

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

In the Matter of Krishnan Balasubramanian)		
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Filing Date: August 5, 2015)	Case No.:	WBA-14-0001
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_____)		

Issued: December 28, 2015

Decision and Order

This Decision considers an Appeal of a Decision and Order issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on July 22, 2015, dismissing a Motion for Reconsideration filed by Krishnan Balasubramanian (the Appellant or Balasubramanian), seeking leave to refile a Complaint against his employer, Lawrence Livermore National Security, LLC (LLNS), under the DOE’s Contractor Employee Protection Program, 10 C.F.R. Part 708. Following Balasubramanian’s third request for a health-related postponement of his Part 708 hearing, an OHA Administrative Judge (Administrative Judge) dismissed his Complaint without prejudice, subject to Balasubramanian refiling his Complaint with OHA by June 1, 2015. On May 29, 2015, Balasubramanian requested a three-month health-related postponement of the deadline to refile his Complaint with OHA, which was characterized by OHA as a Motion for Reconsideration (Motion). As set forth in this Decision, we have determined that the dismissal of the Motion should be affirmed and the Appeal denied.

I. Background

A. 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, [their] 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.” 10 C.F.R. § 708.12.

B. Factual and Procedural Background

In 2000, Balasubramanian began working for LLNS. Balasubramanian filed his Complaint on October 6, 2013, with the Employee Concerns Program at the National Nuclear Security Administration in Albuquerque, New Mexico. In his Complaint, Balasubramanian alleges that, during 2013, he engaged in protected activity and that, as a result of that activity, LLNS engaged in several acts of retaliation against him. On October 28, 2013, LLNS filed a Response, contending that despite his assurances to the contrary, Balasubramanian was actively pursuing a remedy in state court and, therefore, the Complaint should be dismissed. On January 2, 2014, Balasubramanian requested the Complaint be forwarded to OHA for investigation and hearing. On January 10, 2014, OHA received the Complaint and the OHA Director appointed an Investigator.

On June 20, 2014, the OHA Investigator issued a Report of Investigation in which she concluded that, based on the evidence gathered during the investigation, it appeared that Balasubramanian had not engaged in protected activity. The Investigator continued that if, however, Balasubramanian were able to prove by a preponderance of the evidence that he made a protected disclosure, the proximity in time of his alleged disclosure would permit an inference that his protected conduct was a contributory factor in his office move, revocation of his outside work agreement, termination of his telework agreement and VPN access, and removal of his laptop. She concluded that LLNS had presented evidence of legitimate reasons for these actions and that it would be an issue for the Administrative Judge as to whether this evidence constituted a clear and convincing level of proof. *See Krishnan Balasubramanian*, Case No.WBI-14-0001 (2014) at 8-9.

Thereafter, the OHA Director referred the Complaint to an Administrative Judge for a hearing. Part 708 requires that a hearing be held on the Complaint by the 90th day after the issuance of the report of investigation. 10 C.F.R. § 708.26(a).

On July 14, 2014, Balasubramanian requested a postponement based on ill health, and he submitted a note from his physician supporting his request. July 14, 2014, Email from Balasubramanian to Richard Cronin, OHA Administrative Judge. The Administrative Judge granted this request, and set a deadline of October 1, 2014, for Balasubramanian to be prepared

to schedule a hearing in the matter. July 18, 2014, E-mail from Richard Cronin, OHA Administrative Judge, to Balasubramanian.

On October 1, 2014, Balasubramanian requested an additional three-month postponement, supported by a doctor's note citing ill health. October 1, 2014, E-mail from Balasubramanian to Richard Cronin, OHA Administrative Judge. The Administrative Judge granted this second request. October 9, 2014, E-mail from Richard Cronin, OHA Administrative Judge to Balasubramanian.

On January 1, 2015, Balasubramanian submitted a third request for postponement, this time a four-month postponement until May 1, 2015. January 1, 2015, E-mail from Balasubramanian to Richard Cronin, OHA Administrative Judge. In a January 7, 2015, Letter to Balasubramanian, the Administrative Judge held that, in light of Balasubramanian's claimed ill health and the extensive delay in scheduling the hearing, he was dismissing Balasubramanian's Part 708 Complaint without prejudice, subject to Balasubramanian refiling his complaint with OHA no later than June 1, 2015. January 7, 2015, Letter from Richard Cronin, OHA Administrative Judge, to Balasubramanian.

On May 29, 2015, Balasubramanian again requested that the Administrative Judge extend the deadline for him to refile his original Part 708 Complaint by three months, until September 1, 2015. May 29, 2015, E-mail from Balasubramanian to Richard Cronin, OHA Administrative Judge. The request also contained another note from his physician certifying that Balasubramanian should abstain from employment-related responsibilities and duties until August 31, 2015. April 15, 2015, Note from Balasubramanian's physician (attached to May 29, 2015, E-mail from Balasubramanian to Richard Cronin, OHA Administrative Judge). In further support of his request for an extension to refile his Part 708 Complaint, Balasubramanian asserted that he is "in the process of initiating a global amicable settlement with LLNS" and that he was confident that all legal issues between himself and LLNS could be resolved without need of a hearing. May 29, 2015, E-mail from Balasubramanian to Richard Cronin, OHA Administrative Judge.

LLNS opposed the request, asserting that, since Balasubramanian failed to refile his Part 708 Complaint within the established June 1, 2015, deadline, he was barred from refiling his Part 708 Complaint. June 9, 2015, Letter from Jennifer K. Achtert, Assistant General Counsel, LLNS, to Richard Cronin, OHA Administrative Judge (Response). Further, LLNS asserted that, on February 3, 2015, Balasubramanian filed a civil action in a California Superior Court asserting a claim based upon the same facts made in his Part 708 Complaint. *Balasubramanian v. LLNS*, Case No. HG15757097 (Complaint filed February 3, 2015) (*Balasubramanian State Court Complaint*). Given this legal action, LLNS argued that, pursuant to 10 C.F.R. 708.15(d), OHA had no jurisdiction to hear Balasubramanian's Part 708 Complaint. Response at 1. LLNS also argued, in the alternative, that Balasubramanian had not shown good cause to extend the deadline to refile his Part 708 Complaint because Balasubramanian's health was sufficiently good to allow him to employ a lawyer to file the cited civil complaint against LLNS. Response at 2. Finally, LLNS stated that, although Balasubramanian claims that he is in the process of initiating a global settlement, LLNS had not received any communications from Balasubramanian's

attorney nor been served with a copy of the Balasubramanian State Court Complaint. Response at 3.

The Administrative Judge characterized Balasubramanian's request for an extension to refile his Complaint as a Motion for Reconsideration of the earlier dismissal of the Complaint. The Administrative Judge noted that the two most recent notes (dated December 30, 2014, and April 14, 2015) from Balasubramanian's physician state that Balasubramanian "on the basis of his present disabling condition and the medications that he is taking must be freed completely from his job duties, job-related communications, work related meetings and proceedings." December 30, 2014, Note from Balasubramanian's physician; April 14, 2015, Note from Balasubramanian's physician. The Administrative Judge stated that, while such a statement is usually sufficient for OHA to conclude that a manifest medical necessity exists to grant relief to a movant, the exact extent of Balasubramanian's medical disability is called into question by the fact that Balasubramanian filed a complaint against LLNS in a California Superior Court in February 2015. *See* June 1, 2015, E-mail from Krishnan Balasubramanian to Richard Cronin (with an attached unsigned settlement demand letter from Ismael D. Perez, Esq., regarding employment discrimination and retaliation claims in the case of *Balasubramanian v. LLNS*); *Balasubramanian State Court Complaint*. Despite Balasubramanian's physician's opinion in his December 30, 2014, note that Balasubramanian must not undertake any "job-related communications" through April 30, 2015, Balasubramanian was able to file a civil suit against LLNS in February 2015. The Administrative Judge concluded that there was no basis for concluding that Balasubramanian was unable to refile his Part 708 Complaint by the June 1, 2015, deadline¹ and, therefore, dismissed Balasubramanian's Motion for Reconsideration in a Decision and Order issued on July 22, 2015. *See Krishnan Balasubramanian*, Case No.WBX-14-0001 (2015).

