



Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter Charles K. MacLeod)
Filing Date: June 29, 2016) Case No.: WBU-16-0005

Issued: July 12, 2016

Decision and Order

Charles K. MacLeod (hereinafter MacLeod or the Complainant), a former employee of Fluor-BWXT Portsmouth LLC (FBP), 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. MacLeod, who was terminated from FBP on October 27, 2015, filed this Complaint with the DOE's Portsmouth/Paducah Project Office (PPPO) on March 14, 2016. After the PPPO dismissed his Complaint on May 26, 2016, he appealed that dismissal on June 29, 2016.1 For the reasons set forth herein, we deny 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.

1 By email dated June 2, 2016, MacLeod requested an extension until June 24, 2016, to file his appeal. That extension was granted. The appeal was postmarked June 24, 2016, and received by the Office of Hearings and Appeals (OHA) on June 29, 2016. Because the appeal was postmarked within the extension, it is deemed timely filed.

Thereafter, on July 7, 2016, MacLeod sent an email to OHA containing further legal argument regarding his appeal. Because the deadline for the appeal had passed, that email has not been considered in conjunction with this decision.

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 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).

B. Termination

MacLeod served as Labor Relations Legal Counsel for FBP. At some point (unspecified), allegations surfaced that females in the Labor Relations Office, and elsewhere, were being subjected to inappropriate behavior, resulting in a perceived or real hostile work environment. FBP management elected to conduct a neutral investigation into the allegations. FBP asserts that such an investigation would normally be conducted by the Employee Concerns Program Manager, but “since she was female it was determined that outside counsel would be more appropriate to perform the investigation and avoid even the appearance of conflict.” Letter from FBP to DOE, May 18, 2016, p. 2.

To conduct the investigation, management selected the law firm of Vorys, Sater, Seymore and Peace LLC (Vorys). MacLeod objected to the selection of this firm, alleging that they could not be impartial. He asserted that the firm stood to potentially obtain more work and thus more fees if MacLeod was terminated, since he had allegedly been hired to contain outside labor costs, which could negatively impact the amount of work Vorys would perform for FBP. Accordingly, when representatives from Vorys met with him for an interview on October 8, 2015, MacLeod challenged the firm’s impartiality, and eventually left the interview, based on his belief that the firm could not be impartial. FBP alleged that the failure to cooperate with the investigation constitutes a violation of the company's Code of Business Conduct and Ethics.

Although the investigation was centered on MacLeod’s supervisor, it was determined that MacLeod himself had also engaged in inappropriate behaviors in the workplace.

In justifying MacLeod’s termination, FBP asserted that MacLeod “created an unprofessional environment that was perceived by females both inside the Labor Department and outside the Labor Department as hostile to women.” Letter from FBP to DOE, May 18, 2016, p. 4. They also

cited his “refus[al] to participate in an investigation into allegations of misconduct in his department.” *Id.*

C. Complaint

MacLeod sought to address the termination through the Employee Concerns Program. Appeal, p. 9. When that failed to achieve the results he desired, MacLeod filed his Part 708 complaint on March 14, 2016, with Susan M. Sparks, the Employee Concerns Manager in the Portsmouth/Paducah Project Office. *Id.*

In his complaint, MacLeod raised four specific allegations. In Allegation 1, he alleged that FBP had discharged him from employment for raising issues concerning the alleged conflict of interest of the Vorys law firm in conducting an investigation of management in the FBP Labor Relations Department where he worked. He alleged that:

Vory’s [sic] had a direct financial interest in the outcome of the investigation as I had been hired to contain outside counsel costs in the Labor Arbitration, Labor Law and NLRB function and largely replace Vory’s [sic] Labor Law services to Fluor BWXT.

Whistleblower Complaint (Complaint), p. 2. He alleged that the questions he asked the Vorys investigator during the October 8, 2015, interview “were all together appropriate and protected activity.” *Id.* at pp. 2-3. He alleged that the act of hiring Vorys violated the FBP policy on Conflicts of Interest/Ethics. *Id.* at p. 2.

Allegation 4 of the complaint states simply that MacLeod had been discharged for “Participation in the Fluor BWXT Employee Concerns Program.” There is no further detail provided under this allegation. *Id.* at p. 5.²

By letters dated March 31, 2016, and May 2, 2016, the PPPO requested additional information to assist in determining whether the complaint met the jurisdictional requirements of 10 C.F.R. Part 708. MacLeod responded with additional details, by letters dated May 7, 2016, and May 9, 2016.

By letter to the Employee Concerns Manager, FBP provided a response to MacLeod’s complaint. The response asserted that the complaint was untimely filed, and that MacLeod failed to engage in protected activity. FBP Response (April 7, 2016), p. 1, 2. In a subsequent letter to the Employee Concerns Manager, FBP reiterated its position on the matter, and further rejected MacLeod’s allegation that the discharge was a pretext for discrimination or retaliation. FBP Response (May 18, 2016), pp. 3-4.

² The Complaint included 2 other allegations: One relating to a security matter, and the other alleging age discrimination. Both of these allegations were dismissed by the PPPO, and MacLeod’s appeal explicitly states that he is not appealing these allegations. Appeal, p. 2. Accordingly, this decision does not address those issues, and the Decision of the PPO dismissing them is final.

D. Dismissal

By Decision dated May 26, 2016, the PPPO Employee Concerns Program Manager dismissed Allegation 1 of the complaint (alleging that MacLeod had been terminated in retaliation for raising the alleged conflict of interest in using Vorys for the investigation), stating that:

- Vorys had only been hired to investigate the allegations of wrongdoing, and generate a report; they were not empowered to make the decision to discharge MacLeod;
- The alleged protected disclosure “did not meet the criteria identified under 10 C.F.R. 708.5, because you did not make this alleged disclosure to a DOE official, member of Congress, any other governmental official who has responsibility for oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor;” and
- The allegations, “on their face, do not meet the criteria of a protected disclosure as defined by 10 C.F.R. 708.5.”

Decision, p. 2. The Decision did not explicitly address the allegation in the complaint of retaliation for “Participation in the Fluor BWXT Employee Concerns Program.”

E. Appeal

In his Appeal, filed June 29, 2016, MacLeod reiterates his allegation that his termination was retaliation for raising concerns regarding the hiring of Vorys to investigate the Labor Relations Department. He alleges that:

- Contrary to the PPPO Decision, he did not allege that Vorys was a decision-maker on his termination; instead, he alleges that Vorys violated the FBP Code of Business Conduct by accepting the task assignment, and that this was the basis of his protected disclosure. Appeal, pp. 14-15.
- Contrary to the PPPO Decision, his disclosure was made to appropriate officials, namely both his supervisor and the Fluor Government Group Human Resources/Ethics official (who was in the October 8, 2015, meeting with Vorys and MacLeod). *Id.* at p. 15.
- The alleged violation of the FBP Code of Business Conduct is an “abuse of authority,” *id.* at p. 21, “gross mismanagement,” *id.* at p. 23, and “fraud,” *id.* at p. 24, pursuant to 10 C.F.R. § 708.5.
- The FBP Code of Business Conduct constitutes a “rule,” pursuant to 10 C.F.R. § 708.5(a)(1), and therefore his disclosure falls within the protections of 10 C.F.R. Part 708. *Id.* at p. 26.

MacLeod further asserts that, in a determination of a dismissal, the reviewer should “consider all materials in the light most favorable to the party opposing the dismissal.” Appeal, p. 18 (citing

DOE and federal court precedent). He cites DOE precedent stating that the primary purposes of the DOE Contractor Employee Protection Program are “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.” Appeal, p. 16 (cite omitted).

MacLeod further argues that, because his 4th allegation was not explicitly addressed in the PPPO Decision, the allegation should be accepted for processing. In the alternative, he requests that the allegation be remanded to the PPPO for further processing, and that this Appeal be held in abeyance, pending the PPPO’s action on that allegation. Appeal, pp. 2-3.

II. Analysis

The PPPO dismissed MacLeod’s Complaint upon concluding that the allegations, “on their face, do not meet the criteria of a protected disclosure as defined by 10 C.F.R. 708.5.” As noted by MacLeod in his Appeal, 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)). Thus, the question in this matter is whether, considering the materials in the light most favorable to MacLeod, the PPPO properly dismissed his Complaint.

As a preliminary matter, we note that MacLeod raises the issue that his 4th allegation – retaliation for “participation in the Fluor BWXT Employee Concerns Program” – was not explicitly addressed by the PPPO Decision. He requests, therefore, that the allegation be processed, or that it be remanded to the PPPO for a decision on acceptance or dismissal. We decline to take either of these actions. Although the Complaint enumerated this allegation as a separate and distinct allegation, it is not. Previous participation in the DOE Employee Concerns Program is not a basis for finding that a subsequent complaint falls within the ambit of 10 C.F.R. Part 708. The regulations provide for protection against retaliation for “participating in ... an administrative proceeding conducted under this part” 10 C.F.R. § 708.5(b). Participation in the DOE Employee Concerns Program, without more, is not participation in a Part 708 proceeding, and accordingly does not give rise to protection under 10 C.F.R. Part 708.

