

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

In the Matter of Robert J. Schumacher	)		
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Filing Date: March 27, 2015	)	Case No.:	WBA-15-0001
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Issued: May 29, 2015

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**Decision and Order**  
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This Decision concerns a Complaint filed by Robert J. Schumacher (the Appellant or Schumacher) against his former employer, Bechtel National, Inc. (Bechtel), under the DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708.<sup>1</sup> On March 4, 2015, the Office of Hearings and Appeals investigator assigned to the Complaint dismissed the Complaint on procedural grounds, and the Appellant filed the instant Appeal. As set forth in this Decision, we have determined that the Appeal should be granted, and the Complaint remanded for further processing.

**I. Background**

**A. The DOE Contractor Employee Protection Program**

The 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. 57 Fed. Reg. 7533 (March 2, 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

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<sup>1</sup> Bechtel, a DOE prime contractor, coordinates the construction of DOE’s Hanford Site’s Waste Treatment Plant in Hanford, Washington, area.

of operations at a DOE site, your 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. In general a complaint must be filed within 90 days of the alleged retaliation, subject to a tolling period during which the complainant is pursuing a grievance-arbitration procedure. 10 C.F.R. § 708.14.

## **B. Factual and Procedural Background**

Bechtel hired the Appellant as a Pipefitter in 2008. On February 13, 2014, Bechtel terminated the Appellant allegedly for “using abusive language, verbal threats, or intimidation of another individual or creating a hostile work environment (Employee Manual 2.7).” Schumacher Disciplinary File at 44.

On February 21, 2014, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (UA) filed a grievance with Bechtel concerning the Appellant’s termination. The Hanford Site Stabilization Agreement (HSSA) governs grievances at the Hanford Site. The HSSA outlines a four step grievance resolution process. On March 6, 2014, UA and Bechtel conducted a “Step 1” meeting which ultimately resulted in Bechtel denying the grievance. Both parties conducted a “Step 2” meeting on April 18, 2014. The result of this meeting was another denial of the Appellant’s grievance. On April 22, 2014, UA informed Bechtel that it would not refer this matter to the Hanford Administrative Committee (“Step 3”). Under the HSSA, failure to refer a grievance to the Committee “waives the grievance and terminates the grievance process.” Dismissal Letter at 3; *see* HSSA Article XXIV.

On September 2, 2014, the Appellant filed a Part 708 Complaint against Bechtel, alleging that he was terminated from his position because of an alleged disclosure concerning an “unsafe act” he witnessed on June 11, 2013, in the T-52 warehouse. Appellant’s September 2014 Part 708 Complaint at 1. On January 20, 2015, Roger M. Gordon, Manager, Employee Concerns Program (ECP Manager), forwarded the Appellant’s Part 708 Complaint to OHA for investigation and a hearing. January 20, 2015, Memorandum from ECP Manager to Poli A. Marmolejos, Director, Office of Hearings and Appeals.

The OHA Director assigned an OHA Attorney-Advisor to be the OHA Investigator in this case and to conduct an investigation into the Appellant’s Part 708 Complaint. After a preliminary review, the OHA Investigator concluded that the Complaint was untimely. The OHA Investigator noted that the retaliation occurred on February 13, 2014, when the Appellant was terminated. The OHA Investigator found that the Appellant pursued the applicable grievance-arbitration procedure from February 21, 2014, to April 22, 2014, thus tolling the running of 90-day filing deadline during that period. On that basis, the OHA Investigator reasoned that the Complaint was due on July 13, 2014, well before the actual September 2, 2014, filing date.

Dismissal Letter at 2. Consequently, the OHA Investigator dismissed the Appellant's Part 708 Complaint due to lack of timeliness.

## **II. Appeal**

In his Appeal, the Appellant asserts that he met the 90-day deadline. He states that after April 22, 2014, he and a UA official continued to speak to DOE officials in an attempt to resolve the dispute regarding the Appellant's termination. Appeal at 1. Specifically, the Appellant asserts that he and Randy Walli (Walli), a local business agent of Local 598 of UA, attended meetings with DOE Richland Operations Office (Richland) officials Bonnie Lazor (Lazor) and the ECP Manager during the period May 2014 through June 12, 2014, to discuss the Appellant's termination. Appeal at 1. The Appellant claims that, during this period, Lazor and the ECP Manager advised him not to file a Part 708 Complaint regarding his termination until UA had exhausted its efforts to resolve the dispute. Appeal at 1. Finally, Appellant claims that, after the June 12, 2014, meeting with Lazor and the ECP Manager, Walli informed the Appellant that UA had exhausted its efforts to resolve the dispute. The Appellant then submitted his Part 708 Complaint on September 2, 2014, within 90 days of that meeting.

