United States Department of Energy
Office of Hearings and Appeals

In the Matter of John Smallman	)	
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Filing Date: September 7, 2018	)	Case No.: WBA-17-0007
	)	
	)	

Issued: October 19, 2018

Decision and Order

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on August 23, 2018, denying a Complaint of Retaliation filed by John Smallman against his employer, Lawrence Livermore National Security (LLNS) under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. On appeal, Mr. Smallman alleges that LLNS was engaged in violations of law, which he disclosed, and that LLNS retaliated against him for those disclosures. As set forth in this Decision, we have determined that the Appeal should be denied.

I. 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 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, 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).

Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, conducting 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," and must be filed "by the 90th day after the date [the complainant] knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.12, §708.14.

II. Background

On April 28, 2017, Mr. Smallman filed a Part 708 Complaint with DOE's Livermore Field Office. He asserted that he had made several protected disclosures and that LLNS retaliated against him in many ways, including removing him from an alternative work schedule (AWS) that scheduled him for four 10-hour work days each week; assigning him a performance rating of "marginal"; and denying him a strategic bonus. The complaint was dismissed for lack of jurisdiction, but Mr. Smallman appealed to the OHA and we reversed the dismissal. *John Smallman*, Case No. WBU-17-0007 (2017). The Complaint was forwarded to an OHA investigator.

The OHA investigator discovered that Mr. Smallman had filed the Complaint more than 90 days after the last act of retaliation that he alleged. Report of Investigation, *John Smallman*, Case No. WBI-17-0007 (2018). The OHA Administrative Judge ordered Mr. Smallman to show cause why his complaint should not be dismissed. After considering briefs by both parties, the Administrative Judge dismissed the Complaint for untimeliness as to all of the alleged acts of retaliation but one—the denial of the bonus. *John Smallman*, Case No. WBZ-17-0007 (2018).

LLNS moved for summary judgment on the denial of the bonus. The contractor argued that Mr. Smallman had failed to allege a timely act of retaliation because, as both parties agreed, the bonus denial was a delayed consequence of the time-barred "marginal" performance rating rather than a separate act of retaliation. In his response to LLNS's motion, Mr. Smallman did not address whether the denial of the bonus was a separate act of retaliation and the Administrative Judge found that he had conceded the issue. With no genuine dispute that the denial of the bonus was not a discrete act of retaliation, the Administrative Judge applied the law and, on August 23, 2018, issued an Initial Agency Decision (IAD) denying Mr. Smallman's complaint for failure to allege a timely act of retaliation by LLNS. *John Smallman*, Case No. WBH-17-0007, WBZ3-17-0007 (2018).

On September 7, 2018, Mr. Smallman timely filed a notice of appeal with the OHA. He submitted a Statement of Issues on September 21, 2018, outlining the issues for review in his appeal. In its response, LLNS argued that Mr. Smallman "fails to raise any issue that would warrant investigation or review of the Interlocutory Orders or the Initial Agency Decision." LLNS Response to Statement of Issues at 1 (October 9, 2018).

III. Standard of Review

We review the underlying decision's findings of fact for clear error and its conclusions of law *de novo*. *Curtis Hall*, OHA Case No. TBA-0002 at 5 (2008). Part 708 appeals exist to fix defects in initial agency decisions, not to seek a second opinion from a different party. As the Supreme Court

has stated, the initial presentation on the merits "should be 'the main event' . . . rather than a 'tryout on the road.'" *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). By the time they reach the appellate stage, the parties have had a full opportunity to present their case. Appellate review is properly limited to correcting errors in the initial decision.

Part 708 requires that an appeal of an initial agency decision state the issues that it wishes the OHA Director to review. 10 C.F.R. 708.33(a). A tribunal system should not, of its own accord, deconstruct and discredit its own decisions. Doing so would undermine the tribunal's credibility and, more importantly, could unjustly deny successful parties the judgment they were lawfully awarded. *See Ramirezde Arellano v. Weinberger*, 240 U.S. App. D.C. 363, 745 F.2d 1500, 1537 & n.163 (D.C. Cir. 1984) (en banc) ("Unless the new issue uncovered by the appellate court was one which was clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appellate court to direct the issuance of summary judgment on a new issue raised *sua sponte* on appeal."), *vacated on other grounds*, 471 U.S. 1113 (1985). *See also Fund for Animals, Inc. v. United States BLM*, 460 F.3d 13, 25 (D.C. Cir. 2006). It is incumbent upon an appellant to state how and why an underlying decision is wrong.

IV. Analysis

Mr. Smallman's appeal fails for reasons both procedural and substantive. First, his appeal fails to allege a defect with the underlying decision and requests a remedy unavailable under Part 708. Second, a review of the decision below reveals no errors of fact or law. Finally, Mr. Smallman improperly raises new claims on appeal. For these reasons, discussed in detail below, we deny Mr. Smallman's appeal.