Balasubramanian filed an Appeal of the dismissal of his Motion for Reconsideration with OHA on August 5, 2015. *See* August 3, 2015, letter from Balasubramanian to Poli A. Marmolejos, OHA Director (*Letter of Appeal*).

II. Appeal

In his Appeal, Balasubramanian argues that OHA erred in dismissing his Motion. His specific arguments are that: (a) as a "safety and health" matter, he has been unable to "fully...prepare and withstand the burden of the litigation process" since filing his Complaint; (b) prior to the deadline for refiling his Complaint that was specified in the dismissal of his Complaint, he timely filed another additional request for a health-related extension; (c) he emailed a request to the Administrative Judge requesting to refile his Complaint on February 3, 2015, which was prior to the refiling deadline specified in the dismissal and the Administrative Judge refused to accept the filing; (d) his state court filing does not displace OHA's jurisdiction over his Complaint as the state court action is for unrelated unlawful discrimination and retaliation; (e) allowing his Complaint to be refiled is efficient and more cost-effective for DOE as LLNS refuses to enter into any type of global settlement with him; (f) the civil lawsuit filed in state court on his behalf

¹ Because the Administrative Judge found that Balasubramanian's Motion should be dismissed on the grounds stated above, he did not consider LLNS's other arguments raised in its Response. *See Krishnan Balasubramanian*, Case No.WBX-14-0001 (2015) at 3.

against LLNS was filed by his attorney, who only represents him in the state court matter, and does not reflect any ability on his part to participate in a Part 708 proceeding where he is unrepresented and will need to do all of the work himself; and (g) the Administrative Judge was factually incorrect when he stated in the dismissal of the Motion that “although Balasubramanian claims that he is in the process of initiating a global settlement, LLNS has not received any communications from Balasubramanian’s attorney nor been served with a copy of the Balasubramanian Court Complaint.” *Letter of Appeal*; August 31, 2015, E-mail from Balasubramanian to Wade Boswell, OHA Attorney Advisor (*Statement of Issues*). Finally, in his supplemental filing on this Appeal, Balasubramanian states that he continues to be medically unable to fully litigate his Complaint and requests “an extension to start the litigation process” of his Complaint, attaching a certificate from a physician that he “must be freed completely from his job duties, job related communications, work-related meetings, and proceedings” until December 31, 2015. August 19, 2015, Note from Balasubramanian’s physician attached to *Statement of Issues*.

III. Analysis

As set forth in OHA’s other Part 708 appeal cases, the standard of review for appeals is well-established. Conclusions of law are reviewed *de novo*. See *Curtis Hall*, Case No. TBA-0002 at 5 (2008). Findings of fact, however, are overturned only if they are clearly erroneous, giving due regard to the trier of fact to judge the credibility of the witness. *Id.*; *Salvatore Gianfriddo*, Case No. VBA-0007 (1999). Below, we will review issues raised on Appeal and the bases upon which the Administrative Judge dismissed Balasubramanian’s Motion.

A. Balasubramanian’s Appeal Mistakes LLNS Arguments for OHA Findings

The OHA Administrative Judge, in his dismissal of Balasubramanian’s Motion, states a single reason for the dismissal: that despite Balasubramanian’s physician’s opinion in his December 30, 2014, note that Balasubramanian must not undertake any “job-related communications” through April 30, 2015, Balasubramanian was able to file a civil suit against LLNS in February 2015 and, therefore, the Administrative Judge saw no basis for concluding that Balasubramanian was unable to refile his Part 708 Complaint by the June 1, 2015, deadline. *Krishnan Balasubramanian*, Case No. WBX-14-0001 (2015) at 3.