During the pendency of this Appeal, the ECP Manager confirmed the Appellant's assertion that the ECP Manager viewed his Part 708 Complaint as timely filed. April 7, 2015, E-mail from ECP Manager, Richard to Poli A. Marmolejos, Director, Office of Hearings and Appeals (ECP Manager E-mail). The ECP Manager confirmed that, on June 12, 2014, the Appellant and Walli informed him that all attempts at resolution had been exhausted. Further, the ECP Manager confirmed that he then informed the Appellant that the Appellant had until September 2, 2014, to file his Part 708 Complaint and that the ECP Manager received the Part 708 Complaint on that date. ECP Manager E-mail at 1. Further, the ECP Manager essentially takes the position that, even if the Complaint was untimely, it should be processed. ECP Manager E-mail at 1.

In response to the Appeal, Bechtel maintains that the OHA Investigator correctly determined that the Complaint was untimely, and Bechtel agrees with the legal reasoning that the OHA Investigator used in making that determination. May 7, 2015, Submission from Jean H. Dunkirk, Senior Counsel, Bechtel to Richard Cronin, Attorney-Advisor, OHA (Response). In support of that position, Bechtel argues that there is only one grievance-arbitration procedure at Hanford, and it is defined in the HSSA. Consequently, Bechtel argues that any discussions after April 22, 2014, with DOE officials are irrelevant to the timeliness of the Complaint. Response at 2.

Section 708.14 specifies the deadline by which a Part 708 complaint must be filed and the standard for accepting a late filing.

§ 708.14 How much time does an employee have to file a complaint?

- (a) You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation.
- (b) The period for filing a complaint does not include time spent attempting to resolve the dispute through an internal company grievance-arbitration procedure.

The time period for filing stops running on the day the internal grievance is filed and begins to run again on the earlier of:

- (1) The day after such dispute resolution efforts end; or
- (2) 150 days after the internal grievance was filed if a final decision on the grievance has not been issued.

....

- (d) If you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing.

10 C.F.R. § 708.14. As explained below, we reject the Appellant’s argument that the OHA Investigator erred when he determined that the Part 708 Complaint was untimely.

The OHA Investigator correctly concluded that the grievance-arbitration procedure ran from February 21, 2014, to April 22, 2014, and that the Part 708 Complaint was due on July 13, 2014. The preamble to Part 708 indicates that phrase “grievance-arbitration procedure” was intended to refer to formally established procedures and not to other informal attempts to resolve a matter. 64 Fed. Reg. 12862 at 12866 (March 15, 1999) (Interim Final Rule). Accordingly, the OHA Investigator correctly concluded that the tolling ended on April 22, 2014, when UA notified Bechtel that it was not going to file a “Step 3” appeal under the HSSA on behalf of the Appellant. 10 C.F.R. § 708.14(b)(1). Based on that, the OHA Investigator correctly concluded that July 13, 2014, was the last day for the Appellant to file a Part 708 Complaint under Section 708.14.

Nonetheless, we agree that, under the unique circumstances of this case, the complaint should be remanded to an OHA investigator for further processing. Section 708.14(d) allows the ECP Manager to exercise his discretion to accept a complaint, based on the complainant’s showing of “good reason” for not meeting the filing deadline. Because the ECP Manager believed that the Part 708 Complaint was timely, he had no reason to make that determination. Given the ECP Manager’s reasoning in support of the instant Appeal, it is clear that the ECP Manager would have found “good reason” for the late filing; and it is also clear that he would make such a determination were we to remand the Part 708 Complaint for a determination on that issue. Consequently, we will grant the Appellant’s Appeal and remand the Part 708 Complaint to an OHA investigator for further processing.

It Is Therefore Ordered That:

- (1) The Appeal filed by Robert J. Schumacher (Case No. WBA-15-0001) is hereby granted as set forth in Paragraph 2 below.

(2) The Part 708 Complaint is remanded to an investigator for further processing.

(3) This Appeal Decision is an interlocutory decision and, therefore, not subject to further review.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: May 29, 2015