July 11, 1997

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: EG&G Rocky Flats, Inc.

Date of Filing: June 13, 1997

Case Number: VWZ-0008

This decision will consider a Motion for Partial Dismissal and Limitation on Scope of Complainant's Claims filed by EG&G Rocky Flats, Inc. (EG&G) on June 13, 1997. In its motion, EG&G seeks partial dismissal of the underlying complaint and hearing request filed by Arthur Murfin (Murfin) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Murfin's request for a hearing under 10 C.F.R. § 708.9 was filed on January 27, 1997, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0016.

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. 57 Fed. Reg. 7533 (March 3, 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.

On September 27, 1982, Murfin was hired as a machinist by Rockwell Rocky Flats (Rockwell), then the management and operating (M&O) contractor at DOE's Rocky Flats Field Office. On November 20, 1987, while employed in the Future Systems Department, Murfin provided information to a Congressional investigator about possible misappropriation of government funds occurring in the Future Systems Department. In February 1988, Murfin was transferred from Future Systems to the Special Assembly Group. He initially agreed to the transfer, but then reconsidered because of the possibility of adverse physical consequences the new position would have on an existing medical condition, dermatitis. Despite this, he was reassigned and on February 29, 1988, he filed a complaint with Rockwell's Employee Relations Office stating that he was transferred against his will. He alleged

in his complaint that this transfer was an act of reprisal against him for disclosing information to the investigator in 1987.

Shortly after the February 1988 transfer, Murfin allegedly reported to his Special Assembly supervisor, Mr. Brown, that certain equipment was being improperly used or serviced. Murfin contends that this was an "employee health and safety" disclosure as set forth in the whistleblower regulations. In June 1988, Murfin experienced severe dermatitis on his hands and arms and on June 23, 1988, was temporarily reassigned to work for Mr. Reed Hodgin in Atmospheric Sciences. On September 15, 1988, the Rockwell staff physician wrote to Mr. Brown, instructing him that Murfin should not be assigned to work that would aggravate his medical condition.

On September 28, 1988, Murfin wrote to Congressman David E. Skaggs (R.-Colorado) and stated that he

felt his transfer to Special Assembly was punishment for his participation in the Congressional investigation the prior year. On October 8, 1988, Congressman Skaggs informed Murfin that he had requested that DOE review Murfin's case.

On November 14, 1988, Murfin received a performance rating of "needs improvement," the lowest rating in a three-tiered system. On November 21, 1988, Mr. Albert Whiteman, DOE Rocky Flats Area Manager, informed Congressman Skaggs that Murfin would be transferred from his current position, where he was dissatisfied, and would be provided training for a new position. The letter also stated that retaliation against Murfin would not be tolerated. On December 1, 1988, Murfin was reassigned to the position of Technical Writer, a position for which he maintains he did not have the proper skills, training, or background. On January 23, 1989, Murfin was reassigned within the Program Management department from Technical Writer to the W82 Program, a job that Rockwell management felt better suited his background. On October 12, 1989, Murfin's 1989 performance was evaluated at a "needs improvement" level. On December 31, 1989, Rockwell discontinued its management and operation of Rocky Flats and EG&G assumed operation of the facility on January 1, 1990. On May 31, 1990, Murfin was evaluated in an interim performance evaluation, and received an overall rating of "meets or exceeds job requirements." On August 24, 1990, the November 1988 letter from Whiteman to Congressman Skaggs was placed in Murfin's personnel file. In October 1990, Murfin was reassigned from the W82 Program to the 440/460 facilities. In February 1991, Murfin's 1990 performance was evaluated as "effective." This was his first full year appraisal under EG&G management. In January 1992, Murfin received his 1991 evaluation; this time he was rated as "highly effective."

On September 8, 1992, the EG&G General Counsel requested the cooperation of 26 employees, including Murfin, in searching for documents relevant to Rockwell's litigation relating to its prior operation of Future Systems at Rocky Flats. Murfin responded later that month, indicating that he had some documents in his possession and could locate others. On December 9, 1992, Murfin was evaluated as "effective" for 1992. On February 15, 1994, Murfin filed a complaint pursuant to Part 708 with DOE Rocky Flats Office. On April 5, 1994, Murfin was evaluated as "effective" for 1993. On December 10, 1994, Murfin amended his complaint to include additional allegations of reprisal including management's failure to consider him for promotion and allegedly marked differences in pay between Murfin and a named co-worker with similar responsibilities. On March 16, 1995, Murfin again amended his complaint to add allegations of reprisal consisting of the cancellation of a training course for which he had enrolled and his termination through a Reduction-in-Force (RIF) in March 1995. Later in 1995, Kaiser-Hill assumed management of the facility from EG&G, and continues to operate Rocky Flats today.

In summary, Murfin alleges six actions of reprisal by his employers: (1) an involuntary transfer in February 1988 from Future Systems Department to the Special Assembly Engineering Group, (2) unfavorable performance evaluations in 1988, 1989, and 1990, (3) non-selection by management for other positions within his department, (4) disparate salary enhancements compared to his co-workers, (5) denial of training, and (6) termination through a RIF in March 1995.

On January 3, 1997, the now-defunct DOE Office of Contractor Employee Protection (OCEP) finalized its Report of Investigation and Proposed Order (ROI). OCEP found, inter alia, that several of the alleged incidents of retaliation were not covered under Part 708, were not timely filed, or were not subject to relief. In general, OCEP concluded that a preponderance of the available evidence did not support a finding that Murfin's protected disclosures contributed to his limited salary enhancements, termination through a RIF, or failure to be promoted. OCEP found no prohibited retaliation. On January 21, 1997, Murfin submitted a request for a hearing to OCEP, and the OHA received that request on January 27, 1997.

On June 13, 1997, EG&G filed the motion under discussion. In its motion, EG&G argues that two of Murfin's claims of reprisal should be dismissed. These are the alleged reprisals based on Murfin's transfer in 1988 and on his 1988, 1989, and 1990 performance appraisals. Further, EG&G argues that two other claims should either be stated with more specificity or be dismissed. These are the alleged reprisals based

on Murfin's claim of "non-selection" for other positions and on his limited salary enhancements. On June 23, 1997, Murfin filed a response to EG&G's motion, and on June 26, 1997, EG&G filed a reply to Murfin's response. For the reasons stated below, I will grant EG&G's motion in part, and deny the motion in part.

II. Analysis

A. EG&G's Liability for Alleged Reprisals That Occurred in 1988, 1989 and 1990

EG&G argues that because it did not become the Rocky Flats M&O contractor until January 1, 1990, it has no liability for any alleged reprisals that occurred prior to that date. These alleged reprisals are the February 1988 involuntary transfer and the unfavorable 1988 and 1989 appraisals, which occurred while Rockwell was managing the site. It also argues that the 1990 performance appraisal of Murfin, though it was issued after EG&G had assumed management of Rocky Flats on January 1, 1990, creates no liability because it was in fact not a reprisal. For the reasons set forth below, I will dismiss Murfin's claims that are based on these alleged reprisals.

In its motion, EG&G submits, among other contentions, that the whistleblower regulations at 10 C.F.R. Part 708 do not apply to the alleged reprisals that occurred in 1988, 1989 and 1990. I agree with EG&G. 10 C.F.R. § 708.2 gives this proceeding jurisdiction over complaints of reprisal that were filed after the effective date of Part 708 (April 2, 1992), where the acts of reprisal occurred after that date, if the reprisal stems from health and safety matters. All other complaints, for example, those that stem from disclosures of fraud or mismanagement or participation in a congressional proceeding, must relate to acts of reprisal that occurred after both the effective date of the regulations and the date on which the underlying procurement contract contains a clause requiring compliance with the whistleblower regulations. 10 C.F.R. § 708.2(a). EG&G amended its contract to incorporate the provisions of 10 C.F.R. Part 708, effective April 2, 1992. Report of Investigation at 2. Under these circumstances, the whistleblower regulations apply to EG&G reprisals that occurred after April 2, 1992, regardless of the nature of the disclosure from which they stem. Conversely, the whistleblower regulations do not apply to any reprisals that Murfin has alleged to have occurred before April 2, 1992, which include the 1988 involuntary transfer and the performance appraisals issued in 1988, 1989 and 1990. See Mehta v. Universities Research Ass'n, 24 DOE ¶ 87,514 at 89,064 (1995) (Mehta) (Deputy Secretary decision); Richard W. Gallegos, 26 DOE ¶ 87,502 at 89,004 (1996) (application of regulations to reprisals stemming from non-health and safety matters limited to those that occurred after adoption of contractual provision). (1)

EG&G has argued that "no evidence related to this disclosure or purported act of retaliation should be permitted at the hearing in support of Complainant's claim." Motion at 3. With respect to timeliness, the regulations governing this proceeding consider the scope of coverage in terms of reprisals, not disclosures. 10 C.F.R. § 708.2(a). Therefore, although the whistleblower regulations are limited in their application to acts of reprisal that occur after April 2, 1992, those reprisals may stem from protected disclosures made before that date. Consequently, although I will exclude from this proceeding any evidence related to the alleged reprisals that occurred in 1988, 1989 and 1990, I will nevertheless accept evidence concerning the 1987 and 1988 disclosures themselves, provided it relates to an alleged act of reprisal that occurred after April 2, 1992.

B. The Sufficiency of Two Allegations of Reprisal

The balance of EG&G's Motion argues that two of Murfin's allegations of reprisal are stated so broadly and generally that they "should be stated with more particularity, or in the alternative, dismissed." Motion at 7-8. EG&G contends that in order to meet his burden, Murfin must set forth more details in order to provide EG&G the chance to focus its defense on specific transactions. In his complaint, Murfin alleges (1) that he was not selected for vacant positions within his department and (2) that he did not receive salary enhancements in line with colleagues of similar seniority and position. EG&G submits that without knowing, for example, which positions Murfin applied for and was denied, EG&G bears the heavy burden

of justifying each personnel decision made in every department that employed the complainant. Motion at 7. Further, EG&G argues that Murfin has provided only anecdotal evidence to support his view that he received lower raises than others in comparable positions at Rocky Flats, and even if this allegation were true, the complainant has not provided any evidence that his allegedly below average pay raises reflect a retaliatory act. Id.

A motion to dismiss is appropriate only 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 Office of Hearings and Appeals considers dismissal "the most severe sanction that we may apply," and has stated that it will be used sparingly. See Boeing, 24 DOE at 89,005. Based upon this standard, I am not persuaded that Murfin's claim should be dismissed at this point in the proceeding. Instead I will direct that Murfin be permitted to supplement the record concerning non-selection for specific positions and that EG&G provide compensation histories for employees who fall within the parameters described below.

In previous cases, the Office of Hearings and Appeals has found that in order to achieve the purpose of the whistleblower protection program, i.e., encouraging employees to come forth with protected disclosures, it is important not to hold these employees to the strictest standards of technical pleading. See Westinghouse Hanford Company, 24 DOE ¶ 87,502 at 89,011 (1994) (Westinghouse). As EG&G points out, however, the regulations state that a complaint must contain a "statement setting forth specifically the nature of the alleged discriminatory act." 10 C.F. R. § 708.6 (c) (emphasis added). Nevertheless, I note that the Director of OCEP accepted for processing all of the claims that Murfin raised in his complaint and his subsequent modifications.

