

**United States Department of Energy  
Office of Hearings and Appeals**

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| In the Matter Robert Schweiger | ) |           |             |
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| Filing Date: February 2, 2016  | ) | Case No.: | WBU-16-0001 |
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Issued: March 4, 2016

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**Decision and Order**

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Robert Schweiger, a former employee of Bechtel National, Inc. (BNI), appeals the dismissal of a Complaint that he filed under the Department of Energy’s (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Mr. Schweiger, who was terminated from BNI on July 2, 2015, filed this Complaint with the DOE’s Office of River Protection (ORP) on September 30, 2015. After the ORP dismissed his Complaint on January 19, 2016, he appealed that dismissal on February 2, 2016. As explained below, we will deny the Appeal.

**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 purpose is to encourage contractor employees to report unsafe, illegal, fraudulent, or wasteful practices and to protect those “whistleblowers” from reprisals by their employers. The regulations governing the program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

The Part 708 regulations provide, in pertinent part, that a DOE contractor may not discharge or take some other reprisal action against an employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a).

Under Part 708, the DOE office initially receiving a Complaint may dismiss the Complaint due to lack of jurisdiction or for other good cause. 10 C.F.R. § 708.17(a). Such a dismissal is appropriate under any of the following circumstances: (i) the Complaint is untimely, (ii) the facts, as alleged in the Complaint, do not present issues for which relief can be granted under Part 708, (iii) the employee filed a complaint under State or other applicable law with respect to the same facts as alleged in the Part 708 Complaint, (iv) the Complaint is frivolous or without merit on its face, (v) the issues presented in the Complaint have been rendered moot by subsequent events or substantially resolved, or (vi) the employer has made a formal offer to provide the remedy that was requested in the Complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c).

## **B. Termination**

Mr. Schweiger began working for BNI in July 2007. BNI's Motion to Dismiss (December 1, 2015) (Motion to Dismiss) at 1. He served as a field piping engineer at BNI's Waste Treatment Plant (WTP) project at the DOE's Hanford Site in Washington state.<sup>1</sup> *Id.* In the years before his termination, BNI found Mr. Schweiger's performance unsatisfactory. *Id.* at 2. BNI placed him on a Performance Improvement Plan (PIP) in December 2013 and again in January 2015. *Id.*

On July 2, 2015, BNI terminated Mr. Schweiger's employment. *Id.* A termination letter from BNI's construction manager to Mr. Schweiger states that BNI decided to terminate him due to performance problems, including "poor safety practices" and "ongoing carelessness" in his work habits. *Id.* at Attachment 2. The letter describes an incident precipitating his dismissal in which he allegedly told craft workers to install an unsuitable or incorrect part in the WTP. *Id.* The letter indicates that another factor in his termination was that his performance did not improve despite receiving instruction and training designed to address performance issues. *Id.*

## **C. Complaint**

Mr. Schweiger filed his Complaint with the ORP on September 30, 2015. Complaint from Robert Schweiger to Roger Gordon, Employee Concerns Manager, ORP (September 30, 2015) (Complaint) at 1. His 29-page Complaint consists of 11 single-spaced pages of arguments and 18 pages of attached emails and other documents. At the outset of his Complaint, Mr. Schweiger alleges an "abuse of authority" by BNI. *Id.* He also states that "[t]here appears to be a small amount of waste of funds" but that "it is not a gross action or amount." *Id.* The Complaint continues: "There appears to be retaliation that developed as a response to complaining about an individual that appears to be above reproach or the sharing of my involvement in a previous nuclear whistleblower activity." *Id.*

The rest of the Complaint outlines, in detail, what Mr. Schweiger characterizes as failures by his supervisor, and BNI management more generally, to treat him fairly. These include not providing him sufficient guidance and training, not setting realistic expectations for him and failing to listen

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<sup>1</sup> BNI is constructing the Hanford Waste Treatment and Immobilization Plant, a plant that will process radioactive and chemical waste stored at the Hanford Site. See About the Project, at <http://www.hanfordvitplant.com/about-project> (last visited March 1, 2016).

to his input. *Id.* at 2-11. Among his assertions, he claims that his supervisor assigned him unnecessary work, thereby wasting government money. *Id.* at 4, 10. He also contends that the amount of work he was assigned forced him to work unpaid overtime hours. *Id.* at 2, 4, 9. As to BNI's decision to hold him responsible for installing an incorrect part, he attributes the error to BNI not providing him proper training.<sup>2</sup> *Id.* at 11.

