Thomas T. Tiller v. Wackenhut Services, Inc.; Washington, D.C. Case No. VWA-0018

Final Decision and Order Issued by the Deputy Secretary of Energy

Issued February 2, 1999

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

This is a request for review by complainant Thomas T. Tiller of an Initial Agency Decision, issued by the Office of Hearings and Appeals (OHA), denying the two reprisal complaints that he filed pursuant to 10 C.F.R. Part 708, the regulation establishing the DOE Contractor Employee Protection Program. Mr. Tiller was employed by Wackenhut Services, Inc. (Wackenhut), a DOE contractor that provides paramilitary security support services at DOE's Savannah River Site in Aiken, South Carolina.

Background

In 1992, Mr. Tiller became Labor Relations Manager for Wackenhut at DOE's Savannah River Site. In that position, he served as a member of the management team that negotiated contracts with Wackenhut's guard union. In August 1993, Mr. Tiller encountered financial difficulties, and asked the local representative of the guard union for a loan of $900. The union representative's wife advanced the $900 loan to Mr. Tiller interest-free, and Mr. Tiller's wife repaid the loan two weeks later. Initial Agency Decision at 3.

Before asking for the loan, Mr. Tiller had executed a Conflict of Interest Statement for Wackenhut, in which he certified that neither he, nor any immediate family member, had engaged, directly or indirectly, in any activity which created a conflict of interest; that he had read Wackenhut's Conflict of Interest Policy; and that he would immediately disclose any situation in the future that may possibly be interpreted as involving a Conflict of Interest. Among the examples cited in the Conflict of Interest Policy as activities constituting a conflict of interest is a loan to or from any person or organization having any dealing with the Company. Initial Agency Decision at 2-3.

Senior Wackenhut managers first learned of Mr. Tiller's loan in October 1993, during contract negotiations between Wackenhut and the guard union. When two of Mr. Tiller's fellow members on the contract negotiating team confronted him about the loan on or about October 12, 1993, he confirmed that he had solicited and accepted the loan. Shortly thereafter, Wackenhut management removed Mr. Tiller from the negotiating team; orally advised him that he had compromised his position and damaged his credibility; and responded affirmatively when Mr. Tiller asked whether he could be terminated for accepting the loan. Initial Agency Decision at 3.

Mr. Tiller asked why Wackenhut would punish him so harshly, when XXXXXXXXXX- who was Wackenhut's XXXXXXXXX at the Savannah River Site -had done something worse without any apparent adverse repercussion. Specifically, Mr. Tiller alleged that XXXXXXX had accepted stolen telephone wire, and free installation of that wire in his house, from the same union representative who had loaned the $900 to Mr. Tiller. Initial Agency Decision at 3; Exhibit 9 [OHA Administrative Record (A.R.) Vol. I, at 129-54].

After Mr. Tiller's admission that he had accepted the $900 loan, some Wackenhut managers argued that his employment should be terminated, which was an action sanctioned by Wackenhut's Conflict of Interest Policy. However, one Wackenhut manager persuaded the others that Mr. Tiller should be given a second chance with another division of the company. That manager was XXXXXXXXXX., who was at that time Wackenhut's XXXXXXXXXXXXXXX at the Savannah River Site and XXXXXXXXXX. Initial Agency Decision at 4; Transcript (Tr.) at 192+n-94 [A.R. Vol. III, at 1198 - 1200].

Accordingly, in a memorandum dated October 25, 1993, Wackenhut informed Mr. Tiller that he was being removed from his position as Labor Relations Manager because he had violated Wackenhut's Conflict of Interest Policy; that Wackenhut would offer him placement in the position of Personnel Security Supervisor, which had a salary less than that of the position from which he was being removed; that if Mr. Tiller accepted the new position, he would retain his higher salary for a period of one year, after which it would be adjusted downward; and that if he chose to decline the company's offer of reassignment, his employment would be terminated immediately. Mr. Tiller accepted the offer in writing. Initial Agency Decision at 4.

