

June 19, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Gary Vander Boegh

Date of Filing: May 27, 2003

Case Number: TBU-0007

Gary Vander Boegh (the Complainant), an employee of WESKEM LLC (WESKEM), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. WESKEM is a subcontractor of Bechtel Jacobs Company LLC (BJC), the management and integration contractor for the C-746-U Landfill at the DOE's Paducah Gaseous Diffusion Plant located in Paducah, Kentucky. On April 21, 2003, the Manager of Diversity Programs and Employee Concerns (Manager) at the DOE Oak Ridge Operations Office (DOE/OR) dismissed the Vander Boegh complaint. As explained below, I reverse the dismissal of the complaint and remand the matter to the Manager for further processing.

The Complainant is a landfill manager at the C-746-U landfill operated by WESKEM. During the past year he has participated in a proceeding under Part 708. Office of Hearings and Appeals (OHA) Case Nos. TBI-0007; TBH-0007. In that proceeding, the Complainant alleged that he warned WESKEM and BJC about excessive accumulations of leachate in the storage tanks at the landfill that had reached and surpassed the maximum reserve capacities required by the state operating permit. The Complainant contended that these warnings constituted protected disclosures under Part 708. The Complainant further alleged that WESKEM had taken a number of retaliatory actions against him, including issuing a disciplinary memorandum, and reducing his compensation. Pursuant to 10 C.F.R. § 708.25, an OHA Hearing Officer conducted a hearing on this matter. The Hearing Officer has not yet issued an initial agency decision regarding that Vander Boegh complaint.

On March 19, 2003, the Complainant filed a second complaint of retaliation with the DOE/OR employee concerns office. This complaint alleged some additional protected disclosures and

continuing adverse actions by WESKEM, including coercion, intimidation, threats, and negative actions with respect to the terms and conditions of his employment. On April 21, 2003, the Manager dismissed the complaint for lack of jurisdiction. 10 C.F.R. § 708.17(c)(2). He stated as the basis for this finding that the facts as alleged in the complaint did not present issues for which relief can be granted, and the complaint appeared without merit on its face. On May 27, 2003, Vander Boegh filed an appeal of that dismissal with the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

Before turning to the merits of this case, I must address a procedural issue. In reviewing the appeal, I found that the Notice of Appeal was filed via FAX one day late, on May 27. 10 C.F.R. §708.18(a). Since the one day delay is not at all significant here, I see no reason to give it any further consideration, and will proceed with a substantive review of this case. 1/

After reviewing the facts in this case, I do not agree that dismissal is appropriate. I do not think that the complaint appears without merit on its face. As an initial matter, I note that since Vander Boegh has filed this complaint during the pendency of the earlier Part 708 proceeding described above, he has participated in a protected activity under Part 708, and is continuing to do so. WESKEM is precluded from retaliating against him for that activity.

I reviewed the retaliations claimed by Vander Boegh. Although the retaliations were far from well delineated, he did allege in a general way that he had been subjected to threats, coercion and intimidation by his employer. He claimed that WESKEM had adversely affected the terms of his employment as a landfill manager. I was inclined to agree with the Manager's implicit conclusion that Vander Boegh's stated retaliations were vague. However, I did not believe that the complaint as a whole lacked any sign of merit, or

1/ The Complainant's attorney points out that in addition to the FAXed filing, on May 21 he mailed a Notice of Appeal through the U.S. mail. Mail sent to OHA via the U.S. Postal Service is being sanitized, which has caused some delay in delivery of our mail. Therefore, OHA did not receive that mailed notice until more than two weeks later, on June 6. The attorney states that he was not aware of the sanitization process and the delay it could cause. This is a reasonable explanation.

that there was no set of circumstances under which relief could be granted. Accordingly, OHA asked Vander Boegh to supplement his complaint by explaining the retaliations with greater specificity. In his reply, he mentioned as retaliations the removal of his responsibilities for two landfills. One of these removals allegedly took place after the hearing noted above, and thus could be construed as a new retaliation for participating in a protected proceeding. Vander Boegh cited as a remedy the restoration of those responsibilities. He also cited as a retaliation a negative performance evaluation that he received after the hearing. The remedy for this action would be appropriate changes to the evaluation. Thus, overall, there is now clearly sufficient substantive information in the record in this case to warrant further processing. I will therefore remand the matter to the Manager for that purpose.

During that additional processing, the Manager should give further consideration to some important procedural aspects of this case. After close review of the file here, I noted some procedural deficiencies that should be corrected as part of this remand. Section 708.12 specifies what information an employee must include in his complaint of retaliation. In addition to a description of the events giving rise to the complaint, the employee must make the following assertions: state that he is not currently pursuing a remedy under State or other applicable law; state that all of the facts included in the complaint are true and correct to the best of the complainant's knowledge and belief; and affirm that the complainant has completed all applicable grievance or arbitration procedures. 10 C.F.R. § 708.12(b), (c), and (d). In this case, the complaint does not set forth any of these statements for the record. Accordingly, the Manager should make sure to complete and correct the record in this case.

In reviewing the record here, I also noticed a reason why the Employee Concerns Office of DOE/OR might have failed to insure that these procedural statements were included in the complaint. The intake form used by that Office for Part 708 complaints is the same form that it uses for receiving employee concerns. The form is entitled "Employee Concerns Reporting Form," used "to report safety, health, and environmental concerns." The form states that it may also be used by employees to file complaints of retaliation under part 708. While there is certainly some similarity between Part 708 complaints and overall employee concerns about safety, health and environment, there are some obvious, important differences. The requirements of Section 708.12, cited above, are a significant example. These do not apply to the filing of

employee concerns about safety, health and environment outside of Part 708.

Further, a Part 708 complaint involves an allegation of retaliation by an employer for a protected disclosure, and this Part provides protection from such retaliation. The filing of an employee concern does not necessarily mean there was any retaliation involved, and the employee may not be seeking any protection.

Another difference is the fact that Part 708 includes protection for making disclosures that are not related to safety and health. These include reporting of fraud, gross mismanagement, gross waste of funds, or abuse of authority; and participating in a Part 708 proceeding, which is involved here. 10 C.F.R. § 708.5.

The employee concerns form at issue here simply does not provide for automatic consideration of the Section 708.12 requirements, and does not capture these other Part 708 concerns. Accordingly, if the DOE/OR Employee Concerns Office wishes to continue to use the employee concerns reporting form to record and report Part 708 complaints, it should consider amending the form so that it will include an opportunity to automatically review whether all relevant Part 708 requirements have been met. On the other hand, that Office might consider developing a form to be used only for Part 708 concerns, and in that context insure that all procedural requirements are easily identified and considered. I believe that an appropriate adjustment to intake procedures will help individuals who file complaints of retaliation and help insure full adherence to Part 708 procedural requirements.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Gary Vander Boegh (Case No. TBU-0007) is hereby granted and his Part 708 complaint is hereby remanded to the Manger, Diversity Programs and Employee Concerns located in Oak Ridge, Tennessee, for further processing as set forth above.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 19, 2003