United States Department of Energy
Office of Hearings and Appeals

In the Matter of Erik DeBenedictis	)		
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Filing Date: April 27, 2018	)	Case No.:	WBU-18-0004
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Issued: May 03, 2018

Decision and Order

Erik DeBenedictis (the Appellant), an employee of National Technology & Engineering Solutions of Sandia, LLC (NTESS), appealed the dismissal of a whistleblower complaint he filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.[1] The National Nuclear Security Administration's Field Element for Albuquerque, New Mexico (the Field Element) dismissed the Appellant's complaint on April 16, 2018, for lack of jurisdiction. For the reasons set forth herein, the Appellant's appeal is denied.

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 the DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 03, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe evidences 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

[1] The Office of Hearings and Appeals reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by each appellant. *See* 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why the Appellant thinks the dismissal was erroneous).

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at a DOE site, the employer, or any higher tier contractor, information that [the employee] reasonably believe[s] 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).

Employees who believe they have suffered retaliation because they engaged in protected activity may file their complaint with: (1) the Director of the Office of Employee Concerns, or the Director's designee; or (2) the Head of Field Element at the DOE field element with jurisdiction over the contract. 10 C.F.R. § 708.10. The DOE office initially receiving a Part 708 complaint may dismiss it for 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: (1) the complaint is untimely; (2) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708; (3) the employee filed a complaint under state or other applicable law with respect to the same facts as alleged in the Part 708 complaint; (4) the complaint is frivolous or without merit on its face; (5) the issues presented in the complaint have been rendered moot by subsequent events or substantially resolved; or (6) 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). The employee may appeal such a dismissal to the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18(a).

B. Complaint

The Appellant filed a complaint with the Field Element on February 05, 2018, alleging that NTESS, the contracted operator of Sandia National Laboratories, retaliated against him for disclosing conduct he claimed represented gross mismanagement on the part of his prior employer, LMCO-Sandia, which was the prior operator of Sandia National Laboratories.[2]

In 2010, the Appellant filed a disclosure with LMCO-Sandia's ethics office (the Ethics Office). The Appellant's 2010 disclosure alleged that the Appellant's supervisor denied the Appellant's request to travel to a meeting concerning a project for which the Appellant was the principal investigator, that the supervisor denied the Appellant's travel request for the purpose of advancing the personal or professional interests of a coworker of the Appellant, that the manager's decision to send the Appellant's less-qualified coworker represented a waste of government resources, and that the Appellant received a low performance rating from the supervisor because of the supervisor's bias against him. Complaint at 2–3. The Appellant noted that his employer permitted him to travel to the meeting after he referred the matter to the Ethics Office, but that his low performance rating remained unchanged. *Id.* at 2. The Appellant claimed that he later came into possession of excerpts of investigative notes prepared by an OPM investigator in connection with the Appellant's application for a security clearance, and that the notes showed that the Appellant's low performance rating in 2010 was a product of the aforementioned incident. *Id.* at 3.

In 2012, the Appellant made a second disclosure to the Ethics Office. *Id.* This second disclosure "told the Sandia ethics office that an interview where one of their staff members read sections of a case file to an OPM investigator revealed the investigation had a flaw, bias, or cover-up." *Id.* at

[2] The Appellant made all of the alleged protected disclosures to LMCO-Sandia, but an employee of NTESS authored the memorandum that the Appellant alleges constituted retaliation. *See* Appellant's Reply at 2.

1. The Appellant's complaint asserted that the second disclosure was the "principal disclosure" upon which the complaint to the Field Element was based. *Id.*

The Appellant's Complaint indicated that the Appellant pursued his 2012 claim concerning the internal investigation into the Appellant's 2010 referral for some time, until, on September 25, 2017, NTESS sent the Appellant a "Document of Management Expectations and Path Forward" (the Memo) which directed the Appellant to "refrain from using corporate resources and time to further engage Sandia personnel regarding the 2009 and 2010 concerns . . . ." Complaint Exhibit 1. According to the Appellant, the Memo represented retaliation by NTESS for the Appellant's disclosure to the Ethics Office concerning the alleged mishandling of the internal investigation into the Appellant's 2010 complaint. Complaint at 3.

