not initiate the IG investigation, his cooperation in it constituted a protected disclosure under 10 C.F.R. § 708(5)(a)(1). Transcript at 8. Nonetheless, it is not certain that there is jurisdiction in this case. See *id.* § 708.2(b). However, the parties did not brief the issue of jurisdiction, and in view of my decision on the merits, it is not necessary to reach the issue.

<2>Evidence concerning whether there was in fact a change in Mr. Brown's attitude toward Mr. Greer is conflicting. See Exhibits 12 & 20. I also note that even if there were a change in attitude, it could have resulted from factors other than Mr. Greer's role in the IG investigation.

<3>OCEP also investigated other acts of alleged discrimination, including restrictions placed on Mr. Greer's duties and counseling him for tardiness. The Proposed Disposition found that there were reasonable business reasons for these actions and that they could not be traced to Mr. Greer's cooperation

with the IG investigation. Little evidence was offered on these actions at the hearing, and I fully agree with the Proposed Disposition's conclusions concerning them. Transcript at 45-47.

<4>The DOE officials may have discussed Mr. Greer's performance with Mr. Henderson, but the only matter concerning Mr. Greer that Henderson raised with Messrs. Craven and Reavill was a minor tardiness issues that was never a significant problem. Transcript at 57.

<5>OCEP also found that META was mistaken about the need under the contract to eliminate a position to bring on a new project manager. This may well be correct. There is some evidence that META might have been able to retain Mr. Greer. However, it is clear that an extra employee was not needed to perform the work required by the contract. Under these circumstances, I cannot attribute any improper motive to META's decision to discharge an employee. Transcript at 82-86.

<6>In view of this determination, it is not necessary for me to address the arguments raised by LAI as to why, in the event Mr. Greer had been wrongfully discharged, it should not be required to reinstate him.