

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Leigh Huff)

Filing Date: January 18, 2019)

Case No.: WBA-18-0005)

Issued: May 13, 2019

Decision and Order

This Decision concerns the appeal by Leigh Huff (Appellant) of an initial agency determination (IAD) by the United States Department of Energy's (DOE) Office of Hearings and Appeals (OHA) dismissing Appellant's complaint of retaliation against her employer, Savannah River Nuclear Solutions, LLC (SRNS), under DOE's Contractor Employee Protection Program regulations codified at Part 708 of Title 10 of the Code of Federal Regulations (Part 708). Appellant alleges that SRNS retaliated against her for making protected disclosures under Part 708 and that OHA improperly dismissed her complaint. For the reasons set forth below, Appellant's appeal is denied.

I. The DOE Contractor Employee Protection Program

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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7,533 (Mar. 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which 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 DOE contractors from retaliating against an employee because that employee has engaged in protected activity, such as disclosing 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 public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with DOE and are entitled to an investigation by an investigator assigned by the Office of Hearings and Appeals (OHA), followed by a hearing conducted by an OHA Administrative Judge, and an opportunity for review

of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

An employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she engaged in protected activity, as described in 10 C.F.R. § 708.5, and that the employee's protected activity was a contributing factor in one or more alleged acts of retaliation by the contractor against the employee. 10 C.F.R. § 708.29. If the employee meets that burden, the burden then shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected activity. *Id.*

II. Factual and Procedural Background

Appellant filed a Part 708 complaint against her employer, SRNS, on April 17, 2018. Appellant alleged that she disclosed that a co-worker bullied and harassed her over a period of several months; that SRNS retaliated against her for disclosing the alleged bullying and harassment by requiring her to undergo an invasive and unlawful drug test; that she made a second protected disclosure concerning the manner of the drug testing; and that SRNS subsequently engaged in a campaign of retaliation against her. According to Appellant, SRNS retaliated against her by: (1) requiring her to undergo an invasive observed drug test on December 5, 2017; (2) requiring her to use leave time while SRNS investigated her allegations against her co-worker; (3) paying her less than similarly-situated employees; (4) not selecting her for employment positions; (5) requiring her to undergo drug and alcohol testing on January 18, 2018; and (6) initiating disciplinary action against her for allegedly making false allegations of bullying and harassment against her co-worker.

Following an investigation by an OHA investigator, this matter was assigned to an OHA Administrative Judge. On November 27, 2018, the OHA Administrative Judge issued an order to show cause directing Appellant to file a brief indicating why her complaint should not be dismissed for failure to allege a protected disclosure. On December 12, 2018, Appellant submitted a document containing excerpts from the OHA investigator's report of investigation and arguments concerning the alleged acts of retaliation by SRNS. On December 20, 2018, SRNS filed a response in which it argued that Appellant's complaint should be dismissed for failing to demonstrate a protected disclosure. SRNS also argued that the complaint was moot, and should be dismissed pursuant to 10 C.F.R. § 708.17(c)(6), because SRNS had transferred Appellant to a position away from the co-worker against whom she had made allegations of harassment, and no further relief was available to her under Part 708.

On January 3, 2019, the Administrative Judge issued the IAD dismissing Appellant's complaint. In the IAD, the Administrative Judge found that Appellant's "allegations of retaliatory pay and denial of promotions lack[ed] merit on their face . . . [and that Appellant] has already been provided an adequate remedy for the remaining retaliatory actions allegedly taken against her by SRNS and that further remedies are not necessary to abate the alleged Part 708 violations." *Leigh Huff*, Case No. WBH-18-0005 at 4 (2019).

On January 18, 2019, Appellant filed a statement indicating that she wished to appeal the IAD, asserted that she suffered from medical conditions as a result of SRNS's conduct, and requested that OHA assess a fine against SRNS. On February 11, 2019, Appellant supplemented her appeal with an additional statement reiterating her allegations that SRNS had retaliated against her. On February 25, 2019, SRNS filed its response in which it requested that OHA deny Appellant's appeal.

III. Analysis

On an appeal of an initial agency determination under the Part 708 regulations, the underlying conclusions of law are reviewed *de novo* and the underlying conclusions of fact are only reversed if they are clearly erroneous. *See Denise Hunter*, Case No. WBA-12-0004 at 6 (2014) (citing *Curtis Hall*, Case No. TBA-0042 at 5 (2008)). However, the appellant initiating the appeal is responsible for identifying the issues that it wishes for the OHA Director to review. 10 C.F.R. 708.33(a).

Appellant's appeal alleged that she made a protected disclosure on December 5, 2017, that the evidence in the record supported her assertion that SRNS retaliated against her later that day by requiring her to undergo an invasive observed drug test, and that SRNS's actions caused her to subsequently experience medical conditions. Second Appeal Submission of Leigh Huff, Case No. WBA-18-0005 at 1 (Feb. 11, 2019). Appellant also stated that she received a transfer away from the co-worker who she alleged harassed her, but that she found the working conditions intolerable and subsequently retired due to her health conditions. *Id.* at 2. Appellant requested that OHA subject SRNS to a fine or penalty as a remedy. First Appeal Submission of Leigh Huff, Case No. WBA-18-0005 at 1 (January 18, 2019).

The IAD dismissed Appellant's complaint on the basis that some of the alleged acts of retaliation by SRNS occurred before Appellant's alleged protected disclosures and that SRNS's decision to transfer Appellant to a position away from the co-worker who she alleged had harassed her represented the maximum remedy available to her under Part 708. *Leigh Huff*, WBH-18-0005 at 3 (2019). Appellant's appeal submissions do not directly address these findings, and instead reiterate her allegations that SRNS retaliated against her for making protected disclosures. Appellant cited the adverse working conditions as a result of her transfer only in passing, and indicated that her medical conditions led her to retire. Whether or not the IAD was correct in concluding that SRNS could not have provided her a remedy at the time that it was issued, the only remedy Appellant requested in her appeal, a fine or penalty against SRNS, is not available under Part 708. *See* 10 C.F.R. § 708.36(a); *see also Roy Leonard Moxley*, Case No. VBX-0014 at 4 (2000) (indicating that punitive remedies are not available under Part 708).

Since Appellant has not addressed the questions at issue in the IAD or identified a remedy that was available to her under Part 708 and which the IAD failed to take into account, I find that the Appellant failed to identify a defect in the IAD. Accordingly, I will deny the appeal. *See John Smallman*, Case No. WBA-17-0007 (2018) (denying an appeal because the appellant failed to identify a specific defect in the initial agency decision on appeal).

III. Conclusion

Appellant failed to identify a specific defect in the IAD. Accordingly, we find that the determination of the Administrative Judge should be affirmed.

It Is Therefore Ordered That:

- (1) The appeal filed by Leigh Huff, Case Number WBA-18-0005, is 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