

April 16, 2008

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Motion to Compel Discovery

Case Names: Jonathan K. Strausbaugh
Richard L. Rieckenberg

Date of Filing: April 2, 2008

Case Numbers: TBD-0073
TBD-0075

Pending before me is a consolidated Motion to Compel Discovery filed with the Office of Hearings and Appeals (OHA) on behalf of Jonathan K. Strausbaugh and Richard L. Rieckenberg (the complainants) by their attorney. This Motion relates to a hearing requested by the complainants under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708), in connection with the Part 708 complaints they filed against KSL Services, Inc. (KSL). The OHA has assigned Mr. Strausbaugh's and Mr. Rieckenberg's hearing requests Case Nos. TBH-0073 and TBH-0075, respectively, and the present Motion to Compel Discovery, as it relates to each of those cases, Case Nos. TBD-0073 and TBD-0075.

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 purposes are to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

B. Factual Background

The complainants were employees of KSL at the DOE's Los Alamos site. KSL is responsible for the maintenance of the TA-3 steam distribution system, a 57-year-old steam piping system. The TA-3 system was scheduled for an extended shutdown in order to undergo extensive maintenance, beginning on May 31, 2007. The complainants had the primary responsibility for planning and coordinating the steam system shutdown. Shortly after the maintenance work

began, one crew identified a substance they suspected was asbestos in the manhole in which they were working. The work was suspended until a laboratory could analyze the substance. The substance was confirmed to be asbestos, and the complainants reported this discovery to their managers.

In their complaints, the complainants allege that KSL retaliated against them for disclosing the presence of asbestos on the worksite by terminating them. Mr. Rieckenberg further alleges that he was terminated because he raised the possibility that untreated asbestos may have been present in the manholes for a significant period of time and that there may have been numerous undocumented exposures to the substance over the years. KSL concedes that the complainants informed their managers of the presence of untreated asbestos, but maintains that the complainants were terminated for reasons unrelated to their disclosure. More specifically, KSL alleges that the complainants were terminated because they failed to take appropriate precautions in planning for the maintenance work and because they created a hostile work environment in which employees were unable to discharge their duties.

On March 10, 2008, the complainants asked KSL to produce documents, described in 22 document production requests, relating to their Part 708 complaints. KSL responded on March 31, 2008, by generally arguing that discovery had not been authorized in this proceeding, and by specifically objecting to each of the 22 requests. KSL refused to produce any documents. On April 2, 2008, the complainants then filed a Motion to Compel Discovery with this office.¹

II. Analysis

The Part 708 regulations state that the “Hearing Officer may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint.” 10 C.F.R. § 708.28(b)(1). After carefully considering the arguments of both parties on the present Motion to Compel Discovery, I have decided to grant the Motion in part.

A. General Objections

KSL first argues that discovery has not been authorized, because an order for discovery “has not been entered in this case.” KSL’s argument is meritless. It is within the spirit of the Part 708 regulations that arrangements for pre-hearing discovery be worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer, particularly when both parties are represented by competent counsel. In this case, the complainants’ attorney specifically requested whether an order for discovery was needed, in a February 15, 2008, e-mail to me, copied to KSL. I advised the parties in writing that “I would prefer that you work with each other to obtain the discovery you seek. I will resolve any disputes that arise in the course of your discovery.” E-mail from William M. Schwartz, Hearing Officer, OHA, to Timothy L.

¹ In their Motion, the complainants withdrew one request, Document Request #16, in which they sought the names of the witnesses KSL anticipates calling at the upcoming hearing. The pre-hearing schedule established for this proceeding provides a date for the exchange of witness lists by the parties.

Butler, Counsel for Complainants, and Dean Graves, Counsel for KSL, February 15, 2008. KSL did not object at the time to my guidance on this matter. Instead, it waited until it was presented with the complainants' request for document production before voicing its objections.² At this stage, the parties have unfortunately reached an impasse in their discovery efforts, and I will now issue an order mandating that KSL turn over certain documents to the complainants.

KSL has also objected to all of the complainants' current requests for production of documents, on the grounds that they have not made a showing that each document request is designed to produce relevant evidence and, regarding nearly all of them,³ that they are "overly broad and unduly burdensome." Other than as I discuss below, I find that these document requests are not overly broad or unduly burdensome, and designed to produce evidence relevant to and within the scope of this proceeding. Moreover, KSL has not provided any evidence that would lead me to conclude that "complying with the discovery request would produce undue delay in this matter or otherwise prejudice" the company. *Lucy B. Smith*, 27 DOE ¶ 87,521 (August 10, 1999).

Upon careful review of the document production request, I find that six document requests (Document Requests #8, 10, 11, 15, 17, and 20) are broad beyond the scope of that which would be "designed to produce" evidence relevant to the present matter. Thus, I will grant, in part, five requests for production of documents and deny a sixth. Regarding Document Request #20, I find that the subject matter of the documents requested bears no relevancy to the matters within the scope of this proceeding and therefore deny that request. As for Document Requests #8, 10, 11, 15, and 17, I will narrow these requests as follows:

- Document Request #8, which seeks "[c]opies of all incident reports, lab sample results and documentation regarding discovery and determination/assessment of uncontrolled asbestos at issue" will refer only to documents that relate to the May 31, 2007 TA-3 steam system shutdown.
- Document Request #10, which seeks copies of e-mails and attachments between Torres and Rieckenberg, Torres and Strausbaugh, Hay and Rieckenberg, and Hay and Strausbaugh, generated in 2006 and 2007, will refer only such e-mails that relate to the May 31, 2007 TA-3 steam system shutdown, the complainants' termination, or the decision to terminate the complainants.
- Document Request #11, which seeks copies of KSL disciplinary documents in effect during the complainants' termination of Strausbaugh and Rieckenberg will refer to only those documents that address KSL's rules, regulations or policies regarding termination of employment.

² Counsel for KSL notes in its April 2, 2008, response to the Motion to Compel Discovery that it was not involved in the case at the time I advised the parties to proceed with discovery. Its relatively late entry into this proceeding as outside counsel does not excuse it from complying with clear instructions I issued to both parties.

³ KSL does not contend that Document Requests #7, 17, and 21 are "overly broad and unduly burdensome."

- Document Request #15, which seeks “[d]ocuments relating to any complaints made by Taylor concerning Strausbaugh, Rieckenberg, Torres or against any other individuals” will refer only to documents generated through June 14, 2007.
- Document Request #17, which seeks “[c]ontact information for Trosen, and a complete description of circumstances for leaving KSL” will exclude those portions of the requested description that concern non-work-related matters.

B. Specific Objections

Regarding Document Request #2, which seeks e-mails generated or received by named individuals within specified dates “regarding the TA-3 Extended Steam Distribution Shutdown relating to the termination of” the complainants, KSL raises two objections. First, KSL objects that the request “vague.” I find merit to KSL’s objection and will grant the request only in part, as modified below:

All emails and attachments from May 1, 2007 through June 30, 2007, generated or received by David Whitaker, Keith Trosen, Tom Hay, Joan Taylor, Richard Chavez, Martin Dominquez, Laura Jenkins, B.J. Tedder, Ted Torres, Steve Long, David Lujan, Jerome Gonzales, David Padilla, Benito Garcia, Rick Nelson, Mike Goodwin, Chris Tolleson, Carol Lowe, Mark Romero, Stephanie Bement, Richard Flores, and Kiki Sanchez, on the following subjects:

(a) project management, project planning, project budget, project safety, asbestos, and alleged personnel harassment related to the May 31, 2007, TA-3 steam system shutdown; and

(b) the decision to investigate, investigatory suspension, review and discussion of investigation, and decision to terminate Rieckenberg and Strausbaugh.

KSL also objects to Document Request #2 on the grounds that several of the named individuals named have never been KSL employees. I find no merit to this objection and will deny it. If KSL has records of any e-mails in its possession that are responsive to this document request, it should provide them; if it does not, it should so inform the complainants.

Document Request #6 seeks the complete file of KSL’s investigation of the May 31, 2007 TA-3 steam system shutdown, including investigators’ notes, drafts, and recordings. KSL has objected to this request to the extent that some responsive documents are protected by “the attorney-client privilege and/or the work-product doctrine.” I find that there is merit to KSL’s argument, to the extent that privileged documents need not be produced in discovery. Document Request #6 will therefore be granted in part and modified to read: “Complete file of KSL’s investigation, including investigators’ notes, drafts, and recordings, to the extent that such documents are not privileged.”

Document Request #17 seeks contact information for Keith Trosen and a complete description of his circumstances for leaving KSL. KSL has objected to this request in part because, to the

extent that the complainants' attorney intends to communicate with Mr. Trosen, a former manager of KSL, such communication would be a violation of a New Mexico Rule of Professional Conduct that appears to prohibit such conduct with managers "of a corporation . . . about the subject matter of the representation even though the corporation . . . is represented by counsel." *N.M. Rules of Prof'l Conduct* R. 16-402. While I note that Mr. Trosen is no longer a manager of KSL, it would be inappropriate for me to rule on whether this rule applies to the facts of this case. Nevertheless, this objection is speculative in that we do not know what the complainants' attorney's intentions are with respect to contacting Mr. Trosen. I find no merit to KSL's objection and will grant this request.

Document Request #7 seeks a copy of PADOPS BOP-2007-0011, which the complainants allege is a Department of Energy document that concerns in some manner the May 31, 2007, TA-3 steam system shutdown. Document Request #21 seeks a copy of LANL LIR 402-810.01.1, a Los Alamos National Laboratory regulation that addresses Confined Space entries, evaluations and permits. KSL objects to each of these requests, claiming that the documents requested are not KSL documents. I find no merit to this objection and will deny it. If KSL has the requested documents in its possession, it should provide them to the complainants.⁴

C. Request for Exclusion of Evidence

In their Motion to Compel Discovery, the complainants request that I "exclude evidence at the hearing," presumably of any documents that KSL refuses to produce through discovery. I find no basis in the Part 708 regulations for doing so at this time. However, after the present order is issued and the parties have had an opportunity for full discovery, both parties should bear in mind that a hearing officer in a Part 708 proceeding "may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer." 10 C.F.R. § 708.28(b)(5).