On August 31, 1994, ten months after accepting his reassignment to his new position, Mr. Tiller filed his first reprisal complaint. He alleged that Wackenhut demoted him from Labor Relations Manager to Personnel Security Supervisor in retaliation for his disclosing that XXXXXXX had accepted stolen telephone wire and free installation of that wire from the local union representative. On April 18, 1996, Mr. Tiller filed his second reprisal complaint, in which he alleged that Wackenhut initiated several adverse personnel actions against him in retaliation for filing his first complaint.Initial Agency Decision at 5 - 6.

The Office of Inspector General (OIG) conducted an extensive investigation of Mr. Tiller's two complaints, and issued a Report of Inquiry and Proposed Disposition (Report) on September 30, 1997. A.R. Vol. I, at 3 - 61. With respect to his first complaint, the

Report concluded that Mr. Tiller had proven by a preponderance of the evidence that he had made a protected disclosure concerning XXXXXXXXXX's alleged receipt of telephone wire and its installation, but that he had failed to prove that his protected disclosure was a contributing factor to his demotion. Rather, the Report found that Mr. Tiller's solicitation and acceptance of the loan from the union representative were the reasons for his demotion. With respect to his second complaint, the Report concluded that Mr. Tiller had proven by a preponderance of the evidence that he had participated in a protected activity by filing his first reprisal complaint, but that he had failed to prove that his first complaint was a contributing factor to any of the alleged adverse actions taken against him. The Report therefore recommended that his request for relief be denied. Report at 58 - 59.

After his receipt of the Report, Mr. Tiller requested a hearing before OHA, pursuant to 10 C.F.R. 708.9(a). On February 24 and 25, 1998, OHA convened a 22-hour hearing in Aiken, South Carolina, at which the testimony of 33 witnesses was presented. Mr. Tiller, who was represented by counsel, and Wackenhut each submitted pre-hearing and post-hearing briefs. On May 21, 1998, OHA issued an Initial Agency Decision in which it denied Mr. Tiller's request for relief.

Subsection 708.10(c)(1) provides, in pertinent part, as follows:

If the initial agency decision contains a determination that the complaint is without merit, it shall also include a notice stating that the decision shall become the final decision of DOE denying the complaint unless, *within five calendar days of its receipt*, a written request is filed with the Director for review by the Secretary or designee. (emphasis added)

In compliance with that subsection, the Initial Agency Decision that was issued to Mr. Tiller included the following notice:

This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, *within five days of its receipt*, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy. (emphasis added)

Initial Agency Decision at 19.

On May 26, 1998, the Acting Deputy Inspector General for Inspections mailed a copy of the Initial Agency Decision to Samuel Cruse, who is counsel for Mr. Tiller, by certified mail. Attachment 2. The return receipt indicates that Mr. Cruse received the Initial Agency Decision, but the date of delivery written on the receipt is not clearly legible. Attachment 4. However, it is clear that Mr. Cruse received the Initial Agency Decision no later than June 6, 1998, because that is the date he typed on his one-page request for review of that decision. Attachment 3. DOE received his request for review on June 15, 1998. Attachment 3. In that letter, Mr. Cruse merely stated that because he "was involved in a long hard trial and due to the short time given, the complainant was not notified of this decision in the time frame required," and asked DOE to accept his letter as his request for review. Mr. Cruse's letter contained no objections or arguments concerning the merits of the Initial Agency Decision.

Mr. Tiller himself sent DOE a separate two-page letter, dated June 14, 1998, in which he made two specific objections to the Initial Agency Decision. First, he complained that during the OIG's investigation, XXXXXXXXXX was never formally interviewed. XXXXXXXXX was a former XXXXXXXXXXXXXXX at Wackenhut, and had been Mr. Tiller's XXXXXXX. Mr. Tiller admitted that XXXXXXXX later testified during the OHA hearing, but Mr. Tiller accused OHA of failing to consider XXXXXXXXXX's testimony that XXXXXXXXXXX had knowledge of XXXXXXXXXXs alleged conflict of interest.

Second, Mr. Tiller accused XXXXXXXX of misrepresenting the truth when he testified that he had no notice of the Part 708 disclosure prior to the time indicated in his sworn statement. XXXXXXXX was XXXXXXXXXXXX, and had preceded XXXXXXX as Wackenhut's XXXXXXXXXXXX at the Savannah River Site.

