

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

In the Matter of Richard J. Starr

Filing Date: October 18, 2021

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Case No.: WBA-21-0002

Issued: December 9, 2021

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 October 4, 2021, dismissing a Complaint of Retaliation filed by Mr. Richard J. Starr (Mr. Starr) against his employer, Bechtel National, Inc. (BNI), under the DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708. On appeal, Mr. Starr alleges that dismissal was improper as he does “not agree with the reasoning documented” in the IAD. Statement of Issues (November 1, 2021). 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 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” 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(a).

This filing deadline, however, is tolled while an employee is attempting to resolve the dispute through an internal company grievance-arbitration procedure and during time spent resolving jurisdictional issues related to a complaint the employee files under State or other applicable law. 10 C.F.R. §708.15(b), (c). Additionally, the regulations provide that the DOE Employee Concerns Program (ECP) has the discretion to accept an untimely complaint for processing when the complainant provides “any good reason he may have had for not filing” within the 90-day period. 10 C.F.R. §708.15(d).

II. Background

On June 28, 2021, Mr. Starr filed a Complaint with the DOE Hanford ECP Manager. Memorandum from Bonnie A. Lazor to Poli A. Marmolejos (August 11, 2021) at 1. The ECP forwarded the Complaint to OHA on August 11, 2021, and an OHA attorney (Investigator) began a Part 708 investigation. *Id.*; Notice of Appointment from Mr. Marmolejos to Steven Fine (August 12, 2021). On August 30, 2021, pursuant to 10 C.F.R. §708.22 (g), the Investigator requested that the OHA Director appoint an Administrative Judge to determine whether dismissal was appropriate based upon the untimely filing of the Complaint. Memorandum from Mr. Fine to Mr. Marmolejos (August 30, 2021). Accordingly, the OHA Director appointed an Administrative Judge on August 30, 2021. Notice of Appointment from Mr. Marmolejos to James P. Thompson III (August 30, 2021).

After review of the record, the Administrative Judge noted that there was no dispute between the parties that the relevant alleged retaliatory act occurred on March 16, 2020. *In the Matter of Richard J. Starr*, OHA Case No. WBZ-21-0002 at 2 (2021). The Administrative Judge also added that there was no dispute that Mr. Starr filed his Part 708 Complaint with the DOE ECP more than a year later, on June 28, 2021. *Id.* However, in arguing his case, Mr. Starr asserted that he was unaware of the Part 708 filing deadline. *Id.* He further asserted that, prior to filing his Part 708 Complaint: (1) he filed a timely complaint with BNI’s ECP; (2) BNI’s Employee Dispute Resolution (EDR) Program initiated an investigation into his complaint; and (3) he filed a timely complaint with the DOE Office of Inspector General (OIG) pursuant to 41 U.S.C. 4712.¹ *See id.* at 2-3.

Ultimately, the Administrative Judge determined that: (1) neither the filing of a complaint to BNI’s ECP, nor Mr. Starr’s participation in BNI’s EDR Program tolled the Part 708 filing deadline pursuant to 10 C.F.R. §708.15(b), (c); (2) the filing of the §4712 complaint, and the subsequent investigation by the OIG, did not toll the Part 708 filing deadline; and (3) Mr. Starr did not establish a “good reason” for his delay in filing the Part 708 Complaint. *See id.* at 3-5. In the IAD, the Administrative Judge dismissed the case, concluding that Mr. Starr failed to file his Part 708 Complaint in a timely manner. *Id.* at 5.

¹ 41 U.S.C 4712 is a whistleblower protection statute that provides a process for seeking relief from an employer’s retaliatory conduct after engaging in protected activity. 41 U.S.C. §4712(a). Under this statute, the initial complaint is to be filed with the relevant agency’s OIG. *Id.* at §4712(b).

III. Analysis

In considering an appeal, we review an Administrative Judge's findings of fact for clear error. 10 C.F.R. §708.22(b)(2). The conclusions of law are considered *de novo*. *Id.* Accordingly, absent extraordinary circumstances, we review the record as it existed at the time the Administrative Judge made their decision. *See In the Matter of Shou Yuan Zhang*, OHA Case No. WBA-17-0011 at 2 (2019).

On October 18, 2021, Mr. Starr filed a Notice of Appeal, challenging the IAD. Notice of Appeal of IAD (October 18, 2021). On appeal, Mr. Starr states that he does "not agree with" the Administrative Judge's reasoning and asserts three points of appeal: (1) the "internal company grievance-arbitration procedure" referenced in 10 C.F.R. §708.15(b) is applicable to any employee regardless of union affiliation; (2) his filing of a complaint with the OIG pursuant to §4712 tolled the Part 708 filing deadline; (3) the DOE ECP accepted his Complaint and referred it to OHA, and as such, he established a "good reason" for his delay in filing the Part 708 Complaint. Statement of Issues (November 1, 2021). Mr. Starr additionally adds, for the first time in this matter, that the COVID-19 pandemic contributed to his delay in filing his Part 708 Complaint in a timely manner. *Id.* On November 22, 2021, BNI filed a response to Mr. Starr's appeal.² Response (November 22, 2021). BNI argued that Mr. Starr failed to establish that the Administrative Judge erred, and as such, the appeal should be denied. *Id.*

A. 10 C.F.R. § 708.15(b): Internal Company Grievance-Arbitration Procedures

In the IAD, the Administrative Judge noted that, although participation in an internal company grievance-arbitration procedure under Part 708 can toll the filing deadline, it is well established in OHA caselaw that the phrase "internal company grievance-arbitration procedure" is intended to apply solely to union members and "negotiated grievance procedures available to bargaining unit employees." *Richard J. Starr* at 3-4. The Administrative Judge found that BNI's EDR Program did not constitute an internal company grievance-arbitration procedure pursuant to 10 C.F.R. §708.15(b) as the Program's paperwork explicitly stated that it did not apply to "union employees working pursuant to a collective bargaining agreement." *Id.*

