

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

In the Matter of Sherrie Walker)	
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Filing Date: December 20, 2013)	Case No.: WBA-13-0015
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Issued: May 21, 2014

Decision and Order

This Decision considers an Appeal of a Dismissal issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on December 5, 2013, of a Complaint filed by Sherrie Walker (the Appellant or Walker) against her employer, Idaho Treatment Group LLC (ITG), under the DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708.¹ In her Complaint, the Appellant alleges that she has repeatedly reported concerns of non-compliance, abuse of management and misconduct and, as a result, has been subjected to retaliation by ITG. As set forth in this Decision, we have determined that the dismissal of the Complaint should be affirmed and the Appeal denied.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE’s Contractor Employee Protection Program was established for the purpose of “safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste and abuse” at DOE’s government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its

¹ Since October 1, 2011, ITG has operated the Advanced Mixed Waste Treatment Project (AMWTP) for the DOE. AMWTP’s purpose is to safely process and dispose of transuranic waste and mixed low-level waste at the DOE’s Idaho Site.

The Complaint as originally filed also named URS Corporation (URS), which is one of the three entities that own ITG. In ITG’s initial response to the Complaint, ITG requested that URS be dismissed as a party, stating that URS is not Walker’s employer and that, to ITG’s knowledge, no URS personnel participated in the events described in the Complaint. Letter from Florence J. Phillips, General Counsel, ITG to Jan Ogilvie, DOE Idaho Operations Office (November 18, 2013) at 8 – 9. Based upon ITG’s statements, Walker has no objections to the dismissal of URS from the Complaint. Appellant’s First Amended Appeal Notice (January 24, 2014) at 2 – 3.

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 retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including “disclosing to a DOE official, . . . any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [their] employer, or any high tier contractor, information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.” 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a “statement specifically describing the alleged retaliation . . . and the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation.” 10 C.F.R. § 708.12.

B. Factual and Procedural Background

In 2011, ITG assumed management and operation of DOE’s Advanced Mixed Waste Treatment Project (AMWTP) and hired Walker who had worked for prior operators of AMWTP since April 2001. Walker works for ITG (and worked for predecessor operators of AMETP) in records management and document control. In the course of her work, Walker alleges that she became aware of instances of non-compliance by ITG with its records management policy. In addition to discussions with her supervisors and management, Walker states that on March 7, 2013, she expressed concerns about “non-consistency with regards to procedure compliance” at an AMWTP all-hands meeting. Complaint at 3 – 4. The example of non-compliance that she used at the meeting was that ITG’s policy mandated the use of black or blue ink, while a senior manager had instructed her group to process documents notwithstanding that they had been completed with purple ink. *Id.*

Following her comments at the all-hands meeting, she believes that she was “targeted” for having raised this example of non-compliance and therefore met with ITG’s Ethics Officer on April 11, 2013, to discuss her concerns. In that meeting, seven concerns with respect to ITG management practices were raised for investigation, including issues focused on lack of communication within Walker’s group and her request for management to hold regular staff meetings; comments made by ITG management officials to Walker or about Walker; and preferential treatment received by Walker’s direct supervisor.² *Id.* at 6.

² The seven concerns identified by Walker in her meeting with ITG’s Ethics Officer and listed in the Complaint as Part 708 disclosures are:

1. Lack of communication in group that regular staff meetings would help.
2. The “I don’t give a shit” comment from [manager], in reference to the team.
3. “Publically stripped of leadership role,” wording that [manager] used and represents his attitude.
4. [Senior manager’s] explanation that he shouts, to not take it personally, and that employees need to take it. In addition, insensitive comment comparing ITG being a WMC (Weapons Monitor) about placing safety above production with being known as a child molester. (continued on next page)