C. NTESS's Response to the Complaint

NTESS responded to the Appellant's complaint on March 09, 2018, and argued that the Field Element should dismiss the complaint for lack of jurisdiction pursuant to 10 C.F.R. § 708.17(c). First, NTESS argued that the Appellant's complaint was untimely because the Appellant filed the complaint "well more than 90 days after the alleged retaliation." Response at 2; *see also* 10 C.F.R. § 708.14(a). NTESS's response further asserted that the Appellant's complaint was frivolous on its face, and that, even if the Appellant had identified a *bona fide* protected disclosure and corresponding retaliation, the Appellant's complaint did not present issues for which relief could be granted. Response at 2–4; *see also* 10 C.F.R. § 708.17(c)(2),(4).

NTESS argued that the Part 708 regulations did not protect the Appellant's claimed protected disclosure because the Appellant's 2010 disclosure was not substantial, concerned information already known to management, and pertained solely to his disagreement with his performance evaluation rather than fraud, gross mismanagement, gross waste of funds, or abuse of authority. Response at 2–4. NTESS's response further asserted that the Memo cannot have constituted retaliation against the Appellant because the Memo's negative effect on the Appellant was trivial and was not a "discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment." *Id.* at 4–5; *see also* 10 C.F.R. § 708.2. Finally, NTESS claimed that the Memo did not cause the Appellant any tangible harm for which relief could be granted. Response at 5.

D. The Appellant's Reply to NTESS's Response

On March 29, 2018, the Appellant filed a reply to NTESS's response. In his reply, the Appellant asserted that NTESS construed the nature of his protected disclosure too narrowly, and that the disclosure concerned more than the Appellant's 2010 performance review. Reply at 3–5. Appellant additionally observed that the Memo threatened his termination, and therefore constituted retaliation, and that destruction of all copies of the Memo would provide a remedy to NTESS's conduct. *Id.* at 5–7. With respect to the timeliness of his complaint, the Appellant asserted that the ninety-day period for filing his complaint following his receipt of the Memo should have tolled beginning on November 27, 2017, when the Appellant referred the Memo to a supervisor and the Ethics Office. *Id.* at 3; *see also* Reply Exhibit 3.

E. Dismissal

The Field Element dismissed the Appellant's complaint by letter dated April 16, 2018 (the Dismissal Letter). In the Dismissal Letter, the Field Element determined that the ninetieth day following the Appellant's receipt of the Memo was December 24, 2017, but that the Appellant failed to file his complaint until February 5, 2018. Dismissal Letter at 1. The Dismissal Letter further observed that the Field Element provided the Appellant an opportunity to reply to NTESS's response, in which NTESS observed that the complaint was untimely, and that the Appellant failed to "show any good reason [the Appellant] may have [had] for not filing within [the ninety-day] period." Dismissal Letter at 2; *see also* 10 C.F.R. § 708.14(d). The Dismissal Letter rejected the Appellant's argument that his November 27, 2017, email tolled the ninety-day period for filing his complaint because the email did not "equate to an 'internal company grievance-arbitration procedure.'" Dismissal Letter at 2; *see also* 10 C.F.R. § 708.14(b).

The Dismissal Letter further concluded that the Appellant failed to establish that the facts set forth in his complaint alleged a substantial violation of law, or gross mismanagement or waste, on the part of NTESS. Dismissal Letter at 3. Having concluded that the complaint did not allege a protected disclosure, the Dismissal Letter rejected Appellant's argument that the Memo was retaliatory. *Id.* Finally, the Dismissal Letter concluded that no remedy was available under the Part 708 regulations for the harm the Appellant claimed to have suffered. *Id.* at 4.

F. Appeal

The Appellant appealed the Field Element's dismissal of his complaint by letter to the OHA, dated April 26, 2018 (the Appeal). In his Appeal, the Appellant asserts that his Appeal was not untimely, that the Field Element misunderstood the scope of the disclosure he claims that the Part 708 regulations protect, that the Memo constituted retaliation, and that the remedies the Appellant identified in his reply would adequately remedy the retaliation.