Murfin argues in his response that general claims of reprisal are sufficient to meet his burden of establishing whistleblower retaliation, and relies on the Spaletta decision for support of that position. Spaletta, 24 DOE at 89,052. Contrary to Murfin's contention, the complainant in Spaletta did not make "general accusations of reprisal." In fact, the hearing officer consistently held the complainant to the standards of specificity established in previous cases. Spaletta's allegation that he received fewer work assignments after making protected disclosures was easily verifiable, and by no means a "general accusation of reprisal." He was assigned jobs by referral from other groups, and when these referrals declined it was not difficult to quantify the decreased demand for his particular services in the years following his disclosures. Id. at 89,052-54. As for the "general accusation" that Spaletta received minimal raises, Spaletta submitted uncontroverted evidence of a "precipitous decrease" in his pay raises in the years following his protected disclosures. Id. at 89,055. The hearing officer used this evidence to "meet [complainant's] burden of showing that his disclosures were a contributing factor in those merit increases." Id. The final alleged "general accusation" that Murfin describes in his response, Spaletta's constructive termination, was not accepted as an act of reprisal because Spaletta could not prove this claim. Id. at 89,057. Therefore, we will hold Murfin to the standards of specificity required of all whistleblower complainants.

The purpose of the requirement that a complaint be specific is to avoid unfairness to the contractor. Westinghouse at 89,011. In this case, EG&G has persuasively argued that two allegations contained in the current complaint, as they now stand, would unfairly cause EG&G to expend an inordinate amount of time trying to respond to very broad allegations.

With respect to the allegation of non-selection, Murfin should be able to provide information about specific positions for which his not being selected were acts of reprisal. In his May 18, 1997 submission and in a telephone conference on June 6, 1997, Murfin clarified that he wishes to limit his claim of reprisal concerning non-selection to those positions in the department in which he was employed. I will direct him to produce a list of all positions, not later than July 21, 1997, with approximate titles and dates, for which it is his contention that his non-selection was an act of reprisal. In the event Murfin fails to produce this list, I will dismiss this portion of his claim.

As for the allegation of inadequate pay raises, I agree with Murfin's contention that the data which would permit comparison of his compensation history with those of others similarly situated more likely lies within the control of EG&G than within his own. I also agree with EG&G that union wages, such as those Murfin earned as a machinist, are not easily compared to non-union wages, such as those Murfin earned after his 1988 transfer. As stated above, I find that the whistleblower protections provided in 10 C.F.R. Part 708 do not apply to that transfer or to any other alleged reprisal that occurred before April 2, 1992. Therefore, no remedy is available under these regulations for any adverse effects of those alleged reprisals. Any comparison of Murfin's compensation should be made to others who had positions similar to his immediately before the first act of alleged reprisal that is covered by the regulations. See Daniel L. Holsinger, 25 DOE ¶ 87,503 at 89,015 (1996); Spaletta, 24 DOE at 89,058. Because it appears that performance appraisals affected pay raises, I will direct EG&G to produce, not later than July 25, 1997, compensation histories (with personal identifiers deleted) for employees who held positions similar to that of Murfin as of April 2, 1992, beginning with the period for which such employees were rated in their first performance appraisal issued after that date and ending with the date of Murfin's termination from EG&G. I reiterate that EG&G will not be required to produce documents that do not exist, nor perform involved analysis to meet this demand. Because EG&G is the party more likely to be able to produce the data necessary to support this claim, I will not dismiss this claim at this time. I again encourage the parties to cooperate with each other to determine the type of information, readily available to EG&G, that would satisfy Murfin's needs yet not be a burden upon EG&G to produce.

D. Other Matters

In his response to EG&G's motion, Murfin raises two additional matters. First, based on the language of 10 C.F.R. § 708.2(c), Murfin argues that his complaint should be processed even if it extends beyond the scope of the regulations. Second, he contends that he need not produce all his evidence before the hearing itself, but rather may present it at that time. I will address each in this section.

Section 708.2(c) of the whistleblower protection regulations states

For complaints not covered by § 708.5(a) [which provides that DOE contractors may not take adverse action against employees who make specified disclosures], the Director, at his discretion and for good cause shown, may accept a complaint for processing under this part. . . . A determination by the Director not to accept a complaint pursuant to this subsection may be appealed to the Secretary or designee.

