October 6, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Thomas L. Townsend

Date of Filing: September 15, 2008

Case Number: TBU-0082

Thomas L. Townsend (Townsend) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708[1] by the Oak Ridge Operations Office (OR) of the Department of Energy (DOE). As explained below, the dismissal of the complaint should be upheld.

I. Background[2]

Townsend was an employee of LeGacy Resource Consulting Corporation (LRCC), a contractor at the DOE's Oak Ridge facility. In his position, he analyzed the suitability of employees to receive and maintain security clearances. On December 12, 2006, Townsend sent an E-mail (12/12 E-mail) to the Secretary of Energy (Secretary) in which he praised the performance of two federal employees, one of whom was his supervisor. In the 12/12 E-mail he urged that both employees be given promotions to a higher federal pay grade and alleged that "[t]his operations office has held back people for reasons you are not aware of." September 7, 2007, complaint submitted by counsel for Townsend, Loring E. Justice, to Gerald Boyd, Manager, Oak Ridge Operations Office (Complaint) at 2. Later, on February 15, 2007, Townsend sent another E-mail (2/15 E-mail) to the Secretary of Energy in which he urged the Secretary during his visit to Oak Ridge to talk to personnel security analysts at Oak Ridge. Such discussion, he goes on to state, would convince the Secretary of the need for "centralization of personnel security." Complaint at 2. He goes on to allege, "I am not crying wolf but I think you need to hear the real story from people [who] have for years thought about this situation and been told to keep quiet [and] are ordered to grant and continue cases that the headquarters staff would disapprove." Complaint at 2.

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[1]The DOE Contractor Whistleblower Program, 10 C.F.R. Part 708 prohibits employers from retailiating against contractor employees who engage in various defined protected activities such as, reporting a substantial violation of law, gross mismanagement or waste of funds, or a substantial and specific danger to employees or public health and safety. