United States Department of Energy
Office of Hearings and Appeals

In the Matter of Alejandro Ayala	)		
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Filing Date: July 6, 2026	)	Case No.:	WBU-26-0004
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Issued: July 24, 2026

Decision and Order

Alejandro Ayala (Appellant), an employee of Lawrence Livermore National Security, LLC (LLNS),[1] filed the instant appeal on July 6, 2026, which concerns the dismissal of a complaint that he filed against LLNS under Part 708 of Title 10 of the Code of Federal Regulations (Part 708), the Department of Energy's (DOE) Contractor Employee Protection Program. The Head of Field Element for DOE's Livermore Field Office (LFO) dismissed Appellant's complaint on June 26, 2026, for lack of jurisdiction pursuant to 10 C.F.R. § 708.18(c). On July 16, 2026, LLNS submitted a response to the appeal in which it argued that Appellant's appeal should be denied. On July 22, 2026, Appellant submitted a reply to LLNS's response.[2] For the reasons set forth herein, Appellant's appeal is granted.

I. Background

A. 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. 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, unlawful, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. *Id.*

[1] LLNS manages Lawrence Livermore National Laboratory on behalf of the Department of Energy (DOE). *Lawrence Livermore National Security, LLC*, https://www.llnsllc.com/# (last visited July 16, 2026).

[2] Both Appellant and LLNS make several arguments on the merits in their filings. Those arguments go beyond the scope of this appeal, and, as such, I do not address them.

Part 708 prohibits 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). Employees are also protected from retaliation for refusing to participate in an activity, policy, or practice if the employee believes that doing so would violate a Federal health or safety law or cause the employee to have a reasonable fear of serious injury to themselves or others, provided that the employee first asks the contractor to correct the violation or remove the danger. *Id.* §§ 708.5(c), 708.7(a). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* § 708.36.

A complainant who files a Part 708 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 complainant's protected activity was a contributing factor in one or more alleged acts of retaliation by the contractor against the complainant. *Id.* § 708.29. If the complainant 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 complainant's protected activity. *Id.*

A contractor employee at a DOE field facility or site who alleges that he or she suffered retaliation for engaging in protected activity may file a Part 708 complaint with the Head of Field Element at the DOE field element with jurisdiction over the contract. *Id.* § 708.11(b). The Head of Field Element may dismiss a complaint for lack of jurisdiction or for other good cause. *Id.* § 708.18(a). Such a dismissal is appropriate if:

> (1) The complaint is untimely; or
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> (2) The facts, as alleged in the complaint, do not present issues for which relief can be granted under [Part 708]; or
>
> (3) The complainant filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under [Part 708]; or
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> (4) The complaint is frivolous or without merit on its face; or
>
> (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 requested in the complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under [Part 708].

Id. § 708.18(c).

A complainant may appeal dismissal of his or her Part 708 complaint by the Head of Field Element to the Director of the Office of Hearings and Appeals (OHA) "by the 10th day after receipt of the notice of dismissal . . . ." *Id.* § 708.19(a).

B. The Complaint

On March 13, 2026, Appellant submitted a Part 708 complaint (Complaint) to the Head of Field Element for DOE's LFO. Complaint from Alejandro Ayala to LFO (Mar. 3, 2026). In the Complaint, Appellant alleged that he made two protected disclosures between October and November 2025. *Id.* at 1. The Appellant first alleged on October 8, 2025, he disclosed gross mismanagement related to "[a] $5.0 million carryforward material weakness and an $8.5 million budget gap." *Id.* Next, he alleged that there was an abuse of authority related to "[a] terminal conflict of interest involving [a] Manager [] overseeing the budget and audit of her biological brother." *Id.* Appellant further alleged that LLNS retaliated against him for these disclosures by (1) "execut[ing] a [] 50% pay suspension;" (2) "[i]ssu[ing] a retroactive pay strike;"[3] (3) demotion of his role; and (4) revoking his access to certain systems. *Id.*[4]

C. Dismissal

LFO collected a response to the Complaint from LLNS on April 14, 2026. LLNS Response to the Complaint (Apr. 14, 2026). LFO stated that it provided Appellant ten days to reply, and he did not do so.[5] The Head of Field Element subsequently issued a letter (Dismissal) dismissing the Complaint. Dismissal Letter from LFO to Alejandro Ayala (June 26, 2026). The Dismissal concluded that Appellant had "not yet exhausted all applicable grievance-arbitration procedures" because LLNS was still processing a grievance he filed through LLNS's HR Policy 501 and it had been less than 150 days since he had filed that grievance, "his statements [were] insufficient for LFO to determine whether [Appellant] did in fact make protected disclosures as defined under [Part 708]," and "the Complaint does not contain the information required by 10 C.F.R. § 708.13" *Id.* at 3–4.

