Case No. VWZ-0011

May 19, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: West Valley Nuclear Services Co., Inc.

Date of Filing: May 18, 1999

Case Number: VWZ-0011

This decision considers a “Motion to Dismiss” filed by West Valley Nuclear Services, Inc. (West Valley) on May 18, 1999. In its Motion, West Valley seeks the partial dismissal of a Complaint filed by John L. Gretencord (Gretencord) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Mr. Gretencord requested a hearing on his Complaint under 10 C.F.R. Part 708 on March 19, 1999, and it has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0033. The present Motion has been assigned Case No. VWZ-0011.

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). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 F. R. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Part 708's 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 an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . .” 10 C.F.R. § 708.5(a).

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 15, 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

After conducting an investigation of Gretencord's allegations, the IG issued a Report of Investigation (the Report) on February 11, 1999. The Report found that: "[A] preponderance of the available evidence supports a finding that during his employment and work in quality assurance, [Gretencord] disclosed various concerns to [West Valley] officials and to DOE about possible safety violations and incidents of possible rule infractions." Report at 5. However, the Report further found that: "[A] preponderance of the

available evidence does not indicate that the substance of [Gretencord's] 'good faith' concerns contributed to actions that were taken against him." *Id.* at 6. The Report further states: "It is the conclusion of this inquiry, based upon information obtained through interviews of [West Valley] employees and supporting documents, that the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosures." *Id.* at 8. On March 8, 1999, DOE received Gretencord's request for a hearing.

On May 18, 1999, OHA received the present Motion to Dismiss. If the motion were granted, Gretencord would be barred from asserting any claims based upon alleged retaliatory acts that occurred more than 90 days before filing the Complaint.

II. Analysis

10 C.F.R. § 708.14 currently provides that a complaint should be filed "by the 90th day after the date [that the employee] knew or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). West Valley asserts that the portion of Gretencord's Complaint based upon retaliatory acts that allegedly occurred prior to December 17, 1996, which is 90 days before March 19, 1997, the date on which Gretencord filed his Part 708 Complaint with DOE's Office of Inspector General is time-barred because it was filed more that 90 days after the discriminatory acts alleged by the complainant. Affidavit in Support of Motion to Dismiss at 2.

The Report of Investigation (the Report) in this matter was issued on February 11, 1999, by the Assistant Inspector General for Inspections. DOE had not yet issued the Interim Final Rule when Gretencord filed his Complaint and when the IG issued the Report. (1) The regulations in place when the Report was issued provided that the IG could accept the Complaint, unless it determined that the Complaint was untimely. Former 10 C.F.R. § 708.8(a)(2). (2) While it is true that the former Section 708.6(d) stated that a complaint must be filed within 60 days after the alleged discriminatory act occurred, an appropriate DOE official, could extend "all time frames" set forth in the Former Part 708. (3) It is therefore clear that under the previous regulations, the decision to accept a complaint filed after the 60-day period in 708.6(d) was within the discretion of the IG. In the present case, the IG did not dismiss any portion of the complaint as untimely, and there is nothing in the record to suggest that it abused its discretion.

In its Motion to Dismiss, West Valley attempts to avoid this conclusion by characterizing the 60-day time period in 708.6(d) as jurisdictional. In *Sandia National Laboratories*, 23 DOE 87,501 (1993) (*Sandia*), we considered, and ultimately rejected, the same argument. There is nothing in the former Part 708 that would indicate that the 60-day period was meant to be jurisdictional in nature. (4)

West Valley tries to analogize the Part 708 proceedings to the employee protection schemes administered by the Department of Labor (DOL), where, West Valley correctly notes, the courts have strictly enforced a limitations period imposed by Statute. Affidavit in Support of Motion to Dismiss at 4. However, as pointed out by West Valley, the time limits imposed in DOL proceedings are expressly prescribed by statute. *See* Solid Waste Disposal Act, 42 U.S.C. 6971; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Comprehensive Environmental Response, Compensation and Liability Act of 1974, 42 U.S.C. 9610; Toxic Substances Control Act, 15 U.S.C. 2622; Energy Reorganization Act, 42 U.S.C. 5851; Federal Water Pollution Control Act, 33 U.S.C. 1367; Clean Air Act, 42 U.S.C. 7622. By contrast, the more flexible time frames governing this proceeding originated in the Part 708 regulations, which were not mandated by a specific statute, but were issued pursuant to the broad authority granted the DOE to manage the Government Operated- Company Owned facilities in its nuclear weapons complex by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201, the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5814 and 5815, and the Department of Energy Organization Act, as amended, 42 U.S.C. 7251, 7254, 7255, and 7256. Indeed, there are a number of reasons why 708.6(d) should not be read as barring the investigation of a complaint that is filed more than 60 days after the alleged discriminatory act occurred or should reasonably have been discovered. *See Sandia*, 23 DOE at 89,002-03.

First, the DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. The regulations should be construed in a manner which furthers this policy. It is clear from the regulatory history of Part 708 that the 60-day time limitation for the submission of complaints was never intended as an ironclad technical requirement. *Id*.; *see also* *Sandia*, *supra*.

Second, the preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint of discrimination was to ensure the investigation of complaints would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. at 7537 (March 3, 1992). That is surely a legitimate concern. However, West Valley's argument that fading memories may hamper its defense in this case, given its posture, is purely speculative at this time. At this stage in the proceeding there is no evidence that any delay in the filing of the complaint is hampering West Valley's ability to present its defense. Moreover, I fail to see how any delay conceivably worked to the detriment of West Valley, since the Report found in favor of the company with regard to the complainant's allegations.

III. Conclusion

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted 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. *Lockheed Martin Energy Systems, Inc*., 27 DOE ¶ 87,510 (1999); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997)(*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Moreover, this Office has found that, in order to further the purposes of the whistleblower protection program, which include encouraging employees to come forth with protected disclosures, it is important not to hold parties to proceedings under 10 C.F.R. Part 708 to the strictest standards of technical pleading. *EG&G*, *supra*; *Westinghouse Hanford Company*, 24 DOE ¶ 87,502 at 89,011 (1994) (*Westinghouse*). Accordingly, the Motion to Dismiss filed by West Valley Nuclear Services Co., Inc. on May 18, 1999 should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by West Valley Nuclear Services Co., Inc., on May 18, 1999, Case No. VWZ-0011, is hereby denied.

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

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: May 19, 1999

(1)I have conducted my review of the IG's determination under the regulations in place at the time of the determination. However, the results and the reasoning would not be different under the Interim Final Rule.

(2)The Interim Final Rule moves the responsibility for initial jurisdictional determinations from the IG to the Head of Field Element or Employee Concerns Director (as applicable). 10 C.F.R. § 708.17.

(3)The Interim Final Rule clearly provides the Head of Field Element or Employee Concerns Director

with the discretion to accept a complaint filed after the 90 day period set forth in 10 C.F.R. § 708.14(a). 10 C.F.R. § 708.14(d).

(4)10 C.F.R. § 708.14(d) of the Interim Final Rule clearly indicates that the 90-day period set forth in 10 C.F.R. § 708.14(a) was not intended to be jurisdictional in nature