

March 18, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Henry T. Greene

Date of Filing: February 3, 2003

Case Number: TBU-0010

Henry T. Greene, a former employee of Science Applications International Corporation (SAIC) and a present employee of Bechtel SAIC Company LLC (BSC), both Department of Energy (DOE) contractors, appeals the dismissal of the whistleblower complaint against BSC he filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. SAIC and BSC are both contractors for the Department of Energy at the Yucca Mountain Project Site. On January 13, 2003, the Deputy Director of DOE's Office of Repository Development (ORD) dismissed Greene's complaint against BSC. As explained below, I reverse the dismissal of the subject complaint, and remand the matter to ORD 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.

On January 13, 2003, ORD's Deputy Director issued a letter in response to SAIC and BSC's motions to dismiss. The January 13th letter denied SAIC's motion to dismiss. However, the January 13th letter granted BSC's motion to dismiss. To this end, the dismissal letter states, in pertinent part:

BSC has asked that the complaint against it be dismissed for lack of jurisdiction because the facts alleged do not present issues for which relief can be granted under Part 708 with regard to it. I find that the complaint alleges that "but for" retaliation by SAIC, the complainant would be better situated in his current employment with BSC. However, there is no allegation of a disclosure covered by Part 708 having contributed to any act by BSC that meets the definition of retaliation under Part 708. Therefore, I do find a lack of jurisdiction with regard to the complaint against BSC. The complaint as to BSC is hereby dismissed, in accordance with Section 708.17(c)(2).

January 13, 2003, Jurisdictional Determination at 1-2. On February 3, 2003, the Complainant filed the present Appeal. On March 10, 2003, BSC filed a response to the Complainant's appeal.

II. Analysis

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997) (EG&G). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). Moreover, this Office has held that, in order to further the purposes of the whistleblower protection program, which include encouraging employees to come forth with protected disclosures, it is important not to hold parties to proceedings under 10 C.F.R. Part 708 to the strictest standards of technical pleading. *EG&G, supra; Westinghouse Hanford Company*, 24 DOE ¶ 87,502 at 89,011 (1994) (*Westinghouse*).

10 C.F.R. § 708.17 sets forth those circumstances under which a Head of Field Element or EC Director may dismiss a complaint for lack of jurisdiction or for other good cause. ORD's January 13, 2003 Jurisdictional Determination cites only § 708.17(c)(2) as the basis for its dismissal of the complaint against BSC. 10 C.F.R. § 708.17(c)(2) provides: "Dismissal for lack of jurisdiction or other good cause is appropriate if: (2) The facts, *as alleged in your complaint*, do not present issues for which relief can be granted under this regulation." (Emphasis supplied). ORD's reliance on § 708.17(c)(2) is misplaced, however. The Complaint clearly and unambiguously states a claim against BSC for which relief can be granted under 10 C.F.R. Part 708. Under the Part 708 regulations:

The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by

clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.

10 C.F.R. § 708.29. Accordingly, a complaint states a claim upon which relief can be granted under Part 708 if it alleges that (1) an employee made protected disclosures (or otherwise engaged in protected activity) and (2) the protected activity was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor.

Turning to the present case, we note that the Complaint clearly alleges that Greene made a number of protected disclosures. Complaint at ¶ 28, 41, 42, and 48. The Complaint also alleges that these protected disclosures were a contributing factor in a number of personnel actions taken by BSC which negatively affected Greene. Complaint at ¶ 19, 22, 24, 32-39. Thus, the Complaint clearly sets forth the allegations necessary to establish a *prima facie* case under the DOE whistleblower regulations. Therefore, I find that the claims raised here present issues for which relief can be granted. Accordingly, the determination by the ORD was incorrect, and I will remand this matter to the ORD for further consideration and processing.

BSC's Response to the Appeal (Response) is unpersuasive. In its Response, BSC asserts: (1) Greene's protected disclosure occurred before he was employed by BSC, (2) Greene's lack of success in getting the positions he desired resulted only from the residual effects of demotion and therefore did not result from any new retaliation by BSC, and (3) "[t]he factual allegations in the complaint allege nothing from which BSC's knowledge of Complainant's alleged protected activity or any retaliatory motive on BSC's part could fairly be inferred." Response at 2, 5.

Turning to BSC's first argument, we note that Part 708 does not restrict the protection it accords to protected activity to that conduct which takes place while an individual is actually employed by a DOE contractor. *See, e.g. Jagdish C. Laul, Case Number, VBH-0010, (2000)* (finding retaliation by an employer against an employee who had made protected disclosures while employed by a previous employer), *affirmed, Jagdish C. Laul, Case Number, VBA-0010 (2001)*. Accordingly, BSC's first argument, whether true or untrue, is not controlling here. BSC's second contention is similarly flawed. Even if this contention is factually valid, any continuation of past retaliation by a subsequent DOE contractor would be actionable under Part 708. Finally, I note that BSC's third contention is factually flawed: The Complaint specifically states, "All respondents, and decision makers, had knowledge of the protected activities of the Complainant." Complaint at ¶ 52.

III. Conclusion

As indicated by the foregoing, I find that the DOE Office of Repository Development incorrectly dismissed the complaint filed by Henry T. Greene. Accordingly, the complaint against BSC should be accepted for further consideration and processing by ORD.

It Is Therefore Ordered That:

The Appeal filed by Henry T. Greene (Case No. TBU-0010) is hereby granted and his Part 708 complaint is hereby remanded to the Office of Repository Development for further processing as set forth at 10 C.F.R. § 708.21.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 18, 2003