In terms of disclosing information, Mr. Schweiger mentions several instances in which he communicated to BNI management that the company managed its employees poorly or unfairly. For instance, he claims that he went to a senior manager, above his immediate manager, on November 14, 2013, to complain about his manager. *Id.* at 5-6. He states that he met with HR officials on multiple occasions, including on March 14, 2014. *Id.* at 8-9. During the March 14, 2014, meeting, he claims that he tried to discuss "programmatic weaknesses" at BNI but that the HR officials did not listen to him. *Id.* at 8-9. During this meeting, he also informed HR officials that he had worked overtime hours. *Id.* at 9. Mr. Schweiger further indicates that on January 28, 2014, he contacted DOL to complain about BNI management.<sup>3</sup> *Id.* at 8.

#### **D. Dismissal**

On October 21, 2015, the ORP forwarded Mr. Schweiger's Complaint to BNI, which responded on December 1, 2015. In its response, BNI asked the ORP to dismiss the Complaint as "frivolous or without merit on its face" pursuant to 10 C.F.R. § 708.17(c)(4). Motion to Dismiss at 6.

BNI argued that Mr. Schweiger's Complaint fails to explain how anything he disclosed could constitute a protected disclosure under Part 708. *Id.* at 5. BNI contends that the Complaint essentially alleges only that Mr. Schweiger "encountered substandard managers." *Id.* According to BNI, if Mr. Schweiger is asserting that he merely disclosed issues regarding the quality of his supervisors, such disclosures would not rise to the level of an "abuse of authority." *Id.* at 7. Referring to the unfocused nature of the Complaint, BNI contends that Mr. Schweiger should not be allowed to "simply think out loud on the record in the hope that DOE will join his speculative search for the facts and connections he failed to plead in the first place." *Id.* at 8.

On January 19, 2016, the ORP dismissed Mr. Schweiger's Complaint. Notice of Dismissal of Complaint from Kevin W. Smith, Manager, ORP, to Robert Schweiger (January 19, 2016) at 1. Citing 10 C.F.R. § 708.17(c)(2), the ORP concluded in its dismissal letter that the facts alleged in the Complaint do not present issues for which relief can be granted. *Id.* Specifically, the letter

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<sup>2</sup> Mr. Schweiger's Complaint includes many more specific allegations of unfair treatment. The Complaints contends, for example, that: (1) BNI management did not provide him the training or the study time he needed to perform well in a skills assessment procedure known as a "Read and Discuss." *Id.* at 1-5. (2) BNI management wrote PIPs that inaccurately described issues with his performance, that were developed without his input and that were designed to set him up for failure. *Id.* at 6-7, 10. (3) BNI management failed to properly train him in several instances, such as when it canceled a training without rescheduling it or did not provide enough instruction on operating a software program. *Id.* at 8-9. (4) BNI management unfairly criticized him for petty issues such as having a messy desk and stealing toilet paper, water jugs and other items. *Id.* at 9.

<sup>3</sup> Mr. Schweiger additionally alleges that he drafted a letter to DOL to complain about working unpaid hours. *Id.* at 7. Because he only refers to drafting the letter, it is unclear if he sent it.

informed Mr. Schweiger that the Complaint “does not support your claim that you engaged in any protected activities or that your termination was based on any protected activities.” *Id.* at 2.

## **E. Appeal**

OHA received this Appeal from Mr. Schweiger on February 2, 2016. Appeal from Robert Schweiger to Poli Marmolejos, Director, OHA (February 1, 2015). In his Appeal, Mr. Schweiger provides additional details about one of his alleged protected disclosures. He discusses how a co-worker raised some concerns about BNI’s management practices at a meeting in the fall of 2012, how he spoke with that co-worker at the end of the meeting and how that co-worker misinterpreted this interaction as threatening and complained to BNI management. *Id.* at 1-2. He alleges that HR officials subsequently called him to a meeting. *Id.* at 2. He claims that, as part of an attempt to explain that his interaction with the co-worker had been a misunderstanding, he discussed at length how he had been a “whistleblower” in the past.<sup>4</sup> *Id.* The Appeal does not indicate the circumstances of this previous alleged whistleblower activity except to suggest that it took place about 20 years prior.<sup>5</sup> *Id.* Mr. Schweiger also argues in his Appeal that although his Complaint may lack details about his alleged protected disclosures, his reference to those disclosures at the beginning of his Complaint should be sufficient to prevent a dismissal. *Id.* at 5.