Mr. Tiller enclosed two documents with his letter. His first enclosure was a copy of Mr. Cruse's one-page request for review, dated June 6, 1998 and described above. His second enclosure was a copy of a five-page section, entitled "Hearing," from a post-hearing brief that Mr. Cruse had first filed on his behalf with OHA on March 12, 1998. That post-hearing brief was part of the record which OHA reviewed before issuing its Initial Agency Decision. See A.R. Vol. V, at 1750, 1754 - 58.

Analysis

Subsection 708.9(d) sets forth the parties' respective evidentiary burdens in an OHA proceeding under Part 708:

The complainant shall have 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. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation, or refusal.

Concerning Mr. Tiller's first complaint, OHA found in its Initial Agency Decision that Mr. Tiller had established that his allegation regarding XXXXXXXX's conduct was a protected agency disclosure. In making that finding, OHA stated that whether Mr. Tiller's beliefs were factually accurate is irrelevant for purposes of Part 708; rather, the focus is on whether Mr. Tiller had a "good faith belief" that XXXXXX's conduct violated a law, rule, or regulation. OHA noted that the suggestion of Mr. Tiller's gullibility only serves to reinforce the view that he earnestly believed the information he conveyed concerning XXXXXX. Initial Agency Decision at 7- 9.

OHA also found that Mr. Tiller had established a prima facie case that his protected disclosure on or about October 12, 1993 was a contributing factor to his demotion and reassignment on October 25, 1993, solely because, as a matter of law, the temporal proximity between his protected disclosure and his demotion and reassignment was sufficient to establish a prima facie case. OHA stated that although there is conflicting testimony as to how many Wackenhut senior officials knew of Mr. Tiller's disclosure, it is clear that at least one of them -XXXXXXXXX - had actual knowledge of Mr. Tiller's disclosure. XXXXXXXX was the XXXXXXXX to whom Mr. Tiller made his disclosure around October 12, 1993. He was also the same manager who persuaded the others to reassign Mr. Tiller instead of firing him. Initial Agency Decision at 9; Tr. at 17 - 77, 190 - 94 [A.R. Vol. III, at 1182 - 83, 1196 - 200].

Pursuant to subsection 708.9(d), the burden then shifted to Wackenhut to prove by clear and convincing evidence that it would have demoted and reassigned Mr. Tiller absent his protected disclosure. OHA found that Wackenhut had met its burden. Immediately after Mr. Tiller admitted that he had solicited and accepted the loan from the union representative, but *before* he made his protected disclosure, a Wackenhut manager told Mr. Tiller that he could be terminated for having solicited and accepted the loan. Initial Agency Decision at 10; Report at 17. Wackenhut would have been justified in terminating him for violating the company's Conflict of Interest Policy; instead, it reassigned him to the only other position that was available at the time. OHA found that there is absolutely nothing in the record to suggest that Wackenhut reassigned Mr. Tiller in retaliation for his protected disclosure, and denied his first complaint. Initial Agency Decision at 9 - 10, 18.

Concerning Mr. Tiller's second complaint, OHA found that Mr. Tiller had demonstrated by a preponderance of the evidence that he participated in a protected activity when he filed his first complaint, and that his first complaint was a contributing factor to several adverse personnel actions against him because of "temporal proximity," but that Wackenhut had proven by clear and convincing evidence that it had independent justification for those adverse personnel actions+m-including "overwhelming evidence that Tiller's performance in the Personnel Security Program was deficient in many respects" (Initial Agency Decision at 14) - and that it would have taken those personnel actions even if Mr. Tiller had not filed his first complaint. OHA therefore denied his second complaint. Initial Agency Decision at 11 - 18.

In Mr. Tiller's letter dated June 14, 1998, which we will consider as a request for review, both of his specific objections concern an issue that OHA decided in his favor: whether Wackenhut officials - specifically, XXXXXXXX and XXXXXX- had knowledge of his protected disclosure concerning XXXXXXXXX's alleged conflict of interest. Mr. Tiller correctly noted that there was conflicting testimony on that issue. However, OHA ultimately decided the issue in Mr. Tiller's favor:

While there is conflicting testimony in the record as to how many Wackenhut senior officials knew of Tiller's protected disclosure, it is clear that at least one Wackenhut manager had actual knowledge of Tiller's disclosure. That manager is the one to whom Tiller made the disclosure around October 12, 1993, and is the same manager who persuaded others at Wackenhut to reassign Tiller instead of firing him.

