

United States Department of Energy  
Office of Hearings and Appeals

In the Matter of Richard Lusby )  
 )  
Filing Date: April 19, 2016 )  
\_\_\_\_\_ )

Case No.: WBU-16-0004

Issued: May 16, 2016  
\_\_\_\_\_

**Decision and Order**  
\_\_\_\_\_

Richard Lusby (hereinafter Lusby or Complainant), an employee of Savannah River Nuclear Solutions (SRNS), appeals the dismissal of a whistleblower complaint that he filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The Savannah River Operations Office's Employee Concerns Office dismissed the complaint on March 30, 2016.<sup>1</sup> For the reasons set forth herein, the appeal is denied.

**I. Regulatory Background**

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 (Mar. 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708, of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not retaliate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, 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 the public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). Similarly, reprisal is prohibited against an employee who participates in a Congressional or administrative employee protection proceeding, *Id.* at (b),

---

<sup>1</sup> Lusby received the decision on April 7, 2016. His appeal was received by the Office of Hearings and Appeals on April 19. A postmark is not available. Allowing for mailing time, we have determined that the appeal was timely filed.

or who refuses to participate in an activity, policy or practice that he or she believes constitutes a violation of federal health and safety laws, or causes that person to have a reasonable fear of serious injury to himself/herself, other employees, or members of the public. *Id.* at (c).

Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator assigned by the Office of Hearings and Appeals (OHA), followed by a hearing by an OHA Administrative Judge, and an opportunity for review of the Administrative Judge's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

However, a complaint may be dismissed for "lack of jurisdiction or for other good cause . . ." 10 C.F.R. § 708.17. The regulations specifically provide that "Dismissal for lack of jurisdiction or other good cause is appropriate if . . . [t]he facts, as alleged in your complaint, do not present issues for which relief can be granted under this part." 10 C.F.R. § 708.17(c)(2). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

## **II. History**

On July 24, 2013, Lusby filed a Notice of Employee Concern with SRNS, alleging that he was "singled out as the only RPD FLM forced to vacate my position . . . after seven years so another FLM . . . from a different facility could have it." Concern (July 24, 2013), p.1. As a result, he alleged that he was forced to move to a different position, and "suffered a severe pay cut." *Id.* Following the filing of the Concern, mediation was conducted, and Lusby agreed to accept another position; however, he asserts that he did not agree to close his Concern.

On February 22, 2016, Lusby filed a Notice of Employee Concern with Savannah River Nuclear Solutions, alleging retaliation in the non-selection for several Radiation Protection Department positions. He cites positions he sought "at the end of 2014," in April 2015, and again in October 2015. He further states that, on January 26, 2016, he met with the Environmental Management Manager and the Radiation Protection Department Manager to discuss the situation, and received no satisfaction. He alleges that "[t]he original complaint I filed with the SRNS ECP [in] July of 2013 led to the workplace retaliation." Concern (February 22, 2016), p.6.

By Notice of Dismissal, the Savannah River Operations Office's Employee Concerns Office issued the Initial Agency Decision, dismissing the complaint "for lack of jurisdiction and for other good cause." The decision stated:

Based on information gathered from your statement dated February 22, 2016, and Savannah River Nuclear Solution's (SRNS) response dated March 21, 2016, your concern was related to SRNS eliminating your position as a RPD<sup>2</sup> and their current

---

<sup>2</sup> In his current Concern, Lusby states that his RPD FLM position was not, in fact, eliminated. He states, instead, that he was removed from his FLM position so that another individual whose position had been eliminated could have it, and that he was then placed in a less favorable position. Concern (February 22, 2016), p.1.

interviewing/hiring practices. Therefore, the facts, as alleged in your complaint, do not present issues for which relief can be granted under 10 CFR 708.

Notice of Dismissal (March 30, 2016). Lusby then filed this appeal. By emails dated April 19, April 21, and April 25, 2016, he provided additional information purporting to show that he was better qualified than the selectees, and that he was subjected to retaliation.

### III. Analysis

The Part 708 regulations provide that a contractor employee may file a complaint against his employer alleging that he has been subject to retaliation for:

(a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals-

- (1) substantial violation of a law, rule, or regulation;
- (2) 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;

(b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --

- (1) Constitute a violation of a federal health or safety law; or
- (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Pursuant to Part 708.12, a whistleblower complaint must contain 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(a). Here, the Concern states:

#### Employee's Disclosure:

Original Complaint – During the budget crisis at the end of October 2012, nine (9) RPD FLM positions were eliminated. My position as an RPD FLM on shift X-3 in L-Area was not one of the positions eliminated. RPD management intentionally found positions of the same comparable schedule and pay, for each of the nine (9) displaced RPD FLM's in order to protect their livelihood. I was the only RPD FLM not granted the same

privilege/treatment. Instead, RPD management intentionally removed me from my position of eight (8) years so one of the 9, an RPD FLM from E-Area shift 32 (days) whose position had been eliminated could fill it. The RPD FLM from E-Area had no knowledge of the facility, did not have the required Q clearance or the required HRP red clip. I did, and I also had excellent job performance reviews, yet I was the only RPD FLM whose position was not eliminated, and the only FLM to suffer a loss of pay. The other FLM could have been given the position I was forced to take on shift 32 (days) at Health Physics Services (HPS) to fill in for the sub-contract Grade 16 employees who had been laid off due to the budget crisis and put plastic on HP field instrumentation used in contamination areas. Had management reassigned the RPD FLM from E-Area to HPS and left me in my position all actions would have been totally fair. All RPD FLM's would have maintained the same schedule and pay and there would have been no issue.

Concern (February 22, 2016), p.1. Lusby cites as a "violation" the fact that his manager (Robbie K. Black) subsequently told other management that Lusby "volunteered" to leave his position. He states, "I never volunteered." He states that this "dishonest act is a violation of the SRNS 5B Manual 'Rules of Conduct'." *Id.* at 2.

The burden rests on a complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation, 10 C.F.R. §§ 708.5, 708.29. Only if the complainant meets this evidentiary burden does the burden then shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected disclosure or activity. *Id.*

In the present case, it is clear that Lusby's alleged disclosure does not fall within the ambit of Part 708. Even assuming the truth of his allegations as to the relevant facts of this case, the alleged disclosure did not, as a matter of law, reveal information that Lusby could have reasonably believed was a "substantial violation of 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). Fraud is defined as a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *See Eugene N. Kilmer*, Case No. TBH-0111 (2011). Gross mismanagement "means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Id.* Abuse of authority constitutes an "arbitrary and capricious exercise of power . . ." *Mark D. Siciliano*, Case No. TBH-0098 (2010).

Based upon these definitions, it is clear that Mr. Lusby's prior action failed to meet the criteria of Part 708.5(a).

Similarly, the prior action failed to meet the criteria of Part 708.5(b) or (c), in that Lusby failed to show that he participated in a Congressional hearing or an administrative proceeding conducted under Part 708, *id.* at § 708.5(b), or that he refused to participate in an activity which he believed to be to be a violation of federal health or safety laws, or which he could reasonably fear would cause harm to himself or others. *Id.* at § 708.5(c). While Lusby previously filed what he termed a "whistleblower" complaint, the record clearly shows that the 2013 Notice of Employee Concern

was purely a management issue resolved through an internal procedure, and did not rise to the level of a whistleblower action under the Part 708 regulations.

Because complainant's prior action was not a proceeding conducted under Part 708, his current complaint of retaliation must fail.

#### **IV. Conclusion**

Based upon consideration of the record as a whole, the Complainant has not identified error warranting reversal of the Initial Agency Decision. Therefore, the appeal is denied.

It is Therefore Ordered That:

- (1) The Appeal filed by Richard Lusby on April 19, 2016 (Case No. WBU-16-0004) of the Initial Agency Decision issued on March 30, 2016, 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. § 708.36

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: May 16, 2016