According to the Complaint, the “targeting” that began following her comments at the all-hands meeting culminated in her receiving a formal verbal warning on August 1, 2013. *Id.* at 6 – 10. On October 11, 2013, Walker filed a Part 708 Complaint with DOE’s Idaho Operations Office, which was forwarded to DOE’s Office of Hearings and Appeals for processing. The OHA Director appointed Shiwali Patel, OHA Staff Attorney (Investigator), to investigate the Complaint. Subsequent to commencing the investigation, the Investigator dismissed the Complaint for failure to (1) state a claim upon which relief can be granted and (2) follow the procedural regulations set forth in Part 708.13. The Investigator evaluated Walker’s assertion that her comments at the all-hands meeting with respect to the use of non-complying ink were “safety related, compliance related, and waste and abuse related” and evaluated as separate disclosures Walker’s telling an ITG manager that he should have a staff meeting to allow an opportunity to vent and address teamwork (and the manager’s response that he did not care about teamwork) and Walker’s communication to the ITG Ethics Officer of seven specific concerns regarding her work environment. In each instance, the Investigator utilized a “disinterested person” standard and concluded that a disinterested person would not conclude that such events constituted disclosure of a substantial violation of law, rule or regulation or fraud, gross mismanagement, gross waste of funds or abuse of authority. As a second deficiency in the Complaint, the Investigator noted that Walker did not comply with the requirements outlined in ITG employee concerns manual prior to filing her Complaint with DOE and, therefore, failed to satisfy the requirements set forth in Part 708.13(b) that she exhaust her employer’s internal applicable grievance-arbitration procedures prior to filing a Part 708 complaint. Letter from Shiwali Patel, DOE Office of Hearings and Appeals, to DeAnne Casperson, Holden Kidwell Hahn & Crapo P.L.L.C., attorney for Walker (December 5, 2013) (Dismissal Letter).

Walker has appealed the dismissal of the Complaint. Letter from DeAnne Casperson, Holden Kidwell Hahn & Crapo P.L.L.C., attorney for Walker, to Poli A. Marmolejos, Director of DOE Office of Hearings and Appeals (December 19, 2013) (Appeal). Following submission of her Appeal, a copy of ITG’s response to the Complaint was served on Walker and she was given the opportunity to respond to ITG’s earlier filing and to submit in greater detail her reasons for believing OHA had erred in dismissing the Complaint. Walker, through her counsel, submitted a supplemental brief and ITG filed a response. *See* Appellant’s First Amended Appeal Notice (January 24, 2014) (Amended Appeal).

II. Appeal

In her Appeal, Walker argues that OHA erred in dismissing her Complaint. She argues that: (a) a disinterested person would have construed her disclosure as a substantial violation of law, rule or regulation or “fraud, gross mismanagement, waste of fund or abuse of authority” as employees are expected to follow procedures; (b) ITG acknowledged that it was a mistake not to follow the

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5. Roles and responsibilities not clear....
 6. Preferential treatment of [direct supervisor] – example of being able to report to [another location] first, then coming to the site when others cannot.
 7. Procedural compliance issue – using a DCR for CCP documents when 18.4 says DCR to not be used.

specific procedure in question and management failed to support an employee having identified procedural non-compliance; (c) her Complaint was sufficient in identifying the procedure being violated by ITG and, if not, OHA precedent allows a complaint to be amended to incorporate the required specificity; (d) she was in compliance with the AMWTP Employee Concern Program with respect to her filing the Complaint, although she questioned as a factual matter whether such program constituted a grievance-arbitration procedure; and (e) failure to use a grievance or arbitration procedure is not a permitted reason for dismissing a complaint under Part 708.17. Amended Appeal at 3 – 6.

III. Analysis

As set forth in OHA's other Part 708 appeal cases, the standard of review for appeals is well-established. Conclusions of law are reviewed *de novo*. See *Curtis Hall*, Case No. TBA-0002 at 5 (2008). Findings of fact, however, are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of the witness. *Id.*; *Salvatore Gianfriddo*, Case No. VBA-0007 (1999). Below, we will review the bases upon which the Investigator dismissed Walker's Complaint.

A. Failure to State a Claim Upon Which Relief Can Be Granted

In her Complaint, Walker seeks redress for actions taken against her for having allegedly made disclosures protected by Part 708. We, therefore, will begin by reviewing the disclosures that Walker purports to have made. Although the Complaint is not entirely clear, Walker appears to allege that she made two disclosures: the first, during an all-hands meeting, related to procedural non-compliance arising from ITG management permitting the use of ink on documents which was not the color ink specified in an ITG procedure; and, the second, in a meeting with her employer's Ethics Officer, related to a series of concerns about her workplace environment arising from her belief that she was "targeted" for having made the earlier comment at the all-hands meeting.³ The analysis below assumes that such disclosures were made and are accurately described in the Complaint and Walker's subsequent filings.

In order for a disclosure to qualify for protection under of Part 708, the disclosure of information by a DOE contractor employee must reveal: (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority. In her Complaint, Walker states that her comment at the all-hands meeting, that management was permitting the use of purple ink on documents, was intended as an example of procedural non-compliance and that other examples of procedural non-compliance existed. Walker asserts that her disclosure is compliance related, safety related and waste and abuse related, which suggests that her disclosure satisfies all three categories of protected disclosures described in 10 C.F.R. § 708.5(a).

³ The Investigator analyzed as a separate disclosure Walker's telling an ITG manager that he should have a staff meeting to allow an opportunity to vent and address teamwork and the manager's response that he did not care about teamwork. See Complaint at 5; Dismissal Letter at 2 – 3. Since these occurrences constitute the first two concerns enumerated in Walker's meeting with ITG's Ethics Officer, they are not analyzed as a separate disclosure in this Decision. See Note 2, *supra*.

Walker's Appeal correctly states that her Complaint referenced two specific ITG procedures illustrating ITG's procedural non-compliance.⁴ The essence of Walker's Part 708 complaint is articulated in her Amended Appeal: "Ms. Walker raised the issue that *ITG* was not following *its own procedures* and management was not supporting employees in identifying non-compliance in an all hands meeting.... Ms. Walker's complaint was for the purpose of illustrating that employees do not get to pick and choose which part of *ITG's procedures* they will or will not follow...." Amended Appeal at 3 (*emphasis added*). The issue is whether these disclosures are within the scope of Part 708.

Part 708 was adopted by the DOE to encourage employees of DOE contractors to come forward with information that they reasonably believe "evidences unsafe, unlawful, fraudulent or wasteful practices." 64 Fed. Reg. 12862 (March 15, 1999). The regulation itself states that its purpose is to protect disclosures of information concerning substantial violations of law. 10 C.F.R. § 708.1. When 10 C.F.R. § 708.5(a)(1) extends the protection of Part 708 to a disclosure that reveals a substantial violation of a law, rule or regulation, it requires that such disclosure relate to some illegality – i.e., a violation of a government mandate. Walker's disclosures, in her own words, relate only to a DOE contractor's noncompliance with its own internal policies and procedures. Amended Appeal at 3 – 4. While such noncompliance could be relevant if a contractor's procedures existed to implement governmental requirements or to ensure employee or public safety, Walker does not identify any such underlying mandate with respect to these ITG procedures. Walker asserts that her disclosure is "compliance related;" however, to be compliance related within the meaning of 10 C.F.R. § 708.5(a)(1), a disclosure must relate to a violation of a requirement imposed on an individual or entity by an act of the government (such as a federal statute, a DOE order or policy or an executive order or directive). Walker does not identify any government mandate that is violated by ITG's non-compliance with its own internal corporate procedures. *See Dennis Rehmeier*, OHA Case No. TBU-0114 (March 1, 2011) (a contractor personnel policy is not a "law, rule or regulation" for 10 C.F.R. § 708.5(a)(1)).

Walker attempts to connect ITG's non-compliance with its own procedures to legal requirements when she asserts that "...the purpose of company procedures is to ensure work is being done consistently, as directed, and in compliance with legal requirements." Amended Appeal at 3. Even if that were true, that does not establish that ITG's failure to comply with its procedures resulted in ITG actually failing to comply with any legal requirements. It is simply a statement that Walker believes such non-compliance creates vulnerabilities for ITG. If such non-compliance has resulted in ITG failing to comply with legal requirements, Walker has failed to identify those legal requirements or reveal a disclosure with respect to such violation as is required for protection under Part 708.