D. Appeal

On July 6, 2026, Appellant filed an appeal with OHA (Appeal). Appeal from Alejandro Ayala to OHA (July 6, 2026). In the Appeal, Appellant argued that LFO's Dismissal was "severe procedural

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[3] It is unclear from the Complaint if these first two alleged acts of retaliation are two distinct actions or simply the notification of a pay suspension and the actual implementation of that pay suspension.

[4] In his Complaint, Complainant requested "an immediate Stay of Personnel Action under 10 C.F.R. § 708.27." Complaint at 2. That provision states that an "Administrative Judge may not require that the parties participate in alternative dispute resolution." 10 C.F.R. § 708.27. In his Appeal, Appellant makes the same request and cites 10 C.F.R. § 708.36(b). Appeal at 26. That provision authorizes interim relief, but only if "an initial agency decision contains a determination that an act of retaliation occurred." 10 C.F.R. § 708.36(b). As there is no initial agency decision in this matter, there is no basis for interim relief.

[5] Appellant alleged in his appeal that he was not provided a copy of LLNS's Response to the Complaint. Appeal at 2. Whether he was provided a copy of that document is not material to the matters at issue here, and, as such, I do not discuss it.

error." Appeal at 1. More specifically, he contended, among other arguments, that LFO's finding that he did not provide sufficient information to determine if he had made protected disclosures was incorrect. *Id.* at 3.

E. Response

On July 15, 2026, LLNS submitted a response to the Appeal. Response Brief (July 15, 2026) (Response). Therein, LLNS stated that its brief "does not address questions concerning the Department of Energy's jurisdiction" and addressed Appellant's claims on the merits. *Id.* at 1–3.

F. Reply

On July 22, 2026, Appellant submitted a reply to LLNS's Response. Reply Brief (July 22, 2026) (Reply). The Reply repeated arguments made in the Appeal. *Id.* Most notably, it requested that OHA grant the Appeal and conduct a hearing on the merits. *Id.* at 2.

II. Analysis

In deciding appeals of dismissals for lack of jurisdiction or other good cause, OHA "will review findings of fact for clear error and conclusions of law *de novo*." 10 C.F.R. § 708.19(c).

A. Exhaustion of Grievance-Arbitration Procedures

Section 708.14[6] requires that, when filing a complaint under Part 708, a complainant must show that "all applicable grievance-arbitration procedures have been exhausted" or that "more than 150 days have passed and a final decision on [a grievance] has not been issued." However, "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*, OHA Case No. WBA-21-0002 at 3 (2021); *Erik DeBenedictis*, OHA Case No. WBU-18-0004 at 5 (2018); *Darryl H. Shadel*, OHA Case No. VBU-0050 at 5 (2000).

LFO determined that because Appellant was still involved in a grievance process pursuant to LLNS HR Policy 501, and 150 days had not passed since the filing of that internal grievance, he had not exhausted grievance-arbitration procedures as required by 10 C.F.R. § 708.14. Dismissal at 3. Having reviewed the HR Policy , I conclude that the policy was not negotiated with a union and does not apply solely to union members. *See 501 / Complaint Resolution*, LAWRENCE LIVERMORE NATIONAL SECURITY, LLC (effective May 27, 2019). Because the policy is not one of

[6] Appellant argued that the DOE Office of Inspector General's (OIG) dismissal of the claim he filed with that office "authorizes a complainant to proceed directly with a Part 708 administrative complaint." Appeal at 1. This argument misreads the regulations. Part 708 bars a complainant from filing a claim under Part 708 if that claim is being adjudicated "under State or other applicable law." 10 C.F.R. § 708.16. The specific provision that Appellant cites, 10 C.F.R. § 708.16(a)(2), provides an exception where a complainant *may* file a claim under Part 708 if OIG declines to investigate a complaint based on the same facts. That provision makes no changes to the jurisdictional requirements imposed by 10 C.F.R. § 708.15. However, as explained, *infra*, we grant the appeal on other grounds.

the kind covered by 10 C.F.R. § 708.14, that provision cannot bar Appellant from filing his Complaint.