After filing his Appeal, Mr. Schweiger submitted another lengthy statement to OHA. *See* Letter from Robert Schweiger to Poli Marmolejos, Director, OHA (February 18, 2016). In this statement, he indicates that he shared “many things” with on-site DOE staff while he was employed at BNI, although he does not say what he shared. *Id.* at 5. He criticizes DOE for not investigating his concerns or taking them seriously.<sup>6</sup> *Id.* at 5-8. Among other opinions and arguments, he states that BNI has a weak “Nuclear Safety and Quality Culture” and that DOE should have a better understanding of the “cultures that exist under its authority.” *Id.* at 1, 4. He defines a strong Nuclear Safety and Quality Culture as “an environment where management is dedicated to not being cruel to their employees.” *Id.* at 2.

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<sup>4</sup> In the meeting, according to Mr. Schweiger, he also told HR officials that, seven months after being hired, he went to an Employee Concerns manager to complain about problems with BNI’s “Nuclear Safety and Quality Culture” related to the “maturity level of management.” *Id.* at 3. It is unclear whether Mr. Schweiger spoke with an Employee Concerns manager at BNI or DOE. He indicates that the employee concern that he filed was dismissed within a few days. *Id.* at 3.

<sup>5</sup> In a phone conversation, Mr. Schweiger explained that he raised a safety concern in 1993 while working for a contractor for the Nuclear Regulatory Commission. Memorandum of Telephone Conversation between Robert Schweiger and Gregory Krauss, OHA (February 26, 2016). In its Response, BNI also states that, through its own research, it found that Mr. Schweiger was involved in a lawsuit in 1995 in which, among other allegations, he made an allegation of whistleblower retaliation against an employer other than BNI. Motion to Dismiss at 5-6.

<sup>6</sup> He states that in January 2014, when he contacted DOL to raise concerns about BNI management practices, he made the call from an on-site DOE office. *Id.* at 6. By that point, he indicates, DOE was aware of his issues with BNI management and should have responded. *Id.* at 6-7.

## II. Analysis

The ORP dismissed Mr. Schweiger's Complaint upon concluding that it does not present issues for which relief can be granted under Part 708. When considering whether the dismissal of a Part 708 complaint is appropriate, we must consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist*, Case No. TBZ-0080 (May 7, 2009) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). Thus, the question in this matter is whether, considering the materials in the light most favorable to Mr. Schweiger, the ORP properly dismissed his Complaint.

Part 708 requires that complaints include a statement "specifically describing" (1) the alleged retaliation and (2) the protected activity that "gave rise" to the retaliation. 10 C.F.R. § 708.12(a). In interpreting these pleading requirements, we look to the Federal Rules of Civil Procedure, which, although not governing in this proceeding, are analogous. *See, e.g., Vincent E. Daniel*, Case No. WBH-13-0006 (September 18, 2013). The relevant Federal Rule is Rule 12(b)(6), under which courts may grant a motion to dismiss for "failure to state a claim upon which relief can be granted . . ." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a complaint must plead "only enough facts to state a claim that is plausible on its face." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007). The complaint "does not need detailed factual allegations" but the allegations "must be enough to raise a right to relief above the speculative level, on the assumption that all of the Complaint's allegations are true . . ." *Id.* at 555 (citation omitted).

As an initial matter, it is unclear, despite Mr. Schweiger's lengthy submissions, whether the act or acts of retaliation he alleges is his termination, BNI's treatment of him prior to his termination, or both.<sup>7</sup> In any event, his Complaint falters because the disclosures that he claims led to retaliation by BNI are not of the type that Part 708 protects. A protected disclosure under Part 708 cannot be on any topic. As outlined above, the individual must reasonably believe that he or she is revealing a substantial violation of a law, rule or regulation; a substantial and specific danger to employees or to the public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a).

