

November 29, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: William Cor
Date of Filing: April 21, 2006
Case Number: TBU-0045

William Cor (the complainant or the employee), 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 should be reversed and the matter remanded for further processing to the Whistleblower Program Manager at the National Nuclear Security Administration Service Center (NNSA).

I. Background

The complainant was an employee with ARES Corporation, a DOE contractor at the Los Alamos National Laboratory in Los Alamos, New Mexico. Pursuant to Part 708, he filed a complaint of retaliation against ARES with the NNSA. On April 5, 2006, the Program Manager dismissed the complaint "for lack of jurisdiction." The Program Manager stated as the basis for this finding that the complainant had failed to show that ARES had terminated the complainant as he had asserted. Rather, the Program Manager found that the complainant's employment with ARES was on an "on call" basis. In this regard, the Program Manager noted that as an on call employee, the complainant was not guaranteed any work, and further that the complainant did not provide any documentation that any other casual employee has received work that could have been assigned to him. On this basis the Program Manager concluded that the Complaint should be dismissed for lack of jurisdiction, citing to 10 C.F.R. § 708.17(c). On April 21, 2006, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

II. Analysis

A program manager may dismiss a Part 708 complaint for lack of jurisdiction or other good cause under 10 C.F.R. § 708.17 based on one or more of the following grounds: (1) the complaint is untimely; (2) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708; (3) the complainant has filed a complaint under other applicable law with respect to the same allegations; (4) the complaint is frivolous or without merit on its face; (5) the issues have been rendered moot or substantially resolved; or (6) the employer has made an offer to provide the requested remedy or a remedy that DOE considers to be equivalent to the remedy that could be provided under Part 708.

The complainant alleges he made a protected disclosure regarding the safety of a proposed design for an acid fume hood system at Los Alamos National Laboratory's Beryllium Technology Facility at Tech Area 3, and then stopped receiving on-call work assignments, thereby constructively terminating his employment. In response to the program manager's solicitation of its comments concerning the complaint, the contractor submitted statements disputing the validity of the complainant's whistleblowing claims, and further asserting that the complainant had not been terminated but instead had stopped receiving assignments simply due to the termination of work on the subcontract on which the complainant was employed.

The complainant responded by submitting information to the Program Manager disputing these assertions, including his contention that further work on the project was performed after he was directed to stop work, and that in fact the parties had manifested an earlier intention to undertake a broader working relationship beyond the project on which complainant was directed to stop work. Complainant further asserted that, contrary to the contractor's assertion that complainant had not been terminated, the contractor had informed an independent witness that the complainant was no longer employed by the firm. See March 22, 2006, e-mail from William Cor to DOE Whistleblower Program Manager.

The Program Manager dismissed the complaint for lack of jurisdiction. In reaching this determination, the program manager found that the complainant had failed to refute the contractor's assertions that the complainant had not been terminated and that no further work remained on the project to which the complainant was assigned.

In the context of a dismissal of a complaint by a program manager as meritless, Section 708.17 authorizes dismissal by a program manager only if the complaint itself fails to allege "issues for which relief can be granted" or "is frivolous or without merit on its face." As relevant here, the Part 708 regulations prohibit a contractor employer from retaliating against its employees for making a disclosure, to various identified governmental or contractor personnel, including a complainant's employer, of information the employee reasonably believes reveals a "substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5 (a) & (a) (2). Complainant asserts that he was directed to design an acid fume exhaust system that was tied into an existing building exhaust system and was not adequate for the concentrated acid exhaust, which should have been exhausted independently from the system. Complainant asserts that the design was "unsafe" and suggests that the alleged design defects posed a risk of acid exposure and injury to workers at LANL.

The respondent contests that the complainant raised an actual safety concern and maintains that complainant's alleged safety disclosures lack protection under Part 708 as being both insubstantial, and actually motivated by the complainant's "inability to produce his work in a timely manner." See Exhibit 3, page 1 to ARES February 27, 2006, Response to Complaint. As noted above, the parties further dispute whether complainant's lack of further assignments following the alleged safety disclosure was the product of impermissible reprisal for the alleged protected disclosure, as alleged in the complaint, or resulted simply from the termination of the exhaust fume project and the absence of other available work.

Resolution of the parties' competing assertions concerning the legitimacy of the alleged safety concerns and availability of additional work is beyond the scope of this initial stage of the proceedings. In the present context, 10 C.F.R. § 708.17 permits a program manager to dismiss a Part 708 complaint if the allegations set forth in the complaint fail to allege a non-frivolous claim for which relief can be granted under Part 708. In the subject case, however, the parties' conflicting claims concerning whether or not the complaint presents a disclosure protected under Section 708.5, and whether or not the complainant suffered any actual reprisal, are not susceptible to summary resolution under Section 708.17. On the basis of the present limited record we cannot say that the allegations in the complaint that the complainant suffered retaliation for making a protected safety disclosure are either

plainly frivolous or, if ultimately proven, would not support relief under Part 708.

Where, as here, the complaint does not meet the grounds for dismissal under Section 708.17, the program manager is authorized to recommend that the parties attempt to resolve the complaint informally, and absent a voluntary resolution to notify the complainant of his options to have the matter referred to OHA for a hearing either with or without a preceding OHA investigation. See 10 C.F.R. § § 708.20, and 708.21. A remand to the program manager for further proceedings in accordance with these provisions is thus in order.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by William Cor (Case No. TBU-0045) is hereby granted and his Part 708 complaint is hereby remanded to the Employee Concerns Program Manager, NNSA Service Center, for further processing as set forth above.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 29, 2006