B. Protected Disclosures

OHA uses Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP), which concerns dismissals for failure to state a claim upon which relief can be granted, as a guide when considering dismissals pursuant to 10 C.F.R. § 708.18(c)(2). *See Erik DeBenedictis*, OHA Case No. WBU-20-0003 at 4 (2019) (identifying prior cases in which OHA looked to Rule 12(b)(6) in evaluating whether a complaint should be dismissed for failing to present issues for which relief can be granted under Part 708). Dismissal under Rule 12(b)(6) is proper only if the complaint does not "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In assessing whether a claim is plausible, the adjudicator must accept all statements of fact in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Appellant's Complaint contains two allegations which he contends constitute protected disclosures. Complaint at 1. We discuss each allegation in turn.

First, Appellant alleged that he disclosed a "$5.0M carryforward material weakness and an $8.5M FY26 budget gap" and that this issue constituted gross mismanagement. Complaint at 1. OHA has defined "gross mismanagement" as "a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Cassondra B. Stark*, OHA Case No. WBU-13-0003 at 10 (2013) (citing *Smith v. Dep't of Army*, 80 M.S.P.R. 311, 315 (1998)). These alleged facts establish a plausible basis for Appellant to have reasonably believed that he had disclosed financial mismanagement that could endanger LLNS's ability to accomplish its mission of running Lawrence Livermore National Lab.

Next, Appellant alleged that he disclosed a "terminal conflict of interest involving [a] Manager [] overseeing the budget and audit of her biological brother" and that it constituted a disclosure of abuse of authority. Complaint at 1. Appellant expanded on these claims in his Appeal,[7] arguing that the manager's oversight of "budget and audit parameters of" her brother was a "direct violation of DEAR 970.5203-3." Appeal at 20. "OHA has defined 'abuse of authority' as the 'arbitrary or capricious exercise of power by an official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.'" *Anthony T. Rivera*, OHA Case No. WBA-14-0006 (citing *Sherrie Walker*, OHA Case No. WBA-13-0015 (2014)). "An action is arbitrary or capricious if the decision maker has relied on inappropriate factors, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of relevant expertise." *Erik DeBenedictis*, OHA Case No. WBA-20-0003 at 9 (2020). Here, his allegations imply that the manager made decisions based on

[7] As we have explained in our previous cases, the FRCP allow a party to amend a pleading as a matter of right before trial twenty-one days after service of a motion to dismiss filed pursuant to Rule 12(b). *Andrei Seryi*, OHA Case No. WBU-26-0003 at 8 (2026). We consider the facts alleged in the Appeal to be an amendment. Further, dismissal, without providing Appellant the opportunity to amend his Complaint, would subject Appellant to more stringent procedural standards than in the FRCP and would not be appropriate given Part 708's more relaxed standards. *Id.*; *Guobin Hu*, OHA Case No. WBU-25-0002 at 5 (2025).

inappropriate factors, namely her relationship with her brother. These allegations provide a factual basis from which one could reasonably conclude that the manager or her family received a personal gain or advantage.

As Appellant has alleged sufficient information that, if true, demonstrates that he made a protected disclosure, we remand the Complaint to LFO for further processing.

III. Conclusion

For the foregoing reasons, we reverse the Dismissal. Therefore, we grant the appeal and remand the matter to LFO for further processing.[8]

It is therefore ordered that:

(1) The Appeal filed by Alejandro Ayala (Case No. WBU-26-0004) is hereby: GRANTED.

(2) This matter is remanded to LFO ECP for further processing consistent with this Decision.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

[8] Appellant has requested that OHA take "direct, de novo jurisdiction" over this matter and move "immediately to a full, administrative agency hearing." Reply at 22. These requests are not among the available remedies here. Part 708 authorizes the OHA Director to either "uphold[] the dismissal" or "order[] further processing of the complaint." 10 C.F.R. § 708.19. Appellant should refer to Subpart C of Part 708 for further information about how his Complaint may proceed.