The Administrative Judge specifically stated that having denied the Motion on the above stated grounds, he did not need to consider other arguments put forward by LLNS in its Response, although all of LLNS’s arguments were summarized in his Decision as part of the background of the proceeding. See *Id.* at 2. In his Appeal, Balasubramanian confuses two of the LLNS’s arguments which the Administrative Judge summarized in the Decision, as bases for OHA’s dismissal of the Motion when they were not. Specifically, LLNS argued that (1) Balasubramanian’s state court filing displaces OHA’s jurisdiction over his Complaint as the state court action asserts a claim based upon the same facts set forth in the Complaint and (2) although Balasubramanian claimed that he is in the process of initiating a global settlement, LLNS had not received any communications from Balasubramanian’s attorney nor been served with a copy of the Balasubramanian Court Complaint; however, neither of these arguments were considered in OHA’s dismissal of the Motion. *Id.* at 2-3.

B. Efficiency and Cost-Effectiveness of Proceedings Are Not Grounds for Part 708 Determinations

Balasubramanian argues that allowing his Complaint to be refiled is efficient and more cost-effective for DOE because, he alleges, LLNS is refusing to enter into any type of global settlement with him. Matters of efficiency and cost-effectiveness are policy considerations that are outside the scope of OHA's jurisdiction under a Part 708 proceeding. Part 708 grants jurisdiction to OHA to adjudicate claims within the scope specified in the regulation, based upon the rights and responsibilities specified therein. OHA does not have the authority to adjudicate claims thereunder based upon the efficiency or cost-effectiveness of the proceedings to the DOE. As previously noted, the Investigator issued the Report of Investigation on the Complaint on June 20, 2014. Under Part 708, a hearing on a complaint is required to be held by the 90th day following the issuance of the Report of Investigation. 10 C.F.R. § 708.26(a). On January 1, 2015, Balasubramanian submitted his third request for a medically-related postponement of the hearing (in this case, through May 1, 2015). The time parameters specified in Part 708 justify the Administrative Judge dismissing the Complaint without prejudice, subject to the Complaint being refiled with OHA no later than June 1, 2015, as the Administrative Judge did on January 7, 2015. January 7, 2015, Letter from Richard A. Cronin, OHA Administrative Judge to Balasubramanian. The Administrative Judge was unable, in light of Balasubramanian's claimed disability, to schedule the hearing within the time parameters specified by Part 708; however, he was permitting the Complaint to be refiled if done within the month following the expiration of Balasubramanian's claimed disability.

C. February 2015 Refiling Was Premature

When Balasubramanian attempted to refile the Complaint approximately one month later on February 3, 2015, the Administrative Judge was equally justified in rejecting the filing and instructing that the Complaint be refiled after April 30, 2015. With his attempted refile in February 2015, Balasubramanian provided no indication that his medical disability had abated or that he was otherwise medically capable of participating in a Part 708 proceeding. Without assurances that Balasubramanian was able and prepared to prosecute his Complaint in a timely manner, accepting his February refile would have required that it be immediately re-dismissed. Attempting to refile his Complaint at a time when he continued to claim that medical disabilities precluded him from participating in a Part 708 proceeding suggests that Balasubramanian failed to understand the reasons for the original dismissal of the Complaint and the timeframe specified therein for refile.

