Case Nos. VWD-0003 and VWD-0005

July 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Supplemental Order

Name of Petitioner: David M. Turner

Date of Filings: June 8, 1999

Case Numbers: VWD-0003

VWD-0005

This decision will consider two Motions for Discovery filed by David M Turner with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on June 8, 1999, as amended on June 22, 1999. The discovery motions relate to a hearing requested by Mr. Turner under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). The OHA has assigned Mr. Turner's hearing request Case No. VWA-0038, and the discovery requests under consideration Case Nos. VWD-0003 and VWD-0005.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE'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 purposes are 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. The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The Part 708 regulations were revised effective April 14, 1999, and by their terms, apply to all cases which were pending as of the date they became effective, including Mr. Turner's case. See 64 Fed. Reg. 12,862 (March 15, 1999); 10 C.F.R. §§ 708.8, 708.22.

B. Factual Background

From 1991 to 1995, Mr. Turner was employed as a Tritium Shift Supervisor by GPC at Princeton University Plasma Physics Laboratory's (PPPL) Tokamak Fusion Test Reactor in Princeton, New

Jersey. At the time, GPC operated as a subcontractor to Princeton, the DOE Management and Operating Contractor at PPPL.

Mr. Turner claims that in April 1995, he disclosed to PPPL and GPC 24 serious inaccuracies in a Final Safety Analysis Report for PPPL's Tritium Regeneration System. Turner also alleges that during this same period, he was instructed to declare PPPL's Tritium Regeneration System operable, despite his having voiced safety concerns about the system. The next month, May 1995, GPC and Princeton removed Mr. Turner from his position, contending that Mr. Turner was no longer physically able to perform his duties as a Tritium Shift Supervisor due to a pre-existing medical condition, i.e., a spinal nerve injury. In June 1995, GPC terminated Turner from its employ.

C. Procedural Background

In August 1995, Mr. Turner filed a complaint under Part 708 with the DOE's Office of the Inspector General (IG) alleging that GPC and Princeton had fired him in retaliation for his having made safety and health disclosures relating to PPPL's Tritium Regeneration System. After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, the IG referred the complaint to the DOE's Chicago Operations Office for informal resolution. After efforts at informal resolution failed, the IG began its investigation into the allegations set forth in Mr. Turner's complaint. (1) On May 26, 1999, the IG issued its Report of Inquiry and Recommendations on Turner's complaint in which it concluded that the available evidence indicated that GPC and PU would have terminated Turner's employment even if he had not made the disclosures about the Tritium Regeneration System.

Mr. Turner filed a timely request with the IG for an administrative hearing on his Part 708 complaint. Shortly after the IG transmitted Turner's hearing request to the OHA Director on April 26, 1999, I was appointed the hearing officer in this case. I have scheduled a hearing in this matter for July 27 and 28, 1999 in Princeton, New Jersey.

II. Motions for Discovery

The Hearing Officer determines, on a case-by-case basis, the necessity and appropriate scope of discovery under the recently revised Part 708 regulations. See 64 Fed. Reg. 12862, 12867 (March 15, 1999). According to the regulations, a Hearing Officer may order discovery at the request of a party if that party shows that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the whistleblower complaint. See 10 C.F.R. § 708.28(b)(1).

In some cases under Part 708, OHA Hearing Officers have requested that the parties work out discovery matters among themselves, only involving the Hearing Officer if a material dispute arises. See Frank E. Isbill, Case No. VWD-0002, 27 DOE ¶ ____(May 21, 1999); L&M Technologies, Inc., Case No. LWD-0009, 23 DOE ¶ 87,502 (1993). In this case, I decided after my first telephone conference with all the parties that a different course of action was warranted because Mr. Turner is not represented by legal counsel. It was evident to me that Mr. Turner could easily be overwhelmed with the discovery process due to his unfamiliarity and inexperience with this or any other court or administrative proceeding. In contrast, the contractors in this case are represented by two highly skilled litigators, one a partner in a major Washington, D.C. law firm and the other a lawyer in Princeton's Office of General Counsel. Both of the contractors' lawyers are well versed in all the nuances of civil litigation, including discovery, and are representing their respective clients with great zeal.

