

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

In the Matter of Jim Kapsales)	
)	
Filing Date: October 18, 2016)	Case No.: WBU-16-0008
)	
_____)	

Issued: November 17, 2016

Decision and Order

Jim Kapsales, a former employee of M.H. Chew & Associates, Inc. (M.H. Chew), a subcontractor of Lawrence Livermore National Security, LLC (LLNS)¹, 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. Kapsales, whose subcontract with M.H. Chew was terminated in July 2016, filed the complaint with DOE’s National Nuclear Security Administration’s (NNSA) Employee Concerns Program (ECP). After the NNSA ECP Manager dismissed his complaint, Kapsales filed an appeal. As explained below, the Appeal is denied.

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

¹ LLNS is the management and operations contractor for the DOE’s Lawrence Livermore National Laboratory (LLNL) in Livermore, California.

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. Employment Background

LLNL employed Kapsales as a scientist with the Weapons and Complex Integration Directorate from October 2003 through July 2015. Letter from Jason Y. Hashimoto, LLNL, to Michelle Rodriguez de Varela, NNSA ECP (September 9, 2016) (LLNL Response) at 2. One of Kapsales' duties was to conduct a multi-week training for mostly Federal employees, referred to as the Federal Nuclear Expertise (FNE) course. *Id.*

When Kapsales retired from LLNS on August 1, 2015, another LLNS employee took over as instructor for the FNE course. *Id.* However, because of Kapsales' experience and knowledge, the Federal sponsors of the training wanted Kapsales present during the next session of the course to ensure that the appropriate knowledge transferred from him to the new LLNS instructor. *Id.* In response to this request, LLNS engaged M.H. Chew, a subcontractor, to hire Kapsales as an employee to prepare for and participate in the upcoming FNE course. *Id.*

LLNS and M.H. Chew executed a subcontract on September 10, 2015, and the terms specified that all work should be completed by September 10, 2016, with no provision for an extension. *Id.* In July 2016, after consulting with the Federal sponsors, LLNS determined that it no longer needed Kapsales' services; therefore, LLNS and M.H. Chew agreed to modify the subcontract to change the expiration date to July 15, 2016. *Id.*

C. Procedural History

On August 26, 2016, Kapsales filed a Part 708 complaint with the NNSA ECP Manager. *See* Complaint of Jim Kapsales (August 26, 2016) (Complaint). In the Complaint, Kapsales asserted that the following incidents were protected activities: (1) in December 2009, during a Government Accountability Office (GAO) audit, he changed LLNL's response to a question on a GAO questionnaire to make the response "complete and non-deceptive"; and (2) from December 2013 through January 2014, while he was the point of contact for a GAO visit to LLNL, LLNL proposed an agenda in order to control the information provided to the government, but GAO rejected this

agenda. Complaint at 1. In the Complaint, Kapsales also asserted that LLNL engaged in an abuse of authority when it interfered with his attempts to respond to these government requests for information. *Id.* at 2. The Complaint alleged that as a result of these disclosures, LLNL retaliated against Kapsales by terminating his consulting subcontract with M.H. Chew on June 30, 2016.² *Id.*

On September 9, 2016, LLNS responded to the Complaint. LLNL Response at 1. LLNS argued that the Complaint should be dismissed under 10 C.F.R. § 708.17(c)(2) and (4) because (i) Kapsales was not an employee of LLNS at the time of the alleged retaliation; (ii) the activities in 2009 and 2014 occurred well outside the 90-day complaint filing period; and (iii) even if the procedural requirements had been satisfied, Mr. Kapsales did not allege any facts to support that his alleged protected activity meets the Part 708 requirements. *Id.* at 5.

On September 27, 2016, M. H. Chew responded to the Complaint. Letter from Melton H. Chew, M.H. Chew and Associates, Inc., to Michelle Rodriguez de Varela, NNSA ECP (September 27, 2016) (M.H. Chew Response). In its response, M.H. Chew stated that the expectation under the subcontract was that Kapsales' services would be "as needed." *Id.* at 2. M.H. Chew stated that in July 2016, LLNL informed M.H. Chew that it wanted to terminate the subcontract. *Id.* M.H. Chew stated that it was unaware of any specific issues to cause the termination of the subcontract, only that LLNL no longer wanted Kapsales to teach the FNE course. *Id.*

On October 3, 2016, the NNSA ECP Manager dismissed the Complaint finding that, even accepting Kapsales' assertions as true, the Complaint did not present issues for which relief could be granted. Letter from Michelle Rodriguez de Valera, NNSA ECP, to Jim Kapsales (October 3, 2016) (Dismissal Letter). As an initial matter, the NNSA ECP Manager stated that 10 C.F.R. § 708.5 only allows complainants to file complaints against his or her employer, and found that at the time of the termination of the subcontract, LLNS was not Kapsales' employer. Dismissal Letter at 1. Kapsales did not include his employer, M.H. Chew, as a party to the Complaint and indicated at the time that he did not wish to do so. *Id.* The NNSA ECP Manager also found that the Complaint did not demonstrate how Kapsales' act of providing LLNL's suggested agenda to GAO would be a disclosure protected under Part 708.³ *Id.* The NNSA ECP Manager further found that because these events took place over two years before the termination of Kapsales' subcontract with M.H. Chew there was no evidence of a retaliatory motive. *Id.* Accordingly, the NNSA ECP Manager dismissed the complaint under 10 C.F.R. § 708.17(c)(2) and (4).⁴ *Id.* at 2.

