

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

In the Matter Dr. Shou-Yuan Zhang)		
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Filing Date: June 7, 2016)	Case No.:	WBU-16-0006
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Issued: July 14, 2016

Decision and Order

Dr. Shou-Yuan Zhang, an employee of Brookhaven Science Associates (BSA), appeals the dismissal of a Complaint that he filed under the Department of Energy’s (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Dr. Zhang, who was transferred to a new position at BSA in March 2016, filed this Complaint with the DOE’s Brookhaven Site Office (BHSO) on March 23, 2016. After the BHSO dismissed his Complaint on May 26, 2016, he filed an appeal of that dismissal on June 7, 2016. As explained below, we will grant the Appeal.

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 3, 1992). Its primary purpose is to encourage contractor employees to report unsafe, illegal, fraudulent, or wasteful practices and to protect those “whistleblowers” from reprisals by their employers. The regulations governing the program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

The Part 708 regulations provide, in pertinent part, that a DOE contractor may not discharge or take some other reprisal action against an 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. *See* 10 C.F.R. § 708.5(a).

Under Part 708, the DOE office or field element initially receiving a Complaint may dismiss the Complaint due to lack of jurisdiction or for other good cause. 10 C.F.R. § 708.17(a). Such a dismissal is appropriate under any of the following circumstances: (i) the Complaint is untimely, (ii) the facts, as alleged in the Complaint, do not present issues for which relief can be granted under Part 708, (iii) the employee filed a complaint under State or other applicable law with respect to the same facts as alleged in the Part 708 Complaint, (iv) the Complaint is frivolous or without merit on its face, (v) the issues presented in the Complaint have been rendered moot by subsequent events or substantially resolved, or (vi) the employer has made a formal offer to provide the remedy that was requested in the Complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.17(c). The complainant may appeal a dismissal due to lack of jurisdiction or other good cause to the Director of the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

B. Scientific Background

Dr. Zhang is an employee of BSA, the management and operations contractor for the DOE's Brookhaven National Laboratory (BNL). He works in BNL's Collider-Accelerator Department (C-AD), which conducts experiments using sophisticated accelerators to study the properties of subatomic particles. One of those accelerators is the Relativistic Heavy Ion Collider (RHIC), a particle accelerator with a 2.4-mile circumference that is capable of accelerating beams of particles to nearly the speed of light and smashing them together to study their properties. *See* Relativistic Heavy Ion Collider, <https://www.bnl.gov/rhic/rhic.asp> (last visited July 6, 2016).

On January 4, 2016, BNL issued a press release announcing that it had successfully implemented a new electron lensing technology that allowed it to double proton collision rates at the RHIC. *See* Press Release, BNL, Beam-Beam Compensation Scheme Doubles Proton-Proton Collision Rates at RHIC (January 4, 2016).¹ The press release described the new technology as an "electron gun" that alters the path of protons in the RHIC and increases proton collision rates. *Id.* According to the press release, the purpose of increasing proton collision rates is to obtain data that will allow scientists to answer questions regarding matters such as the source of proton spin. *Id.* In the release, BNL noted that the term "luminosity" is a measure directly related to proton collision rates. *Id.* BNL indicated that physicists had used the electron lensing technology to achieve a doubling of luminosity. *Id.*

C. Complaint

On March 23, 2016, Dr. Zhang filed a Part 708 Complaint with the BHSO. *See* Email from Dr. Shou-Yuan Zhang to Gerald Granzen, BHSO (March 23, 2016) (Complaint). In the Complaint, he alleged that on February 2, 2016, he emailed Dr. Thomas Roser, the Chair of C-AD. *Id.* at 1. In the email, he disputed the effectiveness of BNL's electron lensing technology, or e-lens, in increasing luminosity. *See id.* at 1-2. Dr. Zhang alleged that he made several scientific contentions in the email, including that "RHIC worked better without e-lens on" and that a factor other than e-lens explained the RHIC's luminosity improvements. *Id.* Dr. Zhang further described how, in the email, he reported that BNL had made inaccurate public claims about e-lens, including in BNL's

¹ The press release is available at <https://www.bnl.gov/newsroom/news.php?a=11800>.

January 4, 2016, press release. *See id.* Dr. Zhang characterized his email to Dr. Roser as a disclosure of “research misconduct.” *Id.* at 2.

Dr. Zhang alleged that on or around March 7, 2016, subsequent to his email to Dr. Roser, BSA transferred him to a new position with a new supervisor. *Id.* He contended that BSA transferred him due to his reporting of research misconduct in his email to Dr. Roser and that “therefore, it is a retaliation.” *Id.* He further stated that in his new position he had been asked to perform work on unfamiliar scientific issues, that he was being pressed for results and that he felt that “punitive action may take place at any time.” *Id.* He requested further investigation as well as “protection of my normal working conditions.”² *Id.*

D. BSA Response

The BHSO forwarded the Complaint to BSA, which issued a response denying Dr. Zhang’s allegations. *See* Response from Doon Gibbs, BNL Director, to Frank J. Crescenzo, BSHO Site Manager (April 18, 2016) (First BSA Response). As part of the response, BSA provided an analysis disputing 46 assertions that Dr. Zhang had made in one or more communications to BSA officials. These included scientific arguments by Dr. Zhang as well as claims by Dr. Zhang that he had not received proper credit for his research contributions and that he deserved a promotion. *See* First BSA Response, Attachment 1. BSA did not dispute that Dr. Zhang had been transferred.³ However, it asserted that the transfer was not retaliatory, that it was based on C-AD’s staffing needs and that other scientists had been transferred to Dr. Zhang’s new area of responsibility at the same time as Dr. Zhang. First BSA Response, Attachment 2 at 2.

Following a request by the BHSO for more information, BSA submitted an additional response. In that response, BSA contended that “Dr. Zhang’s allegations are unreasonable as they concern statements that were not made.” Letter from Dr. Thomas Roser, BSA, to Frank J. Crescenzo, BHSO Site Manager (May 4, 2016) (Second BSA Response) at 1. According to BSA, Dr. Zhang discussed areas of scientific disagreement but did not allege research misconduct, or use the term “misconduct,” in his February 2, 2016, email to Dr. Roser.⁴ *Id.* at 1. BSA reiterated that Dr. Zhang’s reassignment was done for business purposes and characterized the transfer as one that did not negatively affect Dr. Zhang’s compensation or the terms, conditions or privileges of his employment. *Id.* at 2-3. BSA offered to work with Dr. Zhang to “make him successful” in his new assignment and indicated that, if necessary, it would transfer him to a new position. *Id.* at 3.

² Dr. Zhang specifically requested a “full investigation on these two issues.” *Id.* We are unable to determine whether the “two issues” he references are scientific in nature, if they pertain to his allegation of retaliation or if he is referring to both his scientific assertions and his retaliation claim.

³ BSA described Dr. Zhang’s assignment as involving work on a new low energy electron cooling system for the RHIC that would lead to increases in luminosity. First BSA Response, Attachment 2 at 2. It called the project “an excellent match” for Dr. Zhang based on his interest in luminosity. *Id.*

⁴ As to Dr. Zhang’s scientific assertions, BSA stated that those assertions were the subject of an ongoing BSA inquiry that had not officially concluded. Second BSA Response at 1-2. It added that the inquiry had already determined that Dr. Zhang’s scientific contentions were without merit and that the January 4, 2016, press release was accurate. *Id.* at 2.

However, BSA stated that it could not return Dr. Zhang to his previous position because the work he had performed “no longer has any scientific merit to BNL.” *Id.*

The record includes an undated draft settlement agreement proposed by BSA and signed by its General Counsel, but not by Dr. Zhang. *See* Settlement Agreement Pursuant to Part 708 DOE Contractor Employee Protection Program (Draft Settlement Agreement) at 1-2. In the draft settlement, apparently received by Dr. Zhang after BSA’s May 4, 2016, response,⁵ BSA informed Dr. Zhang that it would make an effort to find him a new position “if, after clearly demonstrating your efforts, you are unable to complete your assigned tasks.”⁶ *Id.* at 1.

E. Dismissal

On May 26, 2016, the BHSO dismissed Dr. Zhang’s Complaint. Notice of Complaint Dismissal from Frank J. Crescenzo, BHSO Site Manager, to Dr. Shou-Yuan Zhang (May 26, 2016). (Dismissal). In the Dismissal, the BHSO provided two reasons for its decision. First, citing 10 C.F.R. § 708.17(c)(2), the BHSO found that the Complaint failed to allege facts for which relief can be granted under Part 708. *Id.* at 2. Specifically, the Dismissal concluded that Dr. Zhang had not made a disclosure of the type that is protected under Part 708 because his statements to BSA did not constitute an allegation of research misconduct. Rather, according to the BHSO, Dr. Zhang’s statements were “in the nature of scientific disagreements on technical issues.” *Id.* Second, BHSO dismissed the Complaint upon a finding, pursuant to 10 C.F.R. § 708.17(c)(6), that BSA had offered to provide a remedy that was either the remedy he identified in his Complaint or that was substantially the remedy available to him under Part 708. *Id.*

F. Appeal

In the present Appeal, Dr. Zhang reiterates that his February 2, 2016, email, which he attaches, was a disclosure of research misconduct. Appeal at 1. He insists that the scientific evidence is so clear that he did not merely raise a matter of “scientific disagreement” or initiate a “dispute over technical issues.” *Id.* at 2. He indicates that a BSA inquiry into his scientific assertions was perfunctory and possibly biased and calls for an independent investigation. *Id.* at 1-2.

Dr. Zhang also denies that the transfer had any legitimate business purpose. *Id.* at 2. He calls his working conditions “completely changed” and asserts that BSA removed him, without discussion, from a research area he had worked in for 15 years. *Id.* He describes his new assignment as continuing the research that a summer student had performed more than six months prior. *Id.* Dr. Zhang disagrees with the BHSO’s conclusion that he has been offered the remedy he seeks or a substantially similar one. *Id.*

⁵ Dr. Zhang has stated that he received the settlement offer on May 11, 2016. Appeal from Shou-Yuan Zhang to Poli Marmolejos, Director, Office of Hearings and Appeals (June 5, 2016) (Appeal) at 1.

⁶ BSA further stated that Dr. Zhang’s classification and salary would not be changed in his new position, and it offered to treat his first six months in the position as a training period. Draft Settlement at 1.

II. Analysis

When considering whether the dismissal of a Part 708 complaint is appropriate, we must consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist*, Case No. TBZ-0080 (May 7, 2009) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). Accordingly, the question in this matter is whether, considering the materials in the light most favorable to Dr. Zhang, the BHSO properly dismissed his Complaint.

With respect to Dr. Zhang's alleged protected disclosure, we note that the DOE treats allegations of research misconduct seriously. It has developed policies to ensure the integrity of DOE-funded research and to address allegations of research misconduct. *See, e.g.*, 70 Fed. Reg. 37010 (June 28, 2005); 10 C.F.R. Part 733 (outlining DOE's policy on research misconduct); 48 C.F.R. §§ 935.070 and 935.071 (applying research misconduct policy to DOE contractors and requiring contracts to include a clause on research misconduct); 48 C.F.R. § 952.235-71 (standard DOE contract clause on research misconduct).⁷ When an individual makes an allegation of research misconduct to a DOE contractor, the contractor is required to conduct an inquiry, and, if necessary, an investigation. *See* 48 C.F.R. 952.235-71(b). The DOE may also conduct its own investigation. 48 C.F.R. 952.235-71(c). In addition, contractor employees may raise technical concerns related to environmental, safety and health matters through the Differing Professional Opinions process. *See* DOE O 442.2 (July 29, 2011).