⁴ KSL also objects to Document Requests #6, 8, 9, 11, and 15, on the grounds that the complainants have some or all of the requested documents. I find no merit to this objection and will deny it. Clearly, KSL need not provide the complainants with additional copies of documents it has already provided. However, to the extent that it possesses documents responsive to these requests that it has not yet provided to the complainants, this objection does not relieve KSL from providing such documents. The parties should note that the following documents responsive to these requests for production of documents are part of the record in this proceeding, having been provided to this office during the investigation stage of this case:

- KSL Services Employee Relations Investigative Report (re: suspension of complainants) (7 pp.)
- Performance Improvement and Disciplinary Action for KSL Employees, 14-10-111 (12 pp.)
- Confined Space Entry, 12-10-007 (10 pp. plus one-page attachment on training plans)
- Confined Space Evaluations on Manhole 1009 (5/21/07) and Manhole 1022 (5/21/07 and 5/30/07)

Any other documents that either party wishes to rely upon at the hearing with respect to the subject matter of these requests must be provided to the opposing party and the hearing officer by the exchange date I shall establish.

III. Conclusion

For the foregoing reasons, I find that Document Request #20 should be denied, that Document Requests #1, 3, 4, 5, 7, 9, 12, 13, 14, 18, 19, 21, and 22 should be granted, and that Document Requests #2, 6, 8, 10, 11, 15, and 17 should be granted in part.

Is It Therefore Ordered That:

(1) The Motion to Compel Discovery filed by Jonathan K. Strausbaugh and Richard L. Rieckenberg, Case Nos. TBD-0073 and TBD-0075, is hereby granted in part and denied in part, as specified in Paragraphs (2) through (4) below.

(2) Document Request #20 of the March 10, 2008 Request for Discovery submitted by Jonathan K. Strausbaugh and Richard L. Rieckenberg to KSL Services, Inc., is hereby denied.

(3) Document Requests #1, 3, 4, 5, 7, 9, 12, 13, 14, 18, 19, 21, and 22 of the March 10, 2008 Request for Discovery submitted by Jonathan K. Strausbaugh and Richard L. Rieckenberg to KSL Services, Inc., are hereby granted. KSL Services, Inc., shall provide Jonathan K. Strausbaugh and Richard L. Rieckenberg with its responses to these Document Requests by no later than April 30, 2008.

(4) Document Requests #2, 6, 8, 10, 11, 15, and 17 of the March 10, 2008 Request for Discovery submitted by Jonathan K. Strausbaugh and Richard L. Rieckenberg to KSL Services, Inc., are hereby granted in part. KSL Services, Inc., shall provide Jonathan K. Strausbaugh and Richard L. Rieckenberg with its responses to these Document Requests, as modified below, by no later than April 30, 2008:

(a) Document Request #2: All emails and attachments from May 1, 2007 through June 30, 2007, generated or received by David Whitaker, Keith Trosen, Tom Hay, Joan Taylor, Richard Chavez, Martin Dominquez, Laura Jenkins, B.J. Tedder, Ted Torres, Steve Long, David Lujan, Jerome Gonzales, David Padilla, Benito Garcia, Rick Nelson, Mike Goodwin, Chris Tolleson, Carol Lowe, Mark Romero, Stephanie Bement, Richard Flores, and Kiki Sanchez, on the following subjects:

(i) project management, project planning, project budget, project safety, asbestos, and alleged personnel harassment related to the May 31, 2007, TA-3 steam system shutdown; and

(ii) the decision to investigate, investigatory suspension, review and discussion of investigation, and decision to terminate Rieckenberg and Strausbaugh.

(b) Document Request #6: Complete file of KSL's investigation, including investigators' notes, drafts, and recordings, to the extent that such documents are not privileged.

(c) Document Request #8: Copies of all incident reports, lab sample results and documentation regarding discovery and determination/assessment of uncontrolled asbestos concerning the May 31, 2007 TA-3 steam system shutdown.

(d) Document Request #10: Copies of all e-mails and attachments between Torres and Rieckenberg, Torres and Strausbaugh, Hay and Rieckenberg, and Hay and Strausbaugh, generated in 2006 and 2007, that relate to the May 31, 2007 TA-3 steam system shutdown, the complainants' termination, or the decision to terminate the complainants.

(e) Document Request #11: Copies of KSL disciplinary documents in effect during the termination of Strausbaugh and Rieckenberg that address KSL's rules, regulations or policies regarding termination of employment

(f) Document Request #15: Documents relating to any complaints made by Taylor through June 14, 2007, concerning Strausbaugh, Rieckenberg, Torres or against any other individuals.

(g) Document Request #17: Contact information for Trosen, and a complete description of circumstances for leaving KSL, excluding those portions of the requested description that concern non-work-related matters.

(5) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of the Office of Hearings and Appeals upon the issuance of a decision by the hearing officer on the merits of the complaints.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: April 16, 2008