With respect to the timeliness of the complaint, the Appellant asserts that the Part 708 regulations required the tolling of the ninety-day period for filing his complaint. The Appeal argues that NTESS offers a grievance procedure by reference to a passage of NTESS's employee handbook under the header "Employee Concerns," which notes that:

> "For employee concerns, the first step is to talk with the immediate manager. Conflicts can often be resolved in this manner. However, if the employee believes the issue is more appropriately addressed elsewhere, the concern can be raised to others in the line of management, the Human Resources Business Partner, the Ethics Office, Equal Employment Opportunity and Affirmative Action (EEO/AA) Services, or the Ombuds Office."

Appeal at 2. The Appellant asserts that, since he believes that NTESS offers a grievance procedure, he "interpret[s] 708.13(b)(2) to say [NTESS resources must] be used for 150 days anyway." *Id.* at 1. Alternatively, the Appeal proposes that the OHA conclude that the internal company grievance-arbitration procedure was incomplete at the time that he filed his complaint, and allow him to refile the complaint. *Id.*

II. Analysis

The Field Element properly dismissed the Appellant's complaint for lack of jurisdiction because the Appellant did not file his complaint within ninety (90) days of receipt of the Memo, and failed to establish good cause for not timely filing the complaint. *See* 10 C.F.R. § 708.14(a),(d). There is no dispute in the record as to the fact that the Appellant received the Memo on September 25, 2017. *See* Appeal at 1. The Appellant filed his complaint on February 5, 2018, substantially beyond the ninetieth calendar day following September 25, 2017. Complaint at 1. Appellant claims that he timely filed his complaint because his November 27, 2017, email to a supervisor and the Ethics Office allegedly initiated "an internal company grievance-arbitration procedure" which tolled the ninety-day period for filing the complaint.

The OHA's long-standing interpretation of the phrase "internal company grievance-arbitration procedure" is a narrow one, intended to prohibit the circumvention of procedures negotiated between labor and management. *Matter of Darryl H. Shadel*, VBU-0050, 5 (June 15, 2000) (*Shadel*), 2000 EOHA Lexis 57; *see also Matter of John Smallman*, OHA Case No. WBU-17-0007 (2017).[3] In *Shadel*, OHA explained that:

> As stated in the 1998 Notice of Proposed Rulemaking, it was the intent of the DOE to continue a policy that bargaining unit employees must use available negotiated procedures to resolve their complaints of retaliation. 63 Fed. Reg. 373, 378 (January 5, 1998). I believe that in the context of the Part 708 rules, "applicable grievance-arbitration procedure" is intended to cover negotiated grievance procedures available to bargaining unit employees, and similar procedures leading to determinations under binding arbitration pursuant to a bargaining unit agreement. This requirement was included in order to ensure that the remedies offered by Part 708 did not permit or encourage employees to bypass procedures set forth in negotiated labor agreements.

Shadel at 4–5. The passage of the NTESS employee handbook cited in the Appeal allows employees to exercise their discretion as to the forum most appropriate for them to direct their concerns, and does not provide for binding arbitration pursuant to a bargaining agreement. Appeal at 2. Therefore, the Appellant's November 27, 2017, email to a manager and the Ethics Office did not toll the ninety-day period for him to file his complaint.

The Appeal does not assert any good reason for which the Field Element should have accepted the Appellant's complaint, notwithstanding its untimeliness, pursuant to 10 C.F.R. § 708.14(d). The record reflects that the Field Element provided the Appellant with a copy of NTESS's response to his complaint, but the Appellant failed to establish a good reason in his reply for which his untimely complaint warranted processing. Therefore, I do not find any basis to remand this matter to the Field Element for further review.

III. Conclusion

[3] Decisions issued by the OHA are available on the OHA website located at http://www.energy.gov/OHA.

The Field Element properly dismissed the Appellant's complaint for lack of jurisdiction because the Appellant's complaint was untimely. Because I have concluded that the Field Element's dismissal of the Appellant's complaint was appropriate on the basis of untimeliness, I need not address the Field Element's determinations that the facts alleged in the complaint did not present issues for which relief can be granted under the Part 708 regulations and that the complaint was frivolous or without merit on its face.

It is therefore ordered that:

(1) The Appeal filed by Erik DeBenedictis (Case No. WBU-18-0004) 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 thirty (30) days after receiving this decision. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals