Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter of John Smallman	)	
	)	
Filing Date: July 7, 2017	)	Case No.: WBU-17-0007
	)	

Issued: August 4, 2017

Decision and Order

John Smallman, an employee of Lawrence Livermore National Security, LLC (LLNS), appeals the dismissal of a whistleblower complaint that he filed under 10 C.F.R. Part 708, the Department of Energy's (DOE) Contractor Employee Protection Program. The National Nuclear Security Administration's (NNSA) Whistleblower Program Manager (the Manager) dismissed the complaint on June 27, 2017. As explained below, NNSA's dismissal of the Complaint is hereby reversed, and the Appeal is remanded to the Manager for further processing in accordance with the instructions set forth herein.

I. Regulatory Background

The DOE's Contractor Employee Protection Program (CEPP) 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 purposes 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. The regulations governing the CEPP are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The employee may appeal such a dismissal to the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18. In reviewing cases such as this, we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist, OHA Case No. TBZ-0080*, at 5 n.13 (May 7, 2009) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

II. Procedural Background

On April 28, 2017, Mr. Smallman filed a complaint (the Complaint) with the Manager under Part 708, alleging that he had made the following protected disclosures: (1) his supervisor had improperly disclosed to LLNS General Counsel information obtained under the Foreign Intelligence Surveillance Act (FISA); and (2) his supervisor had improperly used his investigatory authority "to satisfy personal animus." Complaint at 1. Mr. Smallman alleged that he made these disclosures to his supervisor and to LLNS's Office of Investigative Services (OIS), but did not state when these alleged protected disclosures occurred. Complaint at 1-2. Mr. Smallman further alleged that he also made these allegations when he met with LLNS's Deputy Director, and Director of Security, on June 29, 2016. Complaint at 8-9.

Mr. Smallman alleged that LLNS retaliated against him for making these disclosures by suspending him, placing him on a Performance Improvement Plan (PIP), changing his work schedule, issuing him a negative performance evaluation, and denying him a bonus. Complaint at 2. Mr. Smallman, submitted a sworn declaration with the Complaint, in which he stated: "My employer has established no grievance-arbitration procedures." April 28, 2017, Declaration of John Smallwood at ¶ 4.

On June 1, 2017, LLNS submitted a response (the Response) to the Complaint, requesting that the Complaint be dismissed. Specifically, the Response asserted that: (1) DOE lacks jurisdiction under Part 708 because Mr. Smallman failed to "exhaust all grievance arbitration procedures as required under 10 CFR 708.13;" (2) the Complaint is time-barred under Part 708's limitation period; (3) Mr. Smallman's conduct, rather than a retaliatory animus, provided the basis for the personnel actions LLNS took against him; and (4) Mr. Smallman's claims are "entirely without merit." Response at 1.

On June 8, 2017, the Manager wrote to Mr. Smallman's counsel, stating in pertinent part: "Having carefully reviewed your client's complaint and [LLNS's] response, the [C]omplaint needs to be returned to exhaust all grievance arbitration procedures...."[1] June 8, 2017, Letter From Michelle Rodriguez de Varela, NNSA Employee Concerns Manager, to Michael L. Vogelsang, Counsel for John Smallman at 1.

On June 20, 2017, Mr. Smallman's counsel wrote the Manager, stating in pertinent part:

> While we are aware of the administrative exhaustion requirement, Mr. Smallman is unaware of any grievance-arbitration procedures at Lawrence Livermore National Security, LLC ('LLNS'), as stated in his declaration filed contemporaneously with his complaint. Under 10 C.F.R. § 708.13(a)(3), an employee may state that an employer 'has established no grievance arbitration procedures.' If you are aware of a specific grievance-arbitration procedure in place at LLNS, please let us know, as Mr. Smallman is unaware of it.

[1] The Manager further stated: "Also, your client needs to provide protected disclosures and alleged retaliations that fall within the 90 day time frame per the 10 CFR [§] 708.14." June 8, 2017, Letter from Michelle Rodriguez de Varela, NNSA Employee Concerns Manager, to Michael L. Vogelsang, Counsel for John Smallman at 1.

June 20, 2017, Letter from Mr. Vogelsang to Ms. Rodriguez de Varela at 1.

On June 27, 2017, the Manager issued a letter (the Dismissal Letter) to Mr. Smallman's counsel, dismissing the Complaint for lack of jurisdiction, stating in pertinent part:

> Under the provisions of 10 CFR 708.13 (a), a complainant is required to demonstrate that all available opportunities for resolution through an applicable grievance-arbitration procedure have been exhausted. Mr. Smallman was eligible to grieve the actions taken against him in accordance with the procedures detailed in the LLNS Personnel Policies Manual. The information available to me indicates that this policy was forwarded to your client along with the Notice of Intent to Suspend. There is no indication that Mr. Smallman availed himself of this procedure. This is consistent with the fact that his complaint does not include the required affirmation (10 CFR 708.12(d)) that he exhausted all applicable grievance or arbitration procedures.

Dismissal Letter at 1.

Mr. Smallman filed the present Appeal on July 7, 2017, claiming in essence that: 1) he has satisfied the requirements of 10 C.F.R. § 708.12(d) by filing his declaration stating that LLNS has no applicable grievance-arbitration procedures; 2) LLNS has no applicable grievance-arbitration procedures; and 3) if LLNS does have an applicable grievance-arbitration procedure, he should be given an opportunity to pursue that procedure with an opportunity to refile his Part 708 claim if he is unable to resolve his issues using that procedure. Appeal at 8-9, 11.