Mr. Schweiger alleges that he made protected disclosures when he (1) complained about an unspecified individual on an unspecified topic and (2) shared with BNI staff his involvement in previous whistleblower activity. His first protected disclosure could be interpreted as a generic allegation that he lodged a complaint about something to someone. Alone it would be insufficient to satisfy the pleading requirement that he specifically describe a protected activity. However, construing the Complaint in Mr. Schweiger's favor, we note that he alleges that his Complaint regards an "abuse of authority" pursuant to 10 C.F.R. § 708.5(a)(3). We also note that he dedicates almost his entire Complaint to discussing disagreements with his supervisor and BNI management. We therefore assume that the unnamed individual is his supervisor. We further assume he is asserting that he made a protected disclosure regarding an abuse of authority in at least one of the

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<sup>7</sup> Retaliation under Part 708 "means an action . . . taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of [the whistleblowing]." 10 C.F.R. § 708.2.

instances in which he complained about the quality of BNI management either to BNI managers, HR officials or possibly DOL or DOE.

We have defined an abuse of authority as “an arbitrary or capricious exercise of power by an official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” See *Thomas L. Townsend*, OHA Case No. TBU-0082 (October 6, 2008). Further, we have found that “Part 708 is not intended to permit DOE to manage the day-to-day decisions and human resource management of a DOE contractor” and that mere “unpleasant” behavior by managers does not rise to the level of an “abuse of authority.” *Sherrie Walker*, Case No. WBA-13-0015 (May 21, 2014). Although Mr. Schweiger characterizes many of BNI’s actions as unfair, we have located nothing in his Complaint regarding BNI’s treatment of him that, if true, could constitute an “abuse of authority.”

With respect to his other alleged protected disclosure, Mr. Schweiger describes in his Appeal how he told HR officials that he had blown the whistle against a different employer decades in the past. Even assuming these facts are true, his revelations about his past do not constitute a protected disclosure. In talking about his past, Mr. Schweiger disclosed information about his own life story, not about any issue within the parameters of Part 708. Accordingly, any statement he made to HR officials about blowing the whistle on a prior employer could not have been a protected disclosure.

Mr. Schweiger also asserts that his Complaint somehow deals with a “waste of funds,” thus implying that he may have made a disclosure regarding a “gross waste of funds” pursuant to 10 C.F.R. § 708.5(a)(3). With respect to any possible disclosures he made on this subject, the only support he provides is to assert that BNI assigned him unnecessary work, thereby wasting money on his salary. Characterizing this set of facts as a “gross waste of funds” is inconsistent with OHA precedent. We have defined a “gross waste of funds” as a “more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” See *Fred Hua*, OHA Case No. TBU-0078 (May 2, 2008) (citing *Jensen v. Dep’t of Agric.*, 104 M.S.P.R. 379 (2007)). Even Mr. Schweiger recognizes that he did not encounter, let alone disclose, any “gross waste of funds.” As noted, he indicates in his Complaint that any waste of funds he disclosed is “small” and “is not a gross . . . amount.”

Finally, we observe that Mr. Schweiger refers in his Complaint to working unpaid overtime hours. According to his Complaint, he objected to working unpaid overtime at least once, on March 14, 2014, in a meeting with HR officials. It also is possible that he mentioned this issue when complaining to DOL and DOE officials about BNI management. We will assume that the reporting of a violation of wage laws or regulations could constitute a disclosure of a “violation of a law, rule or regulation” under 10 C.F.R. § 708.5(a)(1). Nevertheless, the facts Mr. Schweiger alleges indicate that it would not be reasonable for him to have concluded that BNI violated any laws, rules or regulations. First, he never alleges that BNI required him to work extra hours; he asserts only that his supervisor assigned him training activities that he could not complete by his supervisor’s deadline, requiring him to work as much as around 20 hours of overtime. Complaint at 2. Second, he states that when he brought the matter to the attention of HR officials, they asked him to submit any overtime hours he worked but that he chose not to submit those hours. *Id.* at 9. In short, based on the facts he alleges, it would be unreasonable for him to believe that BNI denied him pay for hours he worked.

We agree with the ORP that Mr. Schweiger has not alleged that he engaged in any activities protected by Part 708 and that he has not stated a claim upon which relief can be granted. Although Mr. Schweiger may believe that BNI did not establish a culture in which he could succeed and that DOE should have a better understanding of how BNI treated him, such matters do not constitute a basis for a Part 708 complaint.

### **III. Conclusion**

In the end, the ORP correctly determined that the Complaint should be dismissed. Accordingly, we must deny the instant Appeal.

It is Therefore Ordered That:

- (1) The Appeal filed by Robert Schweiger (Case No. WBU-16-0001) is hereby denied.
- (2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: March 4, 2016