Accordingly, we find that the PPPO Decision did not err in failing to explicitly address the 4th allegation, and that it makes clear that MacLeod’s complaint was dismissed in its entirety. Therefore, we decline to remand the allegation to the PPPO, or to accept the allegation for processing.³

³ We note further that, on March 31, 2016, the PPPO Employee Concerns Manager wrote to MacLeod, stating, “I have reviewed your 10 CFR Part 708 Complaint. Based on the information you’ve provided in your complaint, you allege the following three instances that you believe gave rise to possible retaliation by FBP” She then enumerates three of his allegations, but not the 4th allegation relating to participation in the Employee Concerns Program. The letter was re-issued to MacLeod under a cover letter of May 2, 2016. Both times, MacLeod was asked to provide additional clarifying information. MacLeod provided two responses, dated May 7 and May 9, 2016. In neither response did he challenge the failure to list the 4th allegation, providing further evidence that MacLeod was aware that this was not a separate, free-standing allegation.

We now turn to the sole remaining allegation: that MacLeod was subjected to a retaliatory termination because he opposed the hiring of Vorys to conduct an investigation of the FBP Labor Relations Department. Here, the complaint falters because the disclosures that he claims led to retaliation by FBP are not of the type that Part 708 protects. A protected disclosure under Part 708 cannot be on any topic. An individual must reasonably believe that he or she is revealing 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).

MacLeod alleges that his termination constituted retaliation for disclosure of a substantial violation of a rule, pursuant to 10 C.F.R. § 708.5(a)(1), as well as disclosure of “fraud,” “gross mismanagement,” and “abuse of authority,” pursuant to 10 C.F.R. § 708.5(b). In the present case, even assuming the truth of MacLeod’s allegations as to the relevant facts of this case, the alleged disclosure did not, as a matter of law, reveal information that MacLeod could have reasonably believed was a “substantial violation of law, rule or regulation;” 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). MacLeod has not alleged a knowing misrepresentation of the truth or concealment of material fact in this case.

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.* In requiring that the risk be “substantial,” the regulations seek to ensure that minor, insubstantial issues do not waste limited resources, so that whistleblower protection is available to those workers who legitimately need it. 65 Fed. Reg. 6317 (February 9, 2000). In the present case, the hiring of an external legal firm to conduct an investigation of allegations of inappropriate behavior in one contractor department cannot reasonably be seen as creating a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.

Abuse of authority constitutes an “arbitrary and capricious exercise of power by an 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.” *See Thomas L. Townsend*, OHA Case No. TBU-0082 (October 6, 2008). “Part 708 is not intended to permit DOE to manage the day-to-day decisions and human resource management of a DOE contractor.” *Sherrie Walker*, Case No. WBA-13-0015 (May 21, 2014). Although MacLeod characterizes the decision to hire Vorys to investigate his Department as an “abuse of authority,” the action does not meet the legal standard, as stated herein.

Finally, we need not decide if the FBP Code of Business Conduct constitutes the type of “rule” envisioned by 10 C.F.R. § 708.5(a)(1), because the regulation explicitly requires that the issue

raised constitute a “substantial” violation of law, rule or regulation. For the reasons already espoused herein, the issue raised by MacLeod cannot be deemed to be substantial.⁴

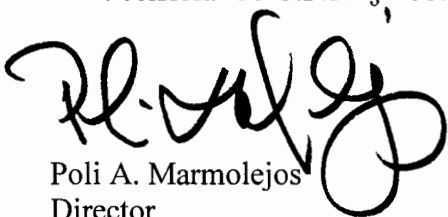
Based upon these definitions, it is clear that MacLeod’s complaint fails to meet the criteria of Part 708.5(a) or (b).

IV. Conclusion

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

It is Therefore Ordered That:

- (1) The Appeal filed by Charles K. MacLeod on June 29, 2016 (Case No. WBU-16-0005) of the Initial Agency Decision issued on May 26, 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: July 12, 2016

⁴ Based on the determination herein that the complaint fails to fall within the ambit of 10 C.F.R. Part 708, we need not address the issue of the timeliness of the complaint, as raised by FBR, nor do we need to address the PPPO determination that the disclosure was not made to a covered person or entity.