

Case No. VWZ-0016

November 8, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: Charles Montaña

Date of Filing: October 4, 1999

Case Number: VWZ-0016

This decision considers a Motion to Dismiss filed by Charles Montaña (Montaña) on October 4, 1999. In his Motion, Montaña seeks dismissal of the hearing scheduled to begin on November 16, 1999 and judgment on the existing record for the Whistleblower Complaint that he filed against the University of California (the University) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. His Complaint under 10 C.F.R. Part 708 has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0042. The present Motion has been assigned Case No. VWZ-0016.

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 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 that furthers this policy.

Montaña has been employed by the University as a Senior Auditor from June 12, 1987 to the present. On February 14, 1996, Montaña filed a complaint under 10 C.F.R. Part 708 with the DOE's Albuquerque Operations Office (Albuquerque). In this complaint, Montaña alleged that he was retaliated against for disclosures of possible fraud and mismanagement. On April 4, 1996, Montaña filed a second complaint under 10 C.F.R. § 708 alleging further retaliation.

After conducting an investigation of Montaña's allegations, the DOE's Office of Inspector General (the IG) issued a Report of Investigation (the Report) on April 14, 1999. The Report found that: "The evidence in the record indicates that [Montaña] made protected disclosures to Los Alamos National Laboratory Management (LAND) at public forums, to members of Congress, the DOE, and [the IG] regarding possible violations of law, rule, or regulation related to non-compliance with the terms and conditions of the LANL contract." Report at 31. The Report further found that: "[Montaña] has established by a preponderance of the available evidence that his protected disclosures contributed to the alleged retaliatory actions taken against him." *Id.* The Report further states: "We also find that [the UC] has failed to show by clear and convincing evidence that the adverse actions taken against [Montaña] would have occurred absent his protected disclosures." *Id.*

In its present motion, Montañó claims that the University failed to file its request for a hearing in a timely manner. Specifically, Montañó, citing the former 10 C.F.R. § 708.9(a), claims that the University received a copy of the Report on April 19, 1999, but failed to file its request for a hearing until May 6, 1999, which in Montañó's view, is two days later than allowed by the former 10 C.F.R. § 708.9(a).

If Montañó's motion were granted, the University's Request for a Hearing would be dismissed and my decision would be based upon the existing record, which consists of the investigatory file compiled by the Office of Inspector General (the IG) in the course of its initial investigation of Montañó's Whistleblower complaints. In effect, the University would be deprived of an opportunity to conduct discovery and to present relevant testimony under oath at a hearing.

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) (*E.G.&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 held 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*).

Most importantly, the criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 Fed. Reg. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Accordingly, the purely procedural regulation cited by Montañó was superseded by the Interim Final Rule which took effect on the very same day that the IG issued the Report. Under the Interim Final Rule, the matter proceeds to a hearing automatically without any requirement for a party to file a request for a hearing. Since the University did not need to file a request for hearing under the controlling regulations, Montañó's contentions are without merit. Accordingly, the Motion to Dismiss filed by Charles Montañó on October 4, 1999, is denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Charles Montañó, on October 4, 1999, Case No. VWZ-0016, 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: November 8, 1999