D. Appeal

On October 18, 2016, Kapsales appealed the Dismissal Letter. *See* Letter from Jim Kapsales to Office of Hearings and Appeals (OHA) Director (October 13, 2016) and Letter from Jim Kapsales to OHA Director (October 14, 2016) (Appeal). In his Appeal, Kapsales states that he did not name M.H. Chew a party to the Complaint because LLNL directed M.H. Chew to terminate his

² The subcontract actually terminated on July 15, 2016, not June 30, 2015, as stated in the Complaint.

³ The Dismissal Letter did not address Kapsales' alleged disclosure regarding the GAO audit questionnaire in 2009.

⁴ 10 C.F.R. § 708.17(c)(2) and (c)(4) allow for dismissal of a complaint when "the facts, as alleged in [the] complaint, do not present issues for which relief can be granted..." or "[the] complaint is frivolous or without merit on its face."

subcontract. Appeal at 1. He asserts that the contract modification was at the insistence of LLNL and that there was no mutual agreement by M.H. Chew. *Id.* Kapsales has now indicated a reluctant willingness to add M.H. Chew to the Complaint. *Id.* Kapsales states that his protected disclosures date back to December 2009 when he “corrected” LLNL management’s response to a question on a GAO questionnaire. *Id.* at 5. In his Appeal, Kapsales asserts that he believes the information he changed should be considered protected because LLNL’s attempt to modify the information indicates that it considers the information sensitive. *Id.* at 6. Kapsales further indicates that since this 2009 incident there was ongoing hostility from LLNL management, including the subsequent issue with the proposed GAO agenda in 2014. *Id.* Kapsales indicates in his Complaint that he retired from LLNL in part because of this ongoing hostility. *Id.*

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 Kapsales, the NNSA ECP Manager properly dismissed the Complaint.

The Part 708 regulations allow an employee to file a complaint against his employer, alleging retaliation for “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, [his] employer, or any higher tier contractor, information that [the employee] reasonably believe 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). As stated above, Kapsales alleges that he made two protected disclosures in 2009 and 2014, that LLNL abused its authority by interfering with his attempts to respond to reasonable government requests for information, and that LLNL retaliated against him by terminating his consulting subcontract with M.H. Chew in 2016. Complaint at 1-2.

As an initial matter, although we agree with the NNSA ECP Manager’s determination that Kapsales was not a LLNL employee at the time of the alleged retaliation, we believe the exclusion of his employer, M.H. Chew, could easily be remedied by amending the Complaint. Because Kapsales stated that he would now be willing to add M.H. Chew to the Complaint, we find that, if this was the only grounds for dismissal, an amendment would be appropriate and we would allow Kapsales to proceed against both LLNL and M.H. Chew.

Despite this, we find that LLNL properly dismissed the Complaint because, even if true, the facts as alleged by Kapsales do not state a disclosure protected under Part 708. Nowhere in the Complaint does Kapsales allege that he disclosed, to an appropriate party, anything that 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. The Complaint states that Kapsales changed an answer on the GAO audit questionnaire, but does not indicate that he reported to GAO that LLNL management changed the original response. Similarly, the Complaint states that GAO rejected LLNL’s proposed agenda for the 2014 GAO visit, but does not indicate that Kapsales reported this to anyone, only that he felt blamed for

LLNL not getting the agenda it proposed. We therefore do not find that Kapsales ever disclosed either of the incidents he described in his Complaint.

Kapsales alleges that the above referenced incidents fall under the purview of Part 708 because they constitute an abuse of authority in that LLNL interfered in his attempts to respond to reasonable government requests for information. An abuse of authority occurs when there is an “arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” *Frank E. Isbill*, OHA Case No. VWA-0034 (1999) (citing *D’Elia v. Dep’t of the Treasury*, 60 M.S.P.R. 226, 232 (1993) (interpreting Whistleblower Protection Act)). Nothing Kapsales alleged in the Complaint rises to a level to establish an abuse of authority; therefore, we cannot find that the incidents as described in the Complaint are protected under Part 708.

Kapsales has also not alleged any facts to demonstrate that the alleged protected disclosures were a contributing factor to the alleged retaliation. It is important to note that the alleged disclosures occurred in 2009 and 2014. Kapsales alleges that hostilities from LLNL management began after these incidents and before he retired from LLNL in 2015. However, in the Complaint, Kapsales only cited the 2016 termination of his subcontract with M.H. Chew as the alleged retaliation. Kapsales asserts that LLNL intentionally waited to retaliate against him for “plausible deniability.” This argument, however, does not hold much weight because LLNL arranged for Kapsales’ consulting subcontract with M.H. Chew, which contradicts any claim of retaliatory animus in the termination of the contract. We find that nothing in the Complaint indicates that it is reasonable to infer a retaliatory connection between the two alleged protected disclosures and the termination of Kapsales’ subcontract several years later.

III. Conclusion

Based on the foregoing, we find that, on its face, the Complaint does not allege any facts that constitute a disclosure protected under Part 708 for which relief could be granted. Therefore, the NNSA ECP Manager properly dismissed the Complaint under 10 C.F.R. § 708.17(c)(2) and (c)(4).

It is Therefore Ordered That:

- (1) The Appeal filed by Jim Kapsales, Case No. WBU-16-0008, 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: November 17, 2016