

April 26, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Michael Goetz

Date of Filing: March 28, 2005

Case Number: TBU-0033

Michael Goetz (the complainant) 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. As explained below, the dismissal of the complaint is upheld.

I. Background

The complainant alleges the following facts. In 2000, he was employed by "MOTA," a DOE subcontractor at the DOE's Argonne National Laboratory (ANL) located in Argonne, Illinois. He filed a report describing safety violations involving radioactive materials and other safety matters that took place between February 2000 and June 2001. In October 2001 he met with an investigator regarding his safety concerns. He met with another investigator in early 2004 regarding this matter. On March 15, 2004, he voluntarily began work at a new position at NASA/Plum Brook Station, a remote test installation site for the National Aeronautics and Space Administration's Glenn Research Center.¹ His employer at Plum Brook was Bartlett Nuclear, Inc. (Bartlett).

It appears that Bartlett is performing a long-term remediation project (decontamination and decommission services) at Plum Brook. Montgomery-Watson is the NASA prime contractor at Plum Brook and Bartlett is a subcontractor of Montgomery-Watson. According to the complainant, "Montgomery-Watson is subject to the oversight of Argonne National Labs personnel." On November 4, 2004, the complainant was fired from his position with Bartlett, allegedly for improper computer use.

1/ The Plum Brook Station is located in Sandusky, Ohio.

The complainant filed a complaint of retaliation against Bartlett with the Argonne Site Office of the Department of Energy. The Argonne Site Office oversees the ANL. The complainant believes that he was fired from his job at Plum Brook in 2004 because he had made safety disclosures at ANL about 3 or 4 years earlier.

On March 4, 2005, the Acting Site Office Manager dismissed the complaint on the grounds that "the DOE Contractor Employee Protection Program applies to complaints of employees of DOE management and operating contractors and to subcontractors performing work at DOE-owned or-leased facilities. . . . Bartlett Nuclear has no contractual relationship with Argonne National Laboratory. The ANL oversight is pursuant to an interagency agreement between DOE and the National Aeronautics and Space Administration (NASA). Further, the NASA/Plum Brook Facility is not a DOE-owned or leased facility; therefore, DOE has no jurisdiction over your complaint." The complaint was dismissed pursuant to 10 C.F.R. § 708.17, for lack of jurisdiction.

On March 28, 2005, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18. In the appeal, the complainant stated that his complaint of retaliation was "initiated through a contractor directly under the oversight of Argonne National Labs. The Bartlett representative merely [followed] the direct instructions of the Montgomery-Watson superintendent. . . [whose] daily activities are subject to the supervision of ANL personnel directly involved with my concerns expressed at ANL. Bartlett functioned as a captive subcontractor employer whose activities at Plum Brook, including all staffing decisions, were subject to approval of the primary contractor, Montgomery-Watson." The complainant further claimed that the events forming the basis of his complaint occurred at ANL. Finally, the complainant stated that Bartlett has had contractual relationships with ANL, and maintains contracts with the DOE at other DOE sites.

On March 30, we wrote a letter to the complainant asking for additional information about the relationship between Bartlett and the DOE. Specifically, we asked him to (i) provide additional information about the (contractual) relationship between Bartlett and ANL; (ii) submit information showing the relevant entities with which Bartlett had a contractual arrangement; (iii) submit copies of contracts between the DOE/ANL and Bartlett, or a DOE prime contractor and Bartlett; (iv) provide some background about Montgomery-Watson and its relationship to ANL, DOE and Bartlett; and (v) provide information about work he was performing at Plum Brook

that directly related to activities at DOE-owned or -leased facilities.

In a telephone conversation with the complainant on April 13, we explained in more detail the type of information we were seeking and the reason it was important. The complainant indicated that he would attempt to provide information that would respond to our letter. Thereafter, the Complainant submitted a copy of a draft of his Complaint of Retaliation. He did not submit any other information.

Section 708.18 provides that the Director of OHA will issue a decision on this type of case by the 30th day after the appeal is received. Since this appeal was filed on March 28, I believe that it is now appropriate to proceed with an analysis of this matter based on the record before me.

II. Analysis

After reviewing that record, I am in agreement with the result reached by the Argonne Site Office. The Part 708 regulations were promulgated to protect DOE contractor/subcontractor employees. According to Section 708.2, an "employee" means a person employed by a contractor, and any person previously employed by a contractor if that person's complaint alleges that employment was terminated for conduct described in . . . this subpart." A "Contractor" means a seller of goods or services who is a party to: (1) a management and operating contract or other type of contract with DOE to perform work directly related to activities at DOE owned or-leased facilities, or (2) a subcontract under a contract of the type described in paragraph (1) of this definition, but only with respect to work related to activities at DOE-owned or-leased facilities." As discussed below, the complainant does not qualify as an employee under the regulatory definition, and Bartlett does not meet the definition of contractor or subcontractor.

The complainant simply states that Bartlett was subject to DOE contractor "oversight." However, he has provided no evidence or reasoned argument that there was any contractual relationship between Bartlett and any DOE contractor. The Argonne Acting Site Office Manager stated that ANL oversight of Bartlett was pursuant to an interagency agreement between DOE and NASA. Without any information to the contrary, I must conclude that this does not meet the definition set forth in Section 708.2.

In any event, the complainant's assertion that the Bartlett representative "merely followed the direct instructions of the Montgomery-Watson superintendent," even if true, does not mandate a different result. DOE contractors, and through them their subcontractors, must comply with Part 708. 64 Fed. Reg. 12862 at 12863 (March 15, 1999). If there is no contractual agreement between the DOE and Montgomery-Watson/Bartlett, but rather only an "inter-agency agreement," between the DOE and NASA, then there is no established basis for the DOE to expect Bartlett to comply with Part 708, and no apparent authority on the basis of which the DOE could order Bartlett to provide relief for the complainant. The complainant has shown no reason for me to conclude otherwise. The complainant's allegation that Bartlett has contracts with the DOE at other sites does not bring the complainant, who did not work at those sites, within the purview of Part 708.

Furthermore, even if there were a sub-contractor relationship between the DOE and Bartlett, since the complainant did not work at a DOE facility, he would be required to show that his work related to activities at a DOE-owned or -leased facility. 10 C.F.R. § 708.2. We asked the complainant to provide such information, by describing the work he was performing. Although submission of this type of evidence was well within his ability, he failed to come forth with even this relatively simple information.

As a final matter, aside from the fact that Part 708 does not permit consideration of the instant complaint, I find there is little plausibility to the gravamen of the complaint here, i.e., that the complainant was fired from a NASA site 4 years after his original DOE/ANL disclosures because a DOE overseer at the NASA site bore him some ill-will.

Even though the complainant is not covered by the DOE's Part 708 regulations, there are other programs and agencies that might offer him protection. The ANL provided the complainant with information about the Occupational Safety and Health Administration (OSHA) whistleblower protection program and suggested other agencies such as the Nuclear Regulatory Commission, NASA and the Army Corps of Engineers that might have jurisdiction over the complainant and "safety at his workplace." Thus, the complainant here may well have avenues of relief other than the DOE's Part 708.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Michael Goetz (Case No. TBU-0033) is denied, and his Complaint of Retaliation is hereby dismissed.

(2) This appeal decision shall become a final agency action unless a party files a petition for Secretarial review by the 30th day after receipt of this appeal determination. 10 C.F.R. § 708.18(d).

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 26, 2005