This is not a forum for evaluating allegations of research misconduct. Nevertheless, at this juncture we are unable to conclude, as a matter of law, that Dr. Zhang did not make a disclosure that he reasonably believed revealed 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. *See, e.g., Heath v. Dep't of Army*, 120 M.S.P.R. 66, 66 (2013) (remanding, in a nonprecedential order, a whistleblower matter in which the appellant alleged that he made a protected disclosure when he reported the falsification of data for a study). In a matter of such scientific complexity, we think that development of the record could be beneficial to understanding the context and significance of Dr. Zhang's February 2, 2016, email and whether Dr. Zhang made a disclosure of the type that Part 708 protects.⁸ *See Clint Olson*, Case No. TBU-0027 (noting that jurisdictional issues may be considered more fully as the facts are developed in the investigation and hearing stages). In particular, although Dr. Zhang has described his disclosure, he has not yet indicated that he reasonably believed that it fell into one or more of the three categories of disclosures protected under 10 C.F.R. §§ 708.5(a)(1)-(3). In *Olson*, we remanded a Part 708 Complaint that had been dismissed on jurisdictional grounds partly to give the employee a chance to explain what he reasonably and in good faith believed at the time of his disclosure. *See id.* Dr. Zhang should have the same opportunity.

⁷ DOE regulations provide that "[r]esearch misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion." 10 C.F.R. § 733.3.

⁸ Along with his Appeal, Dr. Zhang has supplied the February 2, 2016, email to Dr. Roser that he argues constitutes a protected disclosure. Although we could not find the term "research misconduct" in either the email or in an attachment to the email, we are unable to conclude, at this early stage, that the lack of that term is dispositive as to whether he made a protected disclosure.

Considering all materials in a light most favorable to Dr. Zhang, we are also unable to find that, pursuant to 10 C.F.R. § 708.17(c)(6), the Complaint should be dismissed on the grounds that BSA has offered him the remedies he seeks or remedies that are equivalent to the remedies available under Part 708. *See* 10 C.F.R. § 708.36 (stating that available remedies under Part 708 include reinstatement, transfer preference and other forms of relief). We believe that development of the record could clarify the particular remedies that Dr. Zhang seeks and how those remedies align with the remedies BSA has offered. However, at this point, it is reasonably clear that Dr. Zhang wants, at minimum, either reinstatement in his prior position or an improvement in his working conditions, possibly through another transfer. BSA argues that the work Dr. Zhang performed is no longer necessary; it therefore has not offered him his prior position. Moreover, BSA's offer to transfer him to a new position is contingent on him initially remaining in his current position and demonstrating an effort to adjust. BSA thus does not appear to be offering him an immediate transfer. Additionally, one of the remedies Dr. Zhang seeks is further investigation. *See* Complaint at 2. To the extent that Dr. Zhang may want BSA, rather than DOE, to conduct an additional investigation into his scientific assertions, BSA has not agreed to conduct such an investigation. Consequently, we cannot find that the remedies BSA has offered are such that dismissal is appropriate at this stage.

III. Conclusion

We have found that the BHSO should provide Dr. Zhang with an opportunity to clarify certain details regarding his Part 708 Complaint. We are therefore remanding this matter to the BHSO for further processing. On remand, the BHSO should ask Dr. Zhang to indicate what he reasonably believed he revealed when he made his disclosure, with reference to the types of disclosures protected under 10 C.F.R. § 708.5(a). The BHSO should also provide him a chance to clearly state what remedies he may seek that BSA has not offered.

It is Therefore Ordered That:

- (1) The Appeal filed by Dr. Shou-Yuan Zhang (Case No. WBU-16-0006) is hereby granted.
- (2) This matter is remanded to the BHSO for further processing as set forth in 10 C.F.R. § 708.21.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 14, 2016