

November 7, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Mark J. Chugg
Date of Filing: October 9, 2002
Case Number: TBU-0002

Mark J. Chugg, a former employee of Bechtel BWXT Idaho (BWXT), a Department of Energy (DOE) contractor, appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. BWXT is the Management and Operating contractor for the Department of Energy at the Idaho National Engineering and Environmental Laboratory (INEEL). On September 30, 2002, the Employee Concerns Program Manager at the DOE's Idaho Operations Office (DOE/ID) dismissed Mr. Chugg's complaint. As explained below, I reverse the dismissal of the subject complaint, and remand the matter to DOE/ID for further processing.

I. Background

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 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 DOE's Contractor Employee Protection Program 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 complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Mr. Chugg was employed as a Senior Business Operations Specialist at INEEL. After being terminated by BWXT in August 2002, Mr. Chugg filed a Part 708 complaint with DOE/ID, alleging

that he was fired in retaliation for, among other things, reporting to the DOE alleged ethical violations by a BWXT official.*

On September 30, 2002, the Employee Concerns Program Manager at DOE/ID dismissed the complaint. Letter from Paul Allen, Employee Concerns Program Manager, DOE/ID, to Mark J. Chugg (September 30, 2002). The dismissal letter states, in pertinent part:

Specifically, your complaint does not indicate that you were retaliated against (per 10 CFR Part 708.5) for any of the following:

- (a) 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, your employer, or any higher tier contractor, information that you 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; or
- (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
- (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
 - (1) Constitute a violation of a federal health or safety law; or
 - (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

This is not to say that there are none of the above elements scattered among your case history. For instance, we are aware that in previous complaints (since settled) that you have reported what you believed to be violations of laws, rules, and regulations; that you have previously reported Dennis Patterson for ethics violations to a DOE official; and you have alleged abuse of authority. However, the record does not appear to support the supposition that your termination was based on any of the above criteria, but rather based on internal management decisions due to your actions and relationships with other employees, as well as misuse of company systems, and

*In 2001, Mr. Chugg filed a Part 708 complaint that was investigated by this office. After a report of investigation was issued in that case (OHA Case No. VBI-0074), Mr. Chugg and BWXT reached a settlement agreement, and we dismissed the complaint on October 24, 2001.

not being truthful during the course of the investigation. The decision to terminate you was not made by any of the individuals you have previously reported, and thus it is difficult to draw a conclusion of retaliation. Furthermore, the theories you postulate to implicate your co-workers in a conspiracy against you are extremely unlikely. In as much as your employer is able to demonstrate reasonable cause for your termination unrelated to retaliatory motives, we are obligated to dismiss this complaint.

Id. at 1-2.

II. Analysis

DOE-ID's dismissal letter appears to concede that Mr. Chugg engaged in protected activity, but concludes that the claim of retaliation lacks merit. This determination is premature. It reaches an issue that is at the heart of this case and ends the entire proceeding. The complainant's contention that he was terminated because of his protected activity deserves closer examination, and is still in dispute. In fact, this is the very type of issue that the OHA is charged with investigating under Section 708.22 and considering through the hearing process described at Section 708.28.

A DOE Office may not dismiss a case by reaching this type of substantive determination under the provisions of Section 708.17, unless the facts do not present issues for which relief can be granted under Part 708, or the complaint is frivolous or without merit on its face. 10 C.F.R. § 708.17(c)(2), (4). DOE/ID failed to comply with these provisions by applying an incorrect standard for dismissal not consistent with the Part 708 regulations. It stated, "In as much as your employer is able to demonstrate reasonable cause for your termination unrelated to retaliatory motives, we are obligated to dismiss this complaint." Letter from Paul Allen, Employee Concerns Program Manager, DOE/ID, to Mark J. Chugg (September 30, 2002) at 2. However, an evaluation of whether Mr. Chugg was dismissed for cause should not be made at this stage. 10 C.F.R. § 708.17(c)(2), (4). I find that the claims raised here present issues for which relief can be granted (e.g., reinstatement of Mr. Chugg) and which are not frivolous or without merit on their face. Accordingly, I find that this determination by the DOE/ID was incorrect. Daryl J. Shadel, 27 DOE ¶ 87,561 (2000).

III. Conclusion

As indicated by the foregoing, I find that the DOE Office incorrectly dismissed the complaint filed by Mark J. Chugg. Accordingly, the complaint should be accepted for further consideration.

It Is Therefore Ordered That:

The Appeal filed by Mark J. Chugg (Case No. TBU-0002) is hereby granted and his Part 708 complaint is hereby remanded to the DOE Idaho Operations Office for further processing as set forth at 10 C.F.R. § 708.21.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 7, 2002