III. Analysis

Part 708 provides that the Manager may dismiss a complaint for "lack of jurisdiction or for other good cause . . . either on his or her own initiative or at the request of a party named in [the] complaint...." 10 C.F.R. § 708.17(a). Part 708 further provides that an employee must include in the complaint "an affirmation, as described in §708.13 of this subpart, that [the employee has] exhausted (completed) all applicable grievance or arbitration procedures." 10 C.F.R. § 12(d). To show that an employee has exhausted all applicable grievance-arbitration procedures, the employee must state that: (1) they have exhausted all applicable grievance-arbitration procedures; (2) more than 150 days have passed since the commencement of the applicable grievance-arbitration procedures without a resolution; or (3) their employer has not established a grievance-arbitration procedure. 10 C.F.R. § 708.13. The regulations require only that an employee state that one of these three conditions has been met, rather than requiring that the employee make an evidentiary showing thereof. If an employee fails to "provide the information specified in §708.13(a), [their] complaint may be dismissed for lack of jurisdiction as provided in §708.17 of this subpart." 10 C.F.R. § 708.13(b). Mr. Smallman complied with this requirement when he submitted his declaration of April 28, 2107, in which he stated: "My employer has established no grievance-arbitration procedures." April 28, 2017, Declaration of John Smallwood at ¶ 4.

More importantly, it is well settled under established OHA precedent "that the term "applicable grievance-arbitration procedure", as used in the context of Part 708, has a specialized meaning related to procedures negotiated by employees and management. It should thus not be considered

to include every unilaterally-created appeal process offered by an employer. *In Re Darryl H. Shadel*, VBU-0050, 5 (June 15, 2000) (*Shadel*); 2000 *EOHA Lexis* 57. In *Shadel*, the contractor contended that an employee's failure to utilize a grievance process set forth in its employee manual before filing a complaint under Part 708 required that the complaint be dismissed for lack of jurisdiction. On appeal, the OHA Director stated:

> The term "applicable ***grievance-arbitration*** procedure" is not defined in ***Part 708***. However, the expansive reading that the DOE Office has given this term is in my view unjustified. A more limited reading is called for. As stated in the 1998 Notice of Proposed Rulemaking, it was the intent of the DOE to continue a policy that bargaining unit employees must use available negotiated procedures to resolve their complaints of retaliation. *63 Fed. Reg. 373, 378* (January 5, 1998). I believe that in the context of the ***Part 708*** rules, "applicable ***grievance-arbitration*** procedure" is intended to cover negotiated grievance procedures available to bargaining unit employees, and similar procedures leading to determinations under binding arbitration pursuant to a bargaining unit agreement. This requirement was included in order to ensure that the remedies offered by ***Part 708*** did not permit or encourage employees to bypass procedures set forth in negotiated labor agreements.

Shadel at 4-5 (emphasis in original). Accordingly, the decision determined that the employee was not required to utilize the grievance process set forth in the contractor's employee manual before filing his complaint under Part 708.

In the present case, the procedures set forth in the LLNS Handbook are clearly not "negotiated grievance procedures available to bargaining unit employees, and similar procedures leading to determinations under binding arbitration pursuant to a bargaining unit agreement." Accordingly, Mr. Smallman's declaration that his "employer has established no grievance-arbitration procedures" is accurate, for purposes of Part 708.

We are therefore reversing the Manager's findings that: (a) the Complaint did not include the required affirmation (10 CFR 708.12(d)) that Mr. Smallman exhausted all applicable grievance or arbitration procedures; and (b) the Complaint must be dismissed for lack of jurisdiction, because Mr. Smallman failed to demonstrate that all available opportunities for resolution through an applicable grievance-arbitration procedure had been exhausted.

We further direct the Manager's attention to a recent OHA Director's Decision, *In the Matter of Charles K. MacLeod,* WBU-16-0005 (August 3, 2016). The decision reconsidered and vacated a prior OHA decision in the case (dated July12, 2016), and held that due process considerations require that an ECP Manager provide employees with a copy of the contractor's response to the employee's complaint, and an opportunity to respond to it, before deciding whether to accept or dismiss the complaint. In the present case, it does not appear that Mr. Smallman was provided with a copy of LLNS's response to the Complaint. Appeal at 1. On remand, the ECP Manager should ensure that Mr. Smallman receives a copy of the contractor's response to his complaint, and be given an opportunity to respond to it.

V. Conclusion

Because we have found that Mr. Smallman has complied with the requirements of 10 C.F.R. § 12(d), we hereby grant the appeal to the extent provided herein, and reverse the Manager's determination to the contrary. This matter is remanded to the NNSA which shall, after providing Mr. Smallman with a copy of the Contractor's Response and further providing him with an opportunity to respond thereto, either dismiss the Complaint or transmit it to OHA for further processing.[2]

It Is Therefore Ordered That:

(1) The Appeal filed by John Smallman (Case No. WBU-17-0007) is hereby granted in part as set forth above, and remanded to the National Nuclear Security Administration's Whistleblower Program for further processing as set forth in 10 C.F.R. § 708.21, and is denied in all other aspects.

(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. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: AUG 4 2017

[2] The OHA may then consider jurisdictional issues more fully as the facts are developed in the investigation and hearing stages.