On appeal, there is no dispute that Mr. Starr is a non-union employee eligible for participation in BNI's EDR program. However, Mr. Starr argues that BNI's EDR Program should qualify as an "internal company grievance-arbitration procedure" pursuant to 10 C.F.R. §708.15(b). Statement of Issues. Specifically, he asserts that because the scope and purpose of Part 708, pursuant to 10 C.F.R. §708.1, and the definition of "employee," pursuant to 10 C.F.R. §708.2, does not distinguish between union and non-union employees, "all sections of 10 C.F.R. §708 [are] applicable to both non-union and union employee regardless of the phrasing in §708.15(b)." *Id.*

² BNI's response was due to OHA on November 21, 2021; however, on November 18, 2021, BNI requested a one-day extension as November 21, 2021 fell on a Sunday. Email Correspondence, November 18, 2021 through November 21, 2021. Mr. Starr stated that he had no objection to the extension, and as such, an Administrative Judge granted the extension for BNI to submit its response. *Id.*

Mr. Starr provides no legal authority or support for his contention that §708.15(b) applies to all employees regardless of union affiliation. His mere disagreement with established OHA caselaw is not sufficient to demonstrate that the Administrative Judge erred.

B. §4712 OIG Complaint

In the IAD, the Administrative Judge noted that there was “no dispute that Mr. Starr filed his §4712 complaint on February 2, 2021, which is 323 days after the last alleged act of retaliation.” *Richard J. Starr* at 4. Therefore, the Administrative Judge determined that Mr. Starr’s §4712 complaint, and the accompanying OIG investigation, did not toll the Part 708 filing deadline as the deadline had already lapsed. *Id.* On appeal, Mr. Starr argues that he timely filed the §4712 complaint with the OIG, and he was unaware of the Part 708 process until he learned about it from the OIG. Statement of Issues.

At the outset, 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). Furthermore, although Mr. Starr may have filed his §4712 complaint in a timely manner pursuant to the §4712 deadlines,³ he did not file his Part 708 complaint within the 90-day deadline provided for in 10 C.F.R. §708.15(a). As such, the 90-day deadline could not be tolled by the OIG process, as the Part 708 deadline had already passed. We find Mr. Starr’s argument unavailing. Consequently, he has not established on appeal that the Administrative Judge erred regarding this issue.

C. “Good Reason” for Delay

On appeal, Mr. Starr argues that he has established a “good reason” for the delay in filing his Part 708 Complaint. Statement of Issues. He asserts that the DOE ECP’s acceptance of his Complaint, and its subsequent referral of the Complaint to OHA, demonstrated that the ECP exercised its discretion to accept the untimely Complaint as timely for “any good reason” pursuant to 10 C.F.R. § 708.15(d). Statement of Issues.

At the outset, 10 C.F.R. §708.22(g) provides that an Administrative Judge has the authority to decide whether a complaint may be dismissed prior to the completion of an investigation for any reason listed in §708.18(c), which includes dismissal based upon untimeliness. 10 C.F.R. §708.22(g); 10 C.F.R. §708.18(c). Thus, as we have previously indicated, the ECP’s acceptance of a case and its subsequent referral to OHA is not dispositive of its justiciability. *See In the Matter of Lee Anne Champion*, OHA Case No. WBA-20-0007 at 3 (2020).

Additionally, Mr. Starr again asserts that he was never trained in or aware of the Part 708 process. Statement of Issues. Specifically, he contends that he should not “be penalized because all the processes [he] followed (including training) never once instructed [him] to go straight to DOE OHA or DOE ECP.” *Id.* As the Administrative Judge originally noted, an employee’s ignorance of rights and obligations under Part 708 does not establish good reason for failure to timely file a

³ On appeal, Mr. Starr states that he “originally filed the §4712 complaint with the OIG on August 19, 2020, 113 days into [BNI’s] EDR investigation. Statement of Issues. Given that this timeline is still beyond the 90-day deadline set forth in Part 708, it does not impact our decision herein.

complaint. *Richard J. Starr* at 4; see *Billy Joe Baptist*, OHA Case No. TBH-0080 at 7 (2009). Consequently, we find no merit in Mr. Starr's argument.

For the first time, on appeal, Mr. Starr now argues that the COVID-19 pandemic contributed to his delay in filing his Part 708 Complaint in a timely manner. Statement of Issues. He states that he was unable to retain an attorney due to COVID-19, and it caused "increased times/delays for organizations to respond and/or work due to the pandemic." Statement of Issues. Absent extraordinary circumstances, we review the record as it existed before the Administrative Judge. See *In the Matter of Shou Yuan Zhang*, OHA Case No. WBA-17-0011 at 2. (2019). We note that, "regarding the submission of new evidence, extraordinary circumstances may [exist] when the new evidence was unknown or unavailable to the party, despite due diligence...or when a party presents 'a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust.'" *Id.* (citing *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980)). However, if the pandemic impacted the timely filing of Mr. Starr's Part 708 Complaint, he was the only party with knowledge of this information, and he failed to notify the Administrative Judge of these difficulties. Consequently, we do not consider his failure to submit evidence into the record to be an extraordinary circumstance. As such, we will not consider this new issue on appeal.

IV. Conclusion

Based on the foregoing, the determination of the Administrative Judge should be affirmed. Accordingly, it is Ordered that the Appeal filed by Richard J. Starr, Case No. WBZ-21-0002, 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