

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

In the Matter of Sandra Black)		
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Filing Date: September 11, 2015)	Case No.:	WBA-15-0009
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_____)		

Issued: December 31, 2015

Decision and Order

Sandra Black (Appellant), a former employee of Savannah River Nuclear Solutions, LLC (SRNS), appeals the dismissal of a whistleblower retaliation complaint (the Part 708 Complaint) that she filed under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. After filing the Part 708 Complaint, the Appellant filed a whistleblower retaliation complaint at the U.S. Department of Labor (DOL), under 29 C.F.R. Part 24. In both complaints, the Appellant alleges that SRNS terminated her in retaliation for engaging in protected activity. An Office of Hearings and Appeals (OHA) Attorney-Investigator dismissed the Part 708 Complaint, stating that Part 708 requires dismissal of a Part 708 complaint where the complainant has filed a whistleblower complaint in another forum based on the same alleged retaliatory act. As explained below, we have considered the Appellant’s arguments that Part 708 does not require dismissal in this circumstance, and determined that those arguments lack merit. Accordingly, we have determined that the Appeal should be denied.

I. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program was established to safeguard “public and employee health and safety; ensur[e] compliance with the 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 3, 1992). Its primary purpose is to encourage contractor employees to disclose information they believe exhibits illegal, unsafe, 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 who engages in a broad range of protected activity. That broad range of activity includes the disclosure of information that the employee reasonably believes reveals a substantial violation of law, rule or regulation; a substantial and specific danger to employees or to public health and safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority.

If a contractor retaliates against an employee for engaging in protected activity, the employee can file a complaint under Part 708. Part 708, however, requires dismissal of a complaint where the complainant has filed a complaint with respect to the same facts in another forum, whether the complaint is filed before, concurrently with, or after the Part 708 complaint is filed. 10 C.F.R. § 708.15(c).

II. Background

On April 7, 2015, the Appellant sent a letter to the DOE employee concerns specialist at the Savannah River Operations Office (site office). *See* Letter from Billie Pirner Garde to Darren Parham, Employee Concerns Specialist, DOE (April 7, 2015). Although the letter was not designated as a complaint, the Appellant apparently intended the letter to constitute a Part 708 complaint: the letter was filed on the 90th day after SRNS terminated her employment, which is the filing deadline set forth in Part 708, and the letter contained allegations that the Appellant was terminated for engaging in protected activity. Accordingly, we refer to the letter as the Part 708 Complaint.¹

As described in the Part 708 Complaint, the Appellant was employed as an Employee Concerns Program (ECP) manager by SRNS. *Id.* As the ECP manager, the Appellant received, investigated, and resolved employee concerns about SRNS. *Id.* In some instances, she substantiated employee claims made against SRNS. *Id.*

In the Part 708 Complaint, the Appellant alleges that SRNS retaliated against her for engaging in protected activity by terminating her on January 7, 2015. *Id.* The Appellant claims that her daily activities in her position as ECP manager were inherently protected under Part 708. *Id.* In addition, the Appellant specifically cites her fall 2014 statements to the Government Accountability Office (GAO), during a GAO review of the handling of employee concerns at DOE sites, as protected disclosures. *Id.* According to the Appellant, she told GAO that SRNS management did not support the ECP program and interfered in the processing of certain cases. *Id.* The Appellant later disclosed to her supervisors that she had made these statements. *Id.*

¹ The letter did not, however, satisfy the Part 708 filing requirements. The letter did not include a statement that the complainant was not currently pursuing a remedy under State or other applicable law, nor did it state that all of the facts recited therein were true and correct to the best of the complainant's knowledge and belief. 10 C.F.R. § 708.12(b) & (c). Whether the site office notified the Appellant of the opportunity to correct these deficiencies is not known. What is clear is that the site office should not have referred a deficient complaint to OHA for processing and these deficiencies would need to be corrected were the Part 708 Complaint to be further processed. *See also* note 2 *infra*.