To ensure the integrity of the process, and prevent Mr. Turner from feeling intimidated by the opposing parties, I instructed all parties in writing on June 4, 1999 that any motions for discovery must be submitted to me for my evaluation and approval or denial. See Letter from Ann S. Augustyn, Hearing Officer, to David M. Turner, Charles Wayne, Esq. and Katherine Buttolph (June 4, 1999) (June 4 Letter). (2) I also advised the parties at that time that administrative proceedings under Part 708 are intended to be informal in nature and are not intended to emulate formal trial proceedings. 57 Fed. Reg. 7533, 7537-38 (March 3, 1992). Hence, I noted that the discovery requirements, notices, and procedures that are embodied in the Federal Rules of Civil Procedure do not govern discovery in Part 708 proceedings.

On June 8, 1999, I received the Motions for Discovery under consideration, one seeking discovery from Princeton and the other seeking discovery from GPC. Mr. Turner amended these discovery requests on July 22, 1999. I convened a conference call on July 1, 1999 to discuss, and rule on, the specific discovery requests of the motion. On the same date, I issued a discovery order regarding the joint discovery motion filed by Princeton and GPC. Princeton University/General Physics Corporation, Case No. VWD-0004, 27 DOE ¶ ____ (July 1, 1999). In that order, I memorialized my earlier oral decision to bifurcate this proceeding into two phases: a liability and remedial phase. Id. The significance of that ruling is that all discovery regarding damages in this case will not be entertained during the liability phase of this case.

A. Turner's Motion for Discovery from GPC (Case No. VWD-0003)

In his Amended Motion for Discovery, Case No. VWD-0003), Mr. Turner seeks 16 documents from GPC, and requests that GPC respond to four interrogatories. With the exception of Document Request No. 8 and Interrogatory No. 1, GPC objects to the remainder of Turner's discovery requests. GPC has agreed, however, in the spirit of cooperative discovery to produce non-privileged documents or affirmatively state there are no responsive documents with regard to Document Request Nos. 1, 2, 4, 5, 7, 9, 10, 11, 12, 13, 15 and a portion of 16. There is clearly no need for discussion of these discovery requests as there is now no material dispute about these matters. I will therefore grant all the requests where there is agreement between GPC and Mr. Turner.

The first discovery item about which there is a material dispute is Document Request No. 3. In this request, Turner seeks "[t]he GPC policies on handling ADA claims and short and long term disability claims that were in effect on May 25, 1996." Turner seeks this material to discern GPC's policy regarding its treatment of employees who were "not physically capable" of performing their jobs during the period of his employment with GPC at PPPL, 1990 until June 22, 1995. GPC objects to producing these documents on several grounds. First, GPC states that Turner did not raise in his Part 708 Complaint an allegation that GPC violated the Americans with Disabilities Act (ADA) or any other state or federal law. Further, argues GPC, OHA does not have jurisdiction over such claims even had Turner raised them. Lastly, GPC states that Turner has failed to allege that he requested and GPC refused to grant short or long term disability leave.

I find that GPC's policies regarding the manner in which it handles employees who are no longer physically able to perform their job is relevant to Turner's Part 708 Complaint. The record reflects that GPC and Princeton removed Turner from his position of Tritium Shift Supervisor because they apparently believed he could not physically perform his job duties. See Exhibits 4, 6, 8, 11 and 16. In other Part 708 cases, Hearing Officers have looked at the manner in which contractors have adhered to, or departed from, their own policies to determine whether the contractor has proven that it would have taken the same action absent the protected disclosure. E.g. Thomas T. Tiller, 27 DOE ¶ 87,504 (1998), aff'd, 27 DOE ¶ 87,509 (1999) (corporate policy followed regarding the handling of a management employee who borrowed money from a union representative during collective bargaining negotiations); Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996), aff'd, 27 DOE ¶ 87,508 (1997) (contractor followed corporate policy regarding handling of employees who falsify documents); Charles Barry DeLoach, 26 DOE ¶ 87,509 (1997) (corporate policy followed in terminating employees in cases of proven theft); Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994)(contractor followed its personnel procedure of not making a promotion permanent until the job position is posted); Ronald Sorri, 23 DOE ¶ 87,503 (1993)(the contractor did not follow normal business practices or its internal procedural guidelines in laying off the whistleblower). For the foregoing reasons, I will grant Mr. Turner's request that GPC produce its corporate policy regarding the manner in which it routinely handles situations where an employee is no longer physically able to perform his/her functions. In this regard, if GPC does not have an Employee Handbook or specific policy pertaining to its operations at the PPPL, then it should produce its handbooks or other policy guidance that govern other DOE facilities where it operates in a contractor or subcontractor capacity.

The next contested discovery item is Document Request No. 6 in which Turner seeks the following: "[a]ll

job postings GPC had during the time period May 25, 1995 through September 1, 1996 and the contract numbers and names of the people who filled the positions." GPC responds that Turner never alleged that GPC refused to locate alternative employment for him in retaliation for his making a protected disclosure. Moreover, GPC states that Turner's request is overly broad and unduly burdensome. In addition, GPC claims that Turner was terminated in June 1995, implying that a search through September 1996 is not relevant. Finally, GPC maintains that Turner would not have been qualified to perform all jobs for which GPC had openings, noting also that Turner refused to consider positions that, in his opinion, did not pay a high enough salary.

The record reflects that GPC advised Mr. Turner that it had actively sought work for him, was unable to secure that work, and hence was forced to terminate him for lack of work. Exhibit 1, Attachment 4. The record also shows that on May 26, 1995, GPC sent an interoffice memorandum to its Tritium Shift Supervisors announcing that Mr. Turner would no longer be assigned to the PPPL and that GPC would be looking for a reassignment for Mr. Turner to a position which accommodates his needs and qualifications, should such a position become available. Exhibit 1, Attachment 6. Since Mr. Turner's removal from his Tritium Shift Supervisor position and his subsequent termination are central issues in this case, it is certainly relevant to explore GPC's representations that it attempted to locate other positions for Turner prior to its decision to terminate him. I find therefore that job postings within GPC for the period May 24, 1995, the date GPC removed Mr. Turner from his position, through June 22, 1995, the date GPC terminated Mr. Turner from their employ, are the proper subject of discovery. For the foregoing reasons, I will grant Document Request No. 6 in part, limiting the time period for which GPC must produce its job listings.

Document Request No. 14 that asks GPC to produce "[a]ll documents, memos, e-mail or other communications(s), whether written or oral, to or from any agency, commission, board, attorney, individual or other public body that relate to any claim asserted by any other party of claims including, but not limited to, those of any inappropriate action on the part of General Physics in their hiring and/or release of any employee or employee candidate from January 1, 1990 until the present day. I will deny this discovery request. Without question, GPC's hiring practices are not at issue in this proceeding. Moreover, I agree with GPC that unsubstantiated allegations of third parties concerning possible unlawful employment actions on GPC's part are unlikely to lead to any relevant or material information for purposes of this proceeding.

There are two parts to Document Request No. 16. GPC has agreed, in the spirit of cooperative discovery, to turn over all non-privileged documents that relate to that portion of Document Request No.16 that requests non-privileged documents prepared by certain enumerated GPC employees that relate in any way to Mr. Turner's employment with GPC, Mr. Turner's dismissal from PPPL, and Mr. Turner's termination from GPC's employ. The portion of the subject discovery request that GPC objects to asks GPC to describe the "day-to-day" relationship of several GPC employees with "General Physic's contract with Princeton." When I asked Mr. Turner during our telephone conference on July 1, 1999 to describe the relevancy of this portion of the request to an issue in the proceeding, he was unable to do so satisfactorily. I must therefore deny that portion of Mr. Turner's request for documents which asks for an enumeration of the day-to-day relationship of certain GPC employees to Princeton.

With respect to Document Request No. 17 and Interrogatory Nos. 2 and 3, all of which seeks information about and documentation from lay and expert witnesses that GPC intends to call at the hearing, I will require GPC to provide the requested information to me, Mr. Turner, and Princeton no later than July 16, 1999. I had previously requested all parties to furnish me with a number of items by July 12, 1999. See Letter from Ann S. Augustyn, Hearing Officer, to David Turner, Charles Wayne, and Katherine Buttolph (June 4, 1999). Those items included: (1) a list of witnesses each party intends to call at the hearing, together with a short summary of the testimony each expects to elicit from the witnesses, (2) all exhibits each party intends to refer to at the hearing, or intends to enter into the record of this proceeding, and (3) any requests for the issuance of subpoenas to secure the appearance of witnesses at the hearing. During the discovery status telephone conference on July 1, 1999, I informed the parties that the items enumerated

above will now be due on July 16, 1999. Since Document Request No. 17 and Interrogatory Nos. 2 and 3 duplicates the request I made of the parties in my June 4, 1999 letter, those discovery requests are granted. GPC will turn over responsive materials related to those three discovery requests no than July 16, 1999.

The final discovery request about which there is disagreement is Interrogatory No. 4 that asks the following question:

During the past 10 years, if you have been accused of any wrongful employment practices, violations of any disability laws, whether federal, state or local, list the date and the specifics of the complaint and the outcome of such complaint whether culminating in a court hearing or settled out of court or in any other way, shape or form.

I have carefully considered GPC's numerous objections to this discovery request (i.e. Turner did not allege he suffered unlawful retaliation (sic) with respect to any and all employment practices; Turner did not allege any unlawful employment practice by GPC; Turner did not allege GPC violated any state or federal disability law; OHA does not have jurisdiction over claims brought under state or federal disability laws) and the comments submitted by the parties at the July 1, 1999 status telephone conference. After due deliberation, I have decided to grant limited discovery on a discrete issue that is subsumed in Interrogatory No. 4.

OHA Hearing Officers have found it extremely helpful in evaluating Part 708 claims to examine how a company has treated employees similarly situated to the whistleblower. See Ronald Sorri, 23 DOE ¶ 87,503 (1993); Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996), aff'd, 27 DOE ¶ 87,508 (1997). Courts have also examined the treatment of similarly situated employees in determining whether ostensibly legitimate bases for adverse personnel actions are pretexts for punishing or getting rid of a whistleblower. See e.g. Kansas Gas & Electric Co. V. Brock, 780 F.2d 1505 (10th Cir. 1985)(requiring whistleblower to document his educational requirements while not applying similar requirements to other employees). To this end, I will require GPC to respond to the following re- phrased interrogatory:

During the last five years, describe how GPC has handled situations at DOE-owned contractor-operated facilities when one of GPC's employees has become physically unable to perform his/her job responsibilities. For each situation, identify the employee, his/her location, the nature of the physical disability, the reason why the physical disability impeded the employee's job functioning; what efforts GPC undertook to accomodate the employee; whether the employee filed any state, federal or administrative action against GPC and the disposition of any such action.

For all the discovery I have granted in whole or in part, GPC will tender responsive documents or respond to the interrogatories no later than July 16, 1999.

B. Turner's Motion for Discovery from Princeton (Case No. VWD-0005)

In his Motion for Discovery, as amended, Case No. VWD-0005, Turner seeks 21 documents from Princeton and requests that Princeton respond to four interrogatories. There appears to be no material dispute about any of the document production requests at issue. Princeton has agreed to furnish Mr. Turner with documents responsive to Document Request Nos. 1, 5, 6, 7, and 8. While objecting to discovery with respect to Document Request Nos. 14 through 20, Princeton has agreed, in the spirit of cooperative discovery, to turn over non-privileged responsive documents. For Document Request Nos. 2 through 4, 9, and 10, Princeton has provided adequate responses to the document requests. As for Document Request Nos. 11-13 which seek the last known address and telephone number for three former PPPL employees, Counsel for Princeton has agreed to facilitate Mr. Turner's contact with the former employees. Finally, with respect to Document Request No. 21 which seeks documents relating to the findings or opinions of any expert who is expected to testify at the hearing, Princeton responds that the request is premature. On this matter, I will direct Princeton to furnish information responsive to Document Request No. 21 to Mr. Turner, me and GPC no later than July 16, 1999, the same date Princeton's witness

list and exhibits are due.

Princeton has adequately responded to Interrogatory No. 1 in its July 1, 1999 submission commenting on the subject discovery motion. Regarding Interrogatory No. 2, Princeton will advise me and all other parties by July 16, 1999 of the identity of all witnesses and experts who are expected to testify, and otherwise comply with the instructions contained in my June 4, 1999 letter.