D. Findings with Respect to Claimed Inability to Proceed

Rather than refile his Complaint within the one-month period following the expiration of his physician's certificate, Balasubramanian instead filed on May 29, 2015, a request that the deadline for refile his Complaint be extended until September 1, 2015, together with another note from his physician certifying that Balasubramanian should abstain from employment-related responsibilities and duties for an additional three months (until August 31, 2015). May 29, 2015, E-mail from Balasubramanian to Richard Cronin, OHA Administrative Judge. The

Administrative Judge correctly noted that, in a Part 708 proceeding, such a statement from a physician is usually sufficient to conclude that a medical necessity warrants granting the relief requested. *Krishnan Balasubramanian*, Case No.WBX-14-0001 (2015) at 3. However, the Administrative Judge also noted that, in this case, the extent of the movant's disability was called into question by the fact that he had filed a civil suit against LLNS in a California Superior Court in February 2015. Balasubramanian's physician notes consistently stated that Balasubramanian "must be freed completely from ... job-related communications [and] work related meetings and proceedings." *Id.* The Administrative Judge concluded that since Balasubramanian had been able to file a state court action against LLNS there was no basis to conclude that he was unable to refile his Part 708 Complaint by the June 1, 2015, deadline. *Id.*

Balasubramanian argues that the Administrative Judge was incorrect in his conclusion. His primary argument is that he retained an attorney who represented him in his state court proceeding against LLNS and that he was unrepresented in the Part 708 proceeding and would need to do all of the work himself. *Statement of Issues* at 2. This argument is without merit. To the extent that Balasubramanian was medically able to select and retain counsel in a state civil suit and to participate in the activities necessary to file and maintain a state court proceeding (including supervising counsel and providing counsel with the information required to file and respond to pleadings), Balasubramanian demonstrated an ability to participate in "proceedings." Additionally, the state court proceeding is a proceeding which was voluntarily initiated by Balasubramanian and not one where he was forced to respond to the claim by another party. Although Part 708 does not require that a complainant have legal counsel, Part 708 permits a complainant to be represented by legal counsel and nothing precluded Balasubramanian from utilizing legal counsel in his Part 708 proceeding. By Balasubramanian retaining counsel and initiating a state court proceeding, he clearly demonstrated the medical capability to have refiled his Part 708 Complaint by the required deadline, as well as to participate in the "proceedings" necessary to pursue his Part 708 Complaint in a timely manner.

During the pendency of this Appeal, Balasubramanian has written to OHA and copied OHA on correspondence with LLNS about his attempts to mediate with LLNS and proposals he has made to LLNS in an attempt to reach a "global" settlement on the disputes between him and his employer. *See* August 27, 2015, E-mail from Balasubramanian to Jennifer Achter, LLNS Counsel; August 12, 2015, E-mail from Balasubramanian to Wade Boswell, OHA Attorney Advisor. This correspondence reinforces the conclusions of the Administrative Judge that Balasubramanian evidences the willingness and capability to participate in work-related communications and proceedings. For these reasons, Balasubramanian's positions are without merit when he argues that (1) he has continued as a "safety and health" matter to be unable to fully prepare and withstand the litigation process since filing his Complaint and (2) his May 29, 2015, filing of a physician's note as to his continued disability was sufficient to demonstrate compliance with the requirement that he refile his Complaint by June 1, 2015. *See Letter of Appeal; Statement of Issues.*

When Balasubramanian filed with OHA his statement of issues that he wished to be reviewed as part of this Appeal, he included an additional note from his physician that he "must be freed completely from ... job-related communications, work-related meetings, and proceedings" until December 31, 2015. August 19, 2015, Note from Balasubramanian's physician. This medical

certificate was not evaluated as part of this Appeal and, as it was submitted to OHA as part of Balasubramanian's final submission in this proceeding, it is not relevant.

IV. Conclusion

As stated above, we find that Balasubramanian's arguments in opposition to the dismissal of his Motion for Reconsideration lack merit. Accordingly, based on the foregoing, we find that the determination of the Administrative Judge should be sustained, and the instant appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Krishnan Balasubramanian, Case No. WBA-14-0001, is hereby 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. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 28, 2015