Also in the Part 708 Complaint, the Appellant stated her intention to file a complaint with DOE's Office of Inspector General (OIG) and "other federal agencies that have jurisdiction." *Id.* She proposed that the different organizations coordinate an investigation, after which the Appellant would elect the forum in which she sought relief, specifically acknowledging that only one forum could decide the merits of her case. *Id.*

Consistent with her stated intention, the Appellant did file a complaint with DOL (the DOL Complaint), and provided a copy to the employee concern specialist at the site office. After receiving the DOL Complaint, the site office referred the Part 708 Complaint to OHA for an investigation and hearing, and included a copy of the DOL Complaint in the referral materials.

After a preliminary review of the Part 708 Complaint, the OHA Attorney-Investigator advised the Appellant that he was considering dismissing the Part 708 Complaint for lack of jurisdiction under 10 C.F.R. § 708.17(c)(3) (dismissal is appropriate where the complainant has filed a complaint in another forum based on "the same facts" as alleged in the Part 708 complaint). The OHA Attorney-Investigator reasoned that, in both complaints, the Appellant sought relief from her termination based on her alleged whistleblowing activities.

Subsequently, on August 4, 2015, Appellant's counsel submitted a "Response to Show Cause Order" (Show Cause Response) in reply to the OHA Attorney-Investigator. In the Show Cause Response, the Appellant stated that some of the alleged protected activity in the Part 708 Complaint is outside the scope of DOL jurisdiction and, therefore, will not be addressed in that forum; she cited the Appellant's allegations that she disclosed waste, fraud, and abuse, and her statements during the GAO review. *Id.*

On August 28, 2015, the OHA Attorney-Investigator dismissed the Part 708 Complaint. Dismissal Letter from Wade M. Boswell, Investigator, to Billie P. Garde, Esq. (August 28, 2015). He reiterated his previous statement that in both complaints – the Part 708 Complaint and the DOL Complaint – the Appellant sought relief based on the allegation that she was terminated from her position as the result of whistleblowing activity. *Id.* Based on that, he reasoned that the complaints were based on the "the same facts" within the meaning of Section 708.15(c), thereby requiring dismissal of the Part 708 Complaint. *Id.*

On September 11, 2015, the Appellant filed this appeal challenging the dismissal. Appeal of August 28, 2015, Dismissal of Complaint (September 11, 2015). The Appellant argues that "some of the factual issues pertaining to her DOE-related protected activity for which the DOE has jurisdiction are separate from her DOL-related protected activity for which DOL has exclusive jurisdiction." *Id.*

III. Analysis

The Appellant argues that the Part 708 Complaint and the DOL Complaint involve different facts, but the complaints themselves do not indicate that. In both complaints, the Appellant claims that her involvement with employee concerns gave rise to protected activity. Moreover, in both

complaints, the Appellant refers generally to these “concerns” without identifying the specific information giving rise to the concerns. Letter from Billie Pirner Garde to Darren Parham, Employee Concerns Specialist, DOE (April 7, 2015); Complaint of Retaliation (July 2, 2015). Although she makes the general argument that these “concerns” relate to facts giving rise to activities protected under statutes and regulations under the jurisdiction of different agencies, the failure to identify the information to which the concerns relate precludes evaluation of that argument.²

Moreover, although the Appellant argues that DOL has “exclusive” jurisdiction with respect to some of this unspecified protected activity, the Appellant has failed to provide any support for that argument. The Appellant generally asserts that DOL has “exclusive” jurisdiction over disclosures related to violations of statutes under DOL purview. Yet, the Appellant fails to cite any regulatory or other legal authority for that argument or to explain why such disclosures would not be protected under Part 708, which does not limit its protections to disclosures of violations under identified statutes but rather broadly protects disclosures relating to “violations of law, rule, or regulation.” Indeed, given the broad definition of protected activity under Part 708, we fail to see why the Appellant is attempting to carve out portions of its claim for DOL, although we presume that the Appellant has identified some advantage in doing so.

In any event, the issue here is whether Part 708 permits the Appellant to pursue a complaint here at DOE while also pursuing a whistleblower complaint at DOL. Part 708 requires that a complaint be dismissed if the employee files another complaint or pleading with respect to the same facts as the Part 708 complaint in a proceeding established or mandated by State or other applicable law, whether that complaint or pleading is filed before, concurrently with or subsequent to the Part 708 complaint. 10 C.F.R. § 708.15(c), (d) and 708.17(c)(3). *See also* 10 C.F.R. 708.4(c); 708.12(b);

A review of the preamble to Part 708 makes clear that a whistleblower complaint based on the same alleged retaliation is a complaint “with respect to the same facts” within the meaning of Part 708. In the preamble to the 1992 regulations, the DOE stated that it did not intend to limit an employee’s right to pursue remedies under State or other applicable law, but rather wanted the employee to make an exclusive election of remedies. 57 FR 7533-02 (March 3, 1992). Similarity, in the preamble to the 1999 regulations, the DOE stated that, because there are other available remedies for whistleblowers, DOE wanted to avoid the situation where an employee could simultaneously pursue the same whistleblower complaint in more than one forum. 64 FR 12862-01 (March 15, 1999); 65 FR 6314-01 (February 9, 2000).

² Indeed, this lack of specificity renders her Part 708 deficient. 10 C.F.R. § 710.12(a)(2). Although the Appellant cites *Dennis Patterson v. Battelle Energy Alliance, LLC*, OHA Case No. TBH-0047, Initial Agency Decision, June 20, 2008; upheld on appeal in OHA Case No. TBA-0047, Decision and Order, March 10, 2009, that decision does not support the proposition that performing one’s duties as an ECP manager is automatically protected activity. Part 708 defines protected activity and, in that case, the complainant reported procedural and regulatory violations falling within Part 708.

Despite the foregoing, the Appellant maintains that OHA case law supports her argument that she can pursue both whistleblower complaints. First, she cites *Lucy B. Smith*, OHA Case No. VWZ-0012 (June 30, 1999); and *Carl J. Blier*, VBZ-0003 (June 21, 1999). Neither of those cases, however, involved two whistleblower complaints: to the contrary, in both cases the second complaint was an employment discrimination suit, one for age discrimination and the other for discrimination under the Americans With Disabilities Act and the Rehabilitation Act of 1973. Second, the Appellant cites *Edward J. Seawalt*, OHA Case No. VBU-0039 (Nov. 30, 1999), for the proposition that a Part 708 complaint should not be dismissed when doing so would frustrate the purpose of the regulation, “which is to protect contract employees who make protected disclosures.” *Seawalt* did not, however, involve two whistleblower complaints: the contractor filed a state court action against the complainant, and then argued that the employee’s counterclaim warranted dismissal of his Part 708 complaint. OHA stated that it would frustrate the purpose of Part 708 to allow an employer to file a preemptive court action against an employee and then cite the employee’s response as basis for the dismissal of a Part 708 complaint. *Id.* This is clearly not analogous to the instant case where the employee has elected to file whistleblower complaints at both DOE and DOL.

As the foregoing indicates, Part 708 establishes OHA’s jurisdiction, and Part 708 requires dismissal when a complainant files a whistleblower complaint based on the same alleged retaliatory act in another forum, in this case DOL. Accordingly, the Appellant’s Part 708 Complaint should be dismissed in accordance with 10 C.F.R. § 708.17(c)(3).

IV. Conclusion

As stated above, the OHA Attorney-Investigator’s dismissal of the Appellant’s Part 708 Complaint was consistent with 10 C.F.R. § 708.17(c)(3). Therefore, the Appeal is denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Sandra Black, WBA-15-0009, is hereby denied.
- (2) This Appeal 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. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 31, 2015