Walker's also asserts that her disclosure is "safety related" without describing any specific safety concern. A vague assertion that a disclosure is safety related does not satisfy the requirements of 10 C.F.R. § 708.5(a)(2) that a protected disclosure reveals "a substantial and specific danger to employees or to public health." Perhaps Walker's assertion that records need to be "legible" is

⁴ The Complaint identified ITG procedure MP-DOC-18.2 as the procedure that Walker referred to at the all-hands meeting and ITG procedure MP-DOC-18.4 as the procedure that Walker identified during her meeting with the ITG Ethics Officer. The Complaint or subsequent filings did not include copies of either procedure.

intended to describe a safety concern; however, this statement fails to meet the specificity required by Part 708. Complain at 5; Amended Appeal at 3. First, while Walker states that “if records are not legible, they will not reproduce,” she never states that the failure of ITG to comply with its records procedures has resulted in illegible records. Complaint at 5. She actually appears to carefully avoid stating such a conclusion and OHA cannot infer the specificity required by 10 C.F.R. § 708.5(a)(2) when the Appellant has failed to do so. Second, even if ITG’s non-compliance has resulted in records that are illegible, Walker does not describe how such illegibility creates a substantial and specific safety issue. *See Rehmeier* (allegation that the failure to fill certain intelligence analysts positions discloses a public safety issue fails in the absence of the identification of specific foreign intelligence activities at the site); *Chambers v. Dep’t of the Interior*, M.S.P.B. (2011) (disclosure protected when it reveals a specific threat to public safety (e.g., increased drug-related activity observed in urban parks following the reduction in park police patrols) while speculative disclosures (e.g., inadequate park police staffing will result in loss of life or destruction of a national monument) are not protected).

Walker’s assertion that her disclosure reveals “waste and abuse” appears to relate both to the disclosure Walker made at the all-hands meeting and to the seven specific concerns disclosed in her meeting with ITG’s Ethics Officer. We note here that while 10 C.F.R. § 708.5(a)(3) protects disclosures which reveal “gross mismanagement, gross waste of funds, or abuse of authority,” Walker’s Complaint recites conclusory statements sprinkled with phrases like “waste and abuse,” “misconduct,” “abuse of management,” and “abuse of power” without linking these statements and phrases to the overall legal requirements of Part 708. To provide the fullest review of Walker’s Appeal, we have analyzed the substance of her alleged disclosures against the actual requirements of 10 C.F.R. § 708.5(a)(3).

With respect to Walker’s disclosures regarding ITG’s non-compliance with its procedures, Walker argues that “employees cannot pick and choose which portions of procedures they should follow or decide that a portion of a procedure is *de minimis*” and it was an “abuse of management” for an ITG senior manager to “trivialize and ignore the compliance issue” after Walker brought it to management’s attention. Amended Appeal at 3 –4. With respect to the issues disclosed to ITG’s Ethics Officer, Walker appears to be distressed by that fact that even though she believed ITG management confirmed most of her concerns and promised corrective action, she saw no evidence of any changes in her work environment. Complaint at 6.

When Part 708 was amended by DOE in 2000, the threshold for protecting a disclosure relating to “mismanagement” was raised to require that a disclosure relate to “gross mismanagement.” This amendment clarified that Part 708 was not intended to make DOE the arbiter of conflicts over management and personnel practices that regularly occur in the workplace. OHA has stated that “gross mismanagement” is characterized by

more than *de minimis* wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross management means a management action or inaction that creates a substantial risk of a significant adverse impact upon the agency’s ability to accomplish its mission.

Fred Hua, OHA Case No. TBU-0078 (April 3, 2008); *Roger Hardwick*, OHA Case No. VBA-0032 27 DOE ¶ 87, 539 (1999).

Walker argues that her managers behaved improperly by not requiring compliance with certain of ITG's records management procedures. Even if Walker's managers exceeded their decision making authority within ITG's organizational structure, this would be a matter for ITG to address within its organization rather than for DOE to adjudicate under Part 708. While the information in Walker's Complaint indicates that she disagrees with certain management decisions – and believes she has ideas that would improve efficiency and is personally offended by certain management behavior – this does not rise to the level of mismanagement, much less gross mismanagement.