Based on the foregoing, I find Tiller has established a prima facie case that his protected disclosure was a contributing factor to his demotion and reassignment.

Initial Agency Decision at 9. XXXXXXXX is the Wackenhut manager to whom OHA refers. *See* Tr. at 176 - 77, 190 - 94 [A.R. Vol. III, at 1182 - 83, 1196 - 200], *cited in* Initial Agency Decision at 3 - 4. As explained above, the reason that OHA denied Mr. Tiller's first complaint was *not* that it found that Wackenhut officials lacked knowledge of Mr. Tiller's disclosure concerning XXXXXXXXX's alleged conflict of interest, but rather that OHA found that Wackenhut had proven by clear and convincing evidence that it would have demoted and reassigned Mr. Tiller absent his disclosure, because of Mr. Tiller's own admitted conflict of interest.

Because the two specific objections in Mr. Tiller's request for review concern an issue that OHA decided in his favor, those objections do not constitute a basis for reversing OHA's Initial Agency Decision.

Mr. Tiller also made the general objection, without any reference to the record, that the entire investigation has taken over four years and that DOE has allowed Wackenhut "to utilize every effort to single out the issues which I brought to your attention." Request for review at 1. In fact, the record indicates that OHA conducted the proceedings in accordance with the applicable regulations in subsection 708.9. Pursuant to those regulations, OHA allowed Mr. Tiller and his counsel, as well as Wackenhut, the opportunity to address the issues which the other party brought to OHA's attention.

Of the two enclosures to Mr. Tiller's request for review, the first is a copy of his counsel's request for review, which contains no objections or arguments concerning the merits of the Initial Agency Decision, and therefore does not present any basis for reversing that decision. The second enclosure is merely a re-submission of five pages from a post-hearing brief that Mr. Tiller had first submitted to OHA before it issued its Initial Agency Decision, and that OHA had already reviewed before it issued that decision. *See*Initial Agency Decision at 2, 7; A.R. Vol. V, at 1750, 1754 - 58.

Factual findings by OHA will be reversed only upon a showing that they are clearly erroneous, giving due regard to OHA as the trier of fact to judge the credibility of witnesses. *Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (Apr. 14, 1995);*O'Laughlin v. Boeing Petroleum Services, Inc.*, 24 DOE ¶ 87,513, 89,064 (Jan. 31, 1995). Mr. Tiller has failed to present any evidence that OHA's findings on the issues he first raised in his post-hearing brief are clearly erroneous.

Finally, we note that Mr. Tiller's and Mr. Cruse's requests for review were both untimely. Subsection 708.10(c)(1) required a request for review to be filed within five calendar days of receipt of the Initial Agency Decision. Mr. Cruse, as Mr. Tiller's counsel, received the decision no later than June 6, 1998, the date he typed on his request for review. Mr. Cruse's request for review was

filed on June 15, 1998; Mr. Tiller's request for review was dated June 14, 1998. Therefore, Mr. Cruse's request for review was not filed within the time required, and Mr. Tiller's request for review was not even dated within the time required for it to be filed.(1)

For the foregoing reasons, the dismissal of Mr. Tiller's two complaints is affirmed.

Ernest J. Moniz

Deputy Secretary

(1)The content of Mr. Cruse's request for review indicates that he probably received the Initial Agency Decision on some date earlier than June 6, 1998, the date he typed on his request. He admitted in his request that he had failed to notify his client, Mr. Tiller, within the time required. Because that time *i began *r to run on the date of Mr. Cruse's receipt, Mr. Cruse's admission indicates that before the date he typed on his request, he had received the decision and the required time period had passed. In that event, Mr. Cruse's request, as well as Mr. Tiller's request, would have been even more untimely. However, even if all doubts are resolved in Mr. Cruse's favor, and it is assumed that he received the decision on the latest possible date of June 6, 1998, his request and Mr. Tiller's request were still untimely, as explained above.