United States Department of Energy
Office of Hearings and Appeals

In the Matter of Lee Anne Champion	)	
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Filing Date: July 6, 2019	)	Case No.: WBA-20-0007
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Issued: August 14, 2020

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 July 2, 2020, denying a Complaint of Retaliation filed by Lee Anne Champion against her employer, Four Rivers Nuclear Partnership (FRNP), under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. On appeal, Ms. Champion argues that her contact with the Employee Concerns Program should have tolled the time deadline to file her Part 708 complaint. As set forth in this Decision, we have determined that the Appeal 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. § 708.13, §708.15.

II. Background

Appellant filed her Part 708 complaint on February 24, 2020, with the Portsmouth Paducah Project Office (PPPO). Her complaint was forwarded to the Office of Hearings and Appeals (OHA) on May 7, 2020, for investigation. On May 18, 2020, pursuant to 10 C.F.R. § 708.22(g), the OHA Investigator requested that the OHA Director appoint an Administrative Judge to decide whether dismissal on the basis of untimely filing of the complaint would be appropriate. The Investigator cited Appellant's interview statements that she last experienced retaliation from FRNP in September or October of 2019, and noted that the complaint was not filed until at least four months later in February 2020. On May 2020, the Administrative Judge issued an Order to Show Cause, with a ten day deadline, which required that Appellant explain why her case should not be dismissed. Specifically, the Administrative Judge requested that Appellant identify the date on which she knew or reasonably should have known about the most recent act of retaliation against her.

Soon after issuing the Show Cause Order to Appellant, the PPPO contacted the Administrative Judge and stated that it had accepted Appellant's complaint for processing, the untimely filing notwithstanding, pursuant to 10 C.F.R. 708.15(b), which states that time spent attempting to resolve the issue through internal company grievance-arbitration procedures does not count toward the 90 day filing period. The PPPO explained that Appellant had utilized the Employee Concerns Program (ECP) process and filed her complaint after that process was completed without addressing her concerns. The PPPO stated that, although Appellant was not a union member and did not have access to negotiated grievance procedures, they erred on the side of caution and accepted her complaint because her attempt to resolve her concerns through the ECP process could possibly be considered an available grievance-arbitration procedure.

Appellant did not submit a response to the Show Cause Order before the 10 day deadline passed. On the twelfth day, the Administrative Judge contacted Appellant and asked about the status of her submission. Appellant stated that she was not sure what she needed to do and asserted that her complaint was timely because she had reported her concerns to the ECP in June 2019. She did not provide the date of the most recent act of retaliation against her. Furthermore, she did not state why she did not file her Part 708 complaint within the 90 day window for doing so, and did not make any statement regarding participation in the ECP process. In response to Appellant's late submission, FRNP moved for dismissal of the complaint, asserting that Appellant had failed to adequately respond to the Show Cause Order because she had not specified the most recent date of retaliation and had not provided an explanation of why her complaint was untimely. FRNP further asserted that, based on Appellant's complaint, the most recent date of alleged retaliation was September 17, 2019. Based upon that assertion, FRNP argued that Appellant's complaint was filed over 160 days after the most recent act of alleged retaliation and that there was no "good reason" provided for the delay, as required by Part 708 for acceptance of an untimely complaint. *See* 10 C.F.R. § 708.15(d).

The Administrative Judge found that the phrase "internal company grievance-arbitration procedure" from 10 C.F.R. § 708.15(b) applies only to such procedures for union and collective bargaining employees and, therefore, § 708.15(b) was not applicable to Appellant. She further found that the PPPO had not cited a "good reason" in its acceptance of the complaint, as required by 10 C.F.R. § 708.15(d). Finally, she held that the complaint was untimely because it was filed more than 90 days after the most recent act of retaliation alleged by Appellant.

Appellant timely filed an appeal, arguing that her complaint was timely because she disclosed the alleged retaliation to the ECP office in June 2019. She further argued that she was not aware of the requirements of Part 708 because she is not an attorney and, therefore, should not be held to those requirements.

III. Analysis

In considering an appeal, we review the Administrative Judge's findings of fact for clear error. 10 C.F.R. § 708.22(b)(2). Their conclusions of law we consider *de novo*. *Id.* Accordingly, absent extraordinary circumstances, we review the record as it existed at the time the Administrative Judge made their decision.

A. ECP Acceptance of a Complaint Is Not Dispositive of Its Justiciability

As an initial matter, we address the issue of the PPPO's reasoning for accepting the complaint. While Part 708 envisions a role for the various ECP offices in processing complaints, the OHA maintains the independent authority to decide any legal issue in the case. This is evidenced by the existence of 10 C.F.R. § 708.22(g), which allows the OHA to dismiss a complaint for any reason provided in 10 C.F.R. § 708.18(c), which in turn lists the reasons why the ECP may not accept a complaint.

Before a complaint can reach the investigation stage at the OHA, the ECP must decide that it is, or at least may be, timely and justiciable. ECP offices are close to the parties and events involved in the complaint, and can provide valuable insight into the circumstances in a Part 708 case. In the present case, the PPPO's response to the Show Cause Order was proper and helpful for its value in informing the Administrative Judge of its reasoning. However, the OHA is authorized to decide differently during the investigation, pursuant to 10 C.F.R. § 708.22(g).[1]

B. No reason given to upset the decision below and no prosecution of case

Turning to the substance of the appeal, we find that Appellant alleges no defect with the underlying decision, nor has she provided a good reason for failing to answer the Show Cause Order in a timely or complete manner. Appellant stated in her response to the Show Cause Order that she reported her allegations to her company's ECP in June 2019, however she gave no reason as to why she waited until late February 2020 to file a Part 708 complaint. In her appeal, Appellant argues that she did not know her reports to ECP were not sufficient for a 708 complaint because

[1] Relatedly, at the hearing stage of a Part 708 complaint, 10 C.F.R. § 708.28(b)(5) also allows an Administrative Judge to dismiss a claim, defense, or party.

she is not an attorney.

The OHA has long held that "Individuals are generally expected to know and understand their rights and obligations under applicable DOE regulations." *Caroline C. Roberts*, OHA Case No. TBU-0040 at 5 (2006). Additionally, "the issue before OHA at this point is not whether [the Complainant] made an important protected disclosure or whether [her] contractor employer was irresponsible …. It is whether [the Complainant] had a good reason to delay filing a complaint of retaliation." *Donald E. Searle*, OHA Case No. TBU-0065 at 9 (2007).

Furthermore, courts have long taken a party's failure to address an opposing claim or argument as a concession of the claim or argument. *See John Smallman*, OHA Case No. WBA-17-0002 at 4 (2018). *See also, 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.").

Appellant's argument that her lack of legal representation excuses her from regulatory filing requirements ignores the fact that she was free to hire a lawyer in the event that she did not feel she fully understood the regulations. We also note that the Appellant failed to request clarification or explanation from the Administrative Judge, even though the Administrative Judge had offered such assistance. Even so, the Administrative Judge used her discretion to allow Appellant to submit a late response to the Show Cause Order. Appellant has not substantiated an assertion that she was treated unfairly or punitively in the Administrative Judge's expectations of her as a pro se litigant.

IV. Conclusion

Appellant has alleged no error of fact in the underlying decision, nor is any such error clear to us. After thoroughly evaluating the record, we find that the Administrative Judge's decision was reasonable in light of the facts in front of her. Accordingly, we see no reason to disturb the decision below.

For the foregoing reasons, it is Ordered that the Appeal filed by Lee Anne Champion, Case No. WBA-20-0007, is hereby denied.

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