For a disclosure respecting “waste” to be protected under Part 708, it must reveal a “gross waste of funds.” In a previous decision, OHA has stated that

just as gross mismanagement constitutes more than debatable managerial decision, gross waste of funds constitutes a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.

Hua; See *Erika D. Jensen v. Dep't of Agriculture*, 104 M.S.P.R. 379 (2007).

Walker's complaint quantifies no waste of public funds and indeed does not specify any issue with respect to funds as contemplated by the relevant provisions of 10 C.F.R. § 708.5(a)(3). Her allegation of “waste” appears to refer to a generalized disagreement with management decisions and management approaches of her employer. This disagreement does not constitute a protected disclosure with respect to “gross waste of funds” under Part 708.

For a disclosure with respect to “abuse” to be protected under Part 708, it must to reveal an “abuse of authority” which occurs

when there is 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.

Thomas L. Townsend, OHA Case No. TBU-0082 (2008).

With respect to ITG's non-compliance with its procedures, Walker argues that “employees cannot pick and choose which portions of procedures they should follow or decide that a portion of a procedure is *de minimis*” and it was an “abuse of management” for an ITG senior manager to “trivialize and ignore the compliance issue” after Walker brought it to management's attention. Amended Appeal at 3 – 4. Such non-compliance with internal procedures (which, as noted above, are unrelated to legal mandates or safety) is an internal issue to the ITG organization within the discretion of ITG management; this is not a Part 708 matter. With respect to the additional matters Walker disclosed to the ITG Ethics Officer, her Complaint alleges that

she has been affected by management decisions and an aggressive management style with which she disagrees and feels personally uncomfortable. However disagreeable or uncomfortable such a work environment may be for her, Walker does not specify any legal or economic rights of which she has been illegitimately deprived. Part 708 was adopted by DOE, like other whistleblower protections by the federal government, to address situations where those acting under the color of public authority use such authority for improper means. Part 708 is not intended to permit DOE to manage the day-to-day decisions and human resource management of a DOE contractor. However unpleasant Walker finds the behavior of her managers, she has not alleged any behavior that rises to an “abuse of authority” which would be protected by Part 708. *See Townsend* (disagreement between a supervisor and analyst regarding security clearance eligibility does not reflect abuse absent specific details of pressuring analysts to grant inappropriate security clearances); *Frank E. Isbill*, 27 DOE ¶ 87,529 (Case No. VWA-0034, September 27, 1999) (disclosure protected with respect to a DOE task monitor who allegedly provided preferential treatment to a contractor employing monitor’s wife).

We do not doubt that Walker genuinely and reasonably believes that the events described in her Complaint occurred; however, for the reasons stated above, those events do not constitute matters that are protected by Part 708. Therefore, the Complaint does not present an issue for which relief can be granted under Part 708.

B. Failure to Follow Procedural Regulations

The Appeal also challenges the earlier dismissal of the Complaint for failure to exhaust applicable grievance procedures outlines in 10 C.F.R. § 708.13. Since the Complaint does not allege a disclosure which is protected under Part 708, Walker’s appeal of the procedural dismissal is moot.

IV. Conclusion

As stated above, we find that the complainant’s arguments in her Complaint reflect objections that she raised with respect to her employer’s failure to comply with its own internal procedures and that non-compliance with such internal procedures, on this record, does not constitute a violation of a law, rule or regulation within the meaning of Part 708. Additionally, we find that the complainant’s arguments in her Complaint reflect her disagreement with managerial styles and decisions, and do not disclose gross mismanagement, gross waste of funds or abuse of authority. Since the complainant failed to establish that she made disclosures protected under Part 708, the Investigator properly dismissed the Complaint. Accordingly, based on the foregoing, we find that the determination of the Investigator should be sustained, and the instant appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Sherrie Walker, Case No. WBA-13-0015, is hereby denied.

(2) This 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, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 21, 2014