

August 21, 2006

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Dennis D. Patterson

Date of Filing: July 31, 2006

Case Number: TBU-0047

Dennis D. Patterson (Patterson or the complainant) appeals the dismissal of his June 1, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. He filed the complaint with the Employee Concerns (EC) Manager of the DOE's Idaho Operations Office (DOE/ID), located in Idaho Falls, ID. As explained below, the EC Manager's July 17, 2006 dismissal of the complaint should be reversed, and the appeal granted.

I. Background

The complainant is the Manager of the Employee Concerns and Ethics Office of the Battelle Energy Alliance (BEA). BEA manages the DOE's Idaho National Laboratory. On June 1, 2006, Patterson filed a Complaint of Retaliation with the DOE/ID EC Manager. In that complaint, he alleged that he made protected disclosures involving violations of the Privacy Act, the Freedom of Information Act and Part 708. He stated that he made these disclosures to BEA senior management and to the BEA corporate office. He claimed that BEA retaliated against him in a number of ways, including intimidation, a retaliatory investigation of his ethics office, a lower performance appraisal than he had previously received, which resulted in a reduction in his merit pay increase for 2005, and a change in his job title from Manager to Specialist 5, which he contends will have an adverse impact on his future salary increases.

In the July 17, 2006 dismissal letter, the EC Manager of the DOE/ID determined that the complaint should be dismissed for the following reasons. First, the EC Manager found that the complaint was untimely filed. In this regard, she noted that a Part 708 complaint must be filed within 90 days of the date that the complainant knew or should have known of the alleged retaliation. 10 C.F.R.

§ 708.14(a). The EC Manager stated that the complainant had filed a "Charge of Discrimination" with the Idaho Human Rights Commission in which he stated that the latest date of discrimination was February 24, 2006.<sup>1</sup> She therefore determined that the June 1 filing of the Part 708 complaint took place beyond the 90 time frame and consequently was untimely.

As a second reason for the dismissal, the EC manager indicated that the complainant had not stated that he had exhausted all applicable grievance-arbitration procedures, as required by Section 708.13(a)(1).

Based on the above findings the EC Manager dismissed the complaint.

Pursuant to 10 C.F.R. § 708.18(a), Patterson filed the instant appeal with the Office of Hearings and Appeals.

## II. Analysis

### A. Timeliness

As noted above, the EC Manager found that the complaint was untimely because the latest retaliation noted by Patterson in his "Charge of Discrimination" with the Idaho Civil Rights Commission took place on February 24 and he filed his Part 708 complaint on June 1, which was more than 90 days later. I cannot discern why the EC manager referred to the Charge of Discrimination rather than Patterson's Part 708 Complaint of Retaliation in determining whether the filing was timely. In any event, Patterson filed a copy of his June 1 complaint along with his appeal. As Patterson notes in his appeal, the complaint clearly alleges a retaliation on March 14. The retaliation was a reduction in his 2005 merit increase. See Complaint Item (2)(F). Based on that alleged retaliation, the Part 708 complaint was clearly filed within the 90 day time frame permitted under Part 708. Accordingly, this aspect of the EC Manager's determination will not be sustained.

### B. Exhaustion of Grievance/Arbitration Procedures

As stated above, the EC Manager included as a second reason for dismissing the complaint that Patterson had failed to state that he had exhausted all applicable grievance-arbitration procedures, as required by Section 708.13.

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<sup>1</sup>/ The complainant withdrew that complaint on May 25, 2006.

After reviewing record in this case, I find that the EC Manager has erred regarding this issue. As an initial matter, I note that the Patterson complaint does include a statement regarding the grievance-arbitration issue. Specifically, Patterson has included a form that appears to have been developed by the DOE/ID. The form asks the filer to provide information about the various jurisdictional matters that every Part 708 complainant must address, including a required statement by a complainant that he has "exhausted (completed) all applicable grievance or arbitration procedures." 10 C.F.R. § 708.12(d). In connection with this subsection, the DOE/ID form offered the following three options as responses to whether the complainant had exhausted all applicable procedures: "(1) all attempts at resolution. . . have been exhausted; (2) the company grievance procedure is ineffectual or exposes me to employer reprisal; <sup>2</sup> (3) the company has no such procedures." The individual submitting this form is asked to mark all that apply.

In his complaint, Patterson responded by claiming that the procedures were ineffectual (Item No. 2). The EC manager then rejected that response, stating that the complainant had not exhausted all grievance arbitration procedures as required under Part 708.

The EC Manager's determination appears to assume that the complainant was required to exhaust the BEA grievance arbitration procedures. Based on the record in this case, we find that this assumption was incorrect. The term "grievance-arbitration procedure" used in the context of Part 708 has a specialized meaning related to procedures negotiated by employees and management under labor agreements. It therefore does not include every unilaterally-created grievance procedure that an employer may informally offer. *Darryl H. Shadel*, 27 DOE ¶ 87,561 (2000). See also 64 Fed. Reg. 12862 at 12868 (March 15, 1999).

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2/ This option was one that was available under the prior version of Part 708 at Section 708.6(c)(2), which was promulgated in 1992. That provision is not included in the current version of Part 708, promulgated in 1999. Accordingly, this option should not have been included in the form.

In the instant case, it does not appear that Patterson has failed to participate in a union-mandated grievance procedure.<sup>3</sup> Rather, he has simply not utilized a voluntary BEA "Alternative Dispute Resolution" (ADR) process that is set out in the BEA handbook.<sup>4</sup> Such use is not required under Part 708. Accordingly, the complainant was not required to exhaust either a mandatory grievance-arbitration procedure or the BEA voluntary process. His failure to indicate exhaustion of grievance-arbitration procedures on the DOE/ID form is entirely understandable, since the form did not include the appropriate option, i.e. that he was not required to participate in a union-mandated grievance procedure.<sup>5</sup> (I recommend that the form be amended to include an opportunity for a complainant to indicate that he is not required to participate in a union-mandated grievance procedure.) Accordingly, the complaint was improperly dismissed based on the purported failure to include a statement regarding exhaustion of grievance-arbitration procedures.

As indicated by the above discussion, I find that the DOE/ID dismissal was incorrect and the Patterson complaint should be accepted for further processing.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Dennis D. Patterson (Case No. TBU-0047) is hereby granted, and his Part 708 complaint is hereby remanded to the

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3/ In fact, it is not clear that he is even a member of a bargaining unit required to use such procedures.

4/ As Patterson points out, the BEA handbook indicates that "Employees have the right to file complaints with enforcement agencies without using the ADR program." Appeal at 2.

5/ It is also possible that there are no union-mandated procedures at the site, in which case the complainant should have checked item 3. In any event, based on the record here, it appears that the exhaustion requirements of Section 708.13 are not applicable. However, the complainant should confirm this is the case.

Employee Concerns Program Manager, Idaho Operations Office, for further processing as set forth above.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: August 21, 2006