



Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter Charles K. MacLeod)
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Filing Date: June 29, 2016) Case No.: WBU-16-0005
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Issued: August 3, 2016

Reconsideration

On July 12, 2016, the Office of Hearings and Appeals (hereinafter OHA) issued a Decision and Order in the above-referenced appeal of Charles K. MacLeod (MacLeod), filed pursuant to the DOE Contractor Employee Protection Program. Based on new information that has come to light following the issuance of that Decision and Order, OHA has initiated a *sua sponte* reconsideration of this matter. For the reasons set forth herein, the Decision and Order issued on July 12, 2016, is vacated, and the matter is remanded to the Portsmouth/Paducah Project Office (PPPO) for further processing as Ordered herein.

I. Background

MacLeod, who was terminated from FBP on October 27, 2015, filed his Complaint with the Department of Energy (DOE) Employee Concerns (EC) Manager at the Portsmouth/Paducah Project Office (PPPO) on March 14, 2016. In accordance with 10 C.F.R. § 708.16, the PPPO EC Manager provided a copy of the complaint to MacLeod’s former employer, Fluor-BWXT Portsmouth LLC (FBP). See Letter from EC Manager to MacLeod (May 26, 2016) at 1.

By letter to the EC Manager dated April 7, 2016, FBP’s General Counsel requested that the complaint be dismissed. The letter provided extensive legal and factual arguments supporting the request, alleging that: (1) MacLeod’s complaint was not timely filed; (2) MacLeod did not engage in activity protected by 10 C.F.R. Part 708; and (3) MacLeod was discharged as a result of his misconduct. The letter shows that courtesy copies (cc’s) were sent to seven individuals; five at DOE, and 2 at FBP. MacLeod’s name is not included in the list of cc’s.

Thereafter, on May 7 and May 9, MacLeod submitted additional correspondence to the EC Manager regarding his case. By letter dated May 17, 2016, the EC Manager provided copies of those documents to FBP. The following day, May 18, 2016, FBP’s General Counsel submitted a



response to those documents, reiterating FBP's position, and again requesting that the case be dismissed. FBP's response was addressed to the EC Manager, again with seven cc's, none of them being MacLeod.

The PPPO EC Manager dismissed MacLeod's Complaint on May 26, 2016. MacLeod appealed that dismissal to OHA on June 29, 2016.¹

By Decision and Order dated July 12, 2016, OHA denied the appeal, determining that MacLeod's complaint failed to meet the criteria of Part 708.

On July 22, 2016, MacLeod contacted an OHA Administrative Judge (AJ) to discuss matters relating to the decision, and to request information on filing a Petition for Secretarial Review. During the course of the conversation, MacLeod asked the AJ for copies of the letters from FBP's General Counsel, dated April 7, 2016, and May 18, 2016. He stated that he had previously requested them from the PPPO EC Manager, but had not received them.

By email dated July 29, 2016, the AJ contacted the PPPO EC Manager to ask if she normally provides a complainant with copies of the contractor's response. In her response, the EC Manager stated, "I do not normally provide that information to the concerned individual, nor am I aware that there is a requirement for the contractor to provide him copies." Email from EC Manager to AJ (August 1, 2016) at 1.

II. Analysis

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. Because of the nature and purpose of the program, it is important that the program maintain the highest standards of fairness and equity.

The question before us is whether an individual in the Part 708 process is entitled to copies of responses to the complaint which are submitted by the contractor/employer. In the present case, while FBP received copies of all of MacLeod's submissions, MacLeod did not receive copies of either of the responses filed by FBP's General Counsel (dated April 7 and May 18, 2016).

With respect to service on the parties, the regulations state:

By the 15th day after receiving your complaint, the Head of Field Element or EC Director (as applicable) will provide your employer a copy of your complaint. Your employer has

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. MacLeod stated in his appeal that he was appealing only certain issues in the complaint.

10 days from receipt of your complaint to submit any comments it wishes to make regarding the allegations in the complaint

§708.16(a). Accordingly, the regulations make clear that the EC Director (or, in this case, the EC Manager) is to provide a copy of the complaint to the contractor/employer. As noted by the EC Manager, there is no reciprocal requirement in the regulations for the contractor's response to be provided to the complainant. However, the silence of the regulations is not dispositive.²

In interpreting the regulations, we look to the Federal Rules of Civil Procedure (FRCP), which, although not governing in this proceeding, provide analogous support. *See, e.g., Vincent E. Daniel*, Case No. WBH-13-0006 (September 18, 2013). The FRCP is written with the goal of ensuring fairness, equity, and due process in civil procedures, and avoiding even the appearance of impropriety in the process. These goals are equally applicable to the Part 708 process.

The FRCP states that, with limited exceptions not applicable here, the following documents (among others) must be served on every party to an action: any pleading filed after the original complaint; any motion; and any written notice or demand. FRCP Title II, Rule 5(a). Accordingly, due process considerations dictate that, in the present case, MacLeod should have been provided with copies of submissions by FBP. Having the contractor/employer's responses would have ensured that MacLeod had an informed basis for his pleadings, and would have ensured due process, fairness and equity. It would have also allowed him to better determine if he wished to pursue settlement, which is strongly encouraged in the process.

Fairness and equity further dictate that, when the complainant receives a copy of a response by the contractor/employer, he/she should be provided a reasonable opportunity to respond to it. Providing the contractor/employer's response, without giving the complainant an opportunity to respond thereto, would negate the benefit of providing it, and undermine any effort to ensure due process.³ Accordingly, in the present case, the EC Manager should have provided MacLeod with the responses from FBP, and given him a reasonable opportunity to respond before a decision was made on his complaint.⁴

² The actions of the EC Manager in this case evidence that the regulations are not dispositive. Although the regulations provide that a copy of the "complaint" will be forwarded to the contractor/employer, the EC Manager also provided the contractor/employer with copies of subsequent submissions dated May 7 and May 9, 2016. Her action was reasonable and appropriate, and was in accordance with the reasoning in this decision, finding that all such submissions should be shared among all parties.

³ While each party should be provided an opportunity to respond to a submission by the other party, we are aware that those opportunities should not continue *ad infinitum*. In cases of repeated responses by the parties, the EC Manager should make a reasoned decision on when the opportunity for responses should be curtailed.

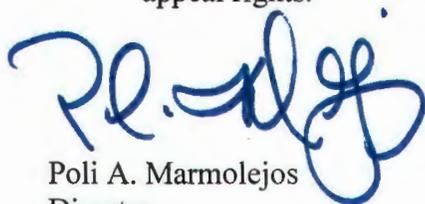
⁴ MacLeod's appeal, filed June 29, 2016, explicitly waived his appeal of certain allegations. Because the issues in processing cited herein took place before the appeal, MacLeod is entitled to pursue all of the allegations originally raised in his complaint, and not just those which he appealed.

III. Conclusion

Based upon new information, the Office of Hearings and Appeals hereby vacates its Decision and Order of July 12, 2016. We are therefore remanding this case to PPPO for further processing.

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 administratively closed.
- (2) This matter is remanded to the PPPO for further processing as follows:
 - a. The PPPO EC Manager shall provide MacLeod with copies of the April 7, 2016, and May 18, 2016 submissions from FBP, as well as any other submissions by FBP relating to this complaint;
 - b. The PPPO EC Manager shall provide MacLeod fifteen calendar days (from receipt) to respond to the FBP submissions;
 - c. The PPPO EC Manager shall provide both parties with a reasonable opportunity for continued responses thereafter; and
 - d. The PPPO EC Manager shall then issue a new decision on the complaint, with appropriate appeal rights.



Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 3, 2016