10 C.F.R. § 708.2(c). The regulations define "Director" as the Director of the Office of Contractor Employee Protection (OCEP), now a part of the Office of the Inspector General. 10 C.F.R. § 708.4. Murfin argues that even if parts of his complaint are not covered by section 708.5(a), the Director or the Secretary of Energy may, for good cause shown, process his complaint. He contends that good cause is established in a letter from the Rocky Flats Manager to Congressman Skaggs, in which the Manager states that Rockwell "will not tolerate retaliation or discrimination against Murfin or any other Rocky Flats employee." Letter from Albert E. Whiteman, Area Manager, to Representative David E. Skaggs, November 21, 1988. This provision confers discretion upon the Director of OCEP to accept complaints that are not strictly covered by section 708.5(a). In this case, OCEP accepted for processing, investigated and reached a proposed determination for each of the allegations of reprisal that Murfin raised in his complaint. That OCEP ultimately concluded that Murfin's complaint lacked merit does not alter the fact that OCEP accepted the entire complaint for processing, which is the subject of the provision under discussion here. Therefore, this provision will not be considered in this proceeding. Moreover, if Murfin desired to challenge OCEP's failure to exercise its discretion to accept his complaint, this section dictates that he raise that appeal to the Secretary of Energy, not to the OHA.

Murfin's remaining contention is that he may present documentary evidence at the time of the hearing even if he has not provided it to me and to EG&G in advance. This, of course, is generally true. (2) The reasons for exchanging information in advance of the hearing are many. First, it eliminates the element of surprise by allowing each party to prepare fully for the arguments that the other party or parties will present.

Second, it speeds and smooths the flow of the hearing by eliminating the need to establish the authenticity of evidence during the hearing itself. Third, it permits the parties to discuss the relevance and necessity of the evidence, which in turn may lead to stipulations or other forms of agreement regarding matters that are not in dispute. Finally, it eliminates the possibility that a document may be successfully challenged at the hearing and possibly excluded from the record and thus from my consideration. Therefore, although the parties may, if necessary, introduce documents at the hearing itself, I will continue to encourage them to prepare for full disclosure before the hearing of all documents and witnesses they intend to rely upon at the hearing.

It Is Therefore Ordered That:

(1) The Partial Motion to Dismiss and Limitation on Scope of Complainant's Claims filed by EG&G Rocky Flats, Inc. on June 13, 1997, is granted in part and denied in part as set forth in Paragraphs 2 through 5 below.

(2) The allegation of reprisal resulting from the alleged February 1988 involuntary transfer is dismissed with prejudice.

(3) The allegations of reprisal resulting from the 1988, 1989 and 1990 performance appraisals are dismissed with prejudice, insofar as the allegation is against EG&G Rocky Flats, Inc.

(4) Not later than July 21, 1997, the Complainant shall provide EG&G with additional documentation on any positions within his department for which it is his contention that his non- selection was an act of reprisal.

(5) Not later than July 25, 1997, EG&G shall produce compensation histories (with personal identifiers deleted) for employees who held positions similar to that of Murfin as of April 2, 1992, as set forth in the above Decision.

(6) This is an Interlocutory Order of the Department of Energy.

William Schwartz

Hearing Officer

Office of Hearings and Appeals

Date: July 11, 1997

(1)Murfin contends that the whistleblower regulations apply to reprisals that predate the April 2, 1992 effective date of the regulations, provided they stem from health and safety disclosures. See Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,055 (1995) (Spaletta). Although Spaletta considered a claim that the contractor retaliated against the complainant by reducing his annual merit pay increases for the years 1989 through 1991, events have overtaken this decision. The agency's position now is that the whistleblower regulations do not apply to reprisals that occurred before their effective date, April 2, 1992. See Mehta.

(2)Nevertheless, the hearing officer may establish deadlines for the production and exchange of documentary evidence. If necessary to ensure justice and prevent unfairness to one or more of the parties, the hearing officer may exclude such evidence that is produced after the deadlines.