Interrogatory No. 4 is identical in substance to Interrogatory No. 4 posed by Mr. Turner to GPC. In short, the interrogatory seeks information about accusations of wrongful employment practices against Princeton over the last ten years as well as accusations that Princeton violated state and federal disability laws over the last ten years.

Princeton objects to this discovery request, arguing it is overbroad and unduly burdensome. In my opinion, it is not relevant to this proceeding whether Princeton in the past violated state and federal disability laws or wrongfully terminated employees. It is relevant, however, to learn how Princeton dealt with its subcontractors whose employees became physically unable to perform their job responsibilites. As stated in Section II.A. above, the manner in which companies treat similarly situated employees or, in this case, oversee its subcontractors handling of this issue is relevant to a Part 708 analysis. Therefore, Princeton will respond to the Interrogatory No. 4, as rephrased below:

During the last five years, describe how Princeton has handled situations at PPPL when an employee of one of its subcontactors has become physically unable to perform his/her job responsibilities. For each situation, identify the subcontractor, the nature of the subcontractor employee's physical disability, the reason why the physical disability impeded the subcontractor employee's job functioning; and what ultimately happened to the employee, if known.

Princeton will furnish its response to the interrogatory set forth above no later than July 16, 1999.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by David M. Turner on June 8, 1999, as amended on June 22, 1999, Case No. VWD-0003, be and hereby is granted as set forth in paragraph (2) below, and denied as set forth in paragraph (3) below;

(2) General Physics Corporation shall submit to Mr. Turner no later than July 16, 1999 non- privileged documents responsive to Document Request Nos. 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 15, and that portion of 16 that requests non-privileged documents prepared by certain enumerated employees of General Physics Corporation that relate in any way to Mr. Turner's employment with General Physics Corporation, Mr. Turner's dismissal from Princeton University, and Mr. Turner's termination from the employ of General Physics Corporation. General Physics Corporation shall also furnish Mr. Turner no later that July 16, 1999 with responses to Interrogatories Nos. 1, 2, and 3. No later than July 16, 1999, General Physics Corporation will also furnish Mr. Turner with documents responsive to revised Document Request Nos. 3 and 6, and a response to revised Interrogatory No. 4, only to the extent set forth in the foregoing Decision and Order.

(3) Mr. Turner's Request for Production of Document No. 14, and that portion of Document Request No. 16 which seeks the day-to-day relationship of certain employees of General Physics Corporation to Princeton University, are denied.

(4) The Motion for Discovery filed by David M. Turner on June 8, 1999, as amended on June 22, 1999, Case No. VWD-0005) be and hereby is granted as set forth in paragraph (5) below and denied in all other respects.

(5) No later than July 16, 1999, Princeton University shall furnish Mr. Turner, consistent with the terms of the foregoing Decision and Order, non-privileged documents responsive to Document Request Nos. 1

through 21. By that same date, Princeton University will respond to Interrogatory Nos. 1, 2, and 3. With respect to Interrogatory No. 4, Princeton University shall respond, no later than July 16, 1999, to the re-phrased interrogatory set forth in the foregoing Decision and Order.

(6) This is a final Order of the Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: July 8, 1999

(1)In the interim, the DOE's Office of Nuclear Safety Enforcement initiated a separate investigation into the safety issues raised by Turner as they related to the Tokamak Fusion Reactor project at PPPL. During its investigation, the Nuclear Safety Enforcement investigators conducted a five-hour deposition of Mr. Turner. In May 1996, the Office of Nuclear Safety advised the IG of its conclusion that Mr. Turner had some valid observations regarding the need for clarification and enhanced descriptive language in the Final Safety Analysis Report for the Tokamak Fusion Test Reactor. See Memorandum dated May 29, 1996 from R. Keith Christopher, Director, Enforcement and Investigation Staff, to James E. Sheldon, III, Investigation Team Leader, Office of Employee Protection.

(2)This situation exemplifies the wisdom of the DOE's decision not to mandate discovery in all situations as suggested by one of the commenters to the proposed interim final rule revising the Part 708 regulations. See 64 Fed. Reg. 12862 at 12867 (March 15, 1999). To do so in this case might have, in my opinion, unduly burdened the whistleblower, and delayed this proceeding beyond reason.