A. The Appeal

Mr. Smallman's appeal of the initial agency decision seeks to demonstrate the truth of Mr. Smallman's protected disclosures and requests a new investigation. *See* Statement of Issues. As LLNS points out in its Response, the appeal does not address the questions at issue in the IAD or interlocutory orders and, in fact, expresses no disagreement at all with the decision below. Response at 1. The appeal does not allege that the decision below incorrectly applied Part 708, nor does it allege clear error in the underlying decision's finding of fact that Mr. Smallman's denial of a bonus was the consequence of a time-barred action rather than an independent act of retaliation. *Id.* at 5. Because the appeal does not allege any defect with the decision below, its claims are irrelevant.

Moreover, the truth of the content of protected disclosures is not at issue in Part 708 cases. *Greta Kathy Congable*, Case No. TBU-0110 at 8 (2010). Part 708's sole purpose is to protect those that have made a protected disclosure from retaliation. In a Part 708 case, the only truth to be discovered is whether the complainant made a protected disclosure he *reasonably believed* to be true; whether his employer took an adverse personnel action against him in retaliation for that disclosure; and whether his employer would have taken such action regardless of that disclosure. Mr. Smallman's Part 708 case was not intended "to get to ground truth regarding serious allegations of misconduct on the part of senior government executives." Statement of Issues at 1.

The veracity of Mr. Smallman's alleged protected disclosures was never at issue in the decision below or at any time this case. *See* Response at 4. As such, claims relating to the truth behind Mr. Smallman's protected disclosures are irrelevant to this appeal and this case as a whole.

Mr. Smallman's requested remedy is also inappropriate. Because the veracity of protected disclosures is not at issue, Part 708 investigations are not intended to uncover whether the content of a protected disclosure is true; a new Part 708 investigation would not reveal the information Mr. Smallman seeks. While it is unclear what information Mr. Smallman believes the OHA investigator missed, the information's lack of relevance to whistleblower matters is likely the reason why it was not included in the Report of Investigation. Simply put, an investigation into allegations of misconduct is beyond the power of the OHA to order or conduct.

B. The Decision Below

The only issue of fact in the decision below was whether the denial of a bonus to Mr. Smallman was a consequence of a previous, time-barred act, rather than a discrete act of retaliation. Because Mr. Smallman did not address the question of whether the bonus denial was a discrete retaliatory act, the Administrative Judge found that the parties did not dispute the fact that the denial was a delayed consequence of a time-barred act of retaliation. *John Smallman*, WBH-17-0007, WBZ3-17-0007 at 5–6. Courts have long taken a party's failure to address a claim as a concession of the issue. *See, e.g., Dinkel v. Medstar Health, Inc.*, 880 F. Supp. 2d 49, 58 (D.D.C. 2012) (internal citation omitted) ("where a party fails to respond to arguments in opposition papers, the Court may treat those specific arguments as conceded."); *Hopkins v. Women's Div., Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."). Mr. Smallman alleges no clear error with this finding and, after reviewing the underlying opinion and the documents it cites, we see no obvious defect with the finding that there was no issue of material fact left in the case.

After determining that the parties did not dispute any material facts, the Administrative Judge applied the law to the facts of the case, holding that the alleged retaliation was not actionable due to untimeliness. *John Smallman*, WBH-17-0007, WBZ3-17-0007 at 6. Because the denial of the bonus was not a discrete act of retaliation—as conceded by Mr. Smallman—it was no longer a viable allegation. LLNS was entitled to judgment as a matter of law because Mr. Smallman lacked a required element of a Part 708 complaint (a timely allegation of retaliation) and, therefore, had failed to allege a prima facie case. *Gabriel v. Corr. Corp. OF Am.*, 211 F. Supp. 2d 132, 140 n.8 (D.D.C. 2002) ("Failure to state a claim or to allege a prima facie case can serve as bases for granting a summary judgment motion."). Again, Mr. Smallman does not challenge the underlying opinion and, viewing with fresh eyes, we see no obvious defect with the underlying decision's conclusions of law.

C. The New Claim

In his appeal, Mr. Smallman alleges a new act retaliation:

> Each time I take time off to assist my wife I am repunished with the loss of leave

> time that has value. This is additionally relevant as to the timing of my claim the violations that I am asserting continue to include that last time that I took leave in support of my wife's illness. [sic]

Statement of Issues at 3. Mr. Smallman alleges for the first time on appeal that having to use leave to assist his wife is an act of retaliation that recurs every time he must use leave. It is well-established that new claims may not be raised on appeal except in "exceptional circumstances." *Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (citing *Flynn v. Commissioner*, 269 F.3d 1064, 1069 (D.C. Cir. 2001)) (Appellate tribunals should review new claims "'only in exceptional circumstances, as, for example, in cases involving uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice.'"). *See also FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1095–96 (D.C. Cir. 2008). Presumably Mr. Smallman has been using leave to attend to his wife ever since his schedule was changed. He could have raised such a claim in his Complaint. Yet, he did not do so and, therefore, we decline to consider this claim now.

V. Conclusion

We find that Mr. Smallman's arguments in opposition to the Initial Agency Decision lack relevance. Accordingly, based on the foregoing, we find that the determination of the Administrative Judge should be affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by John Smallman, Case No. WBA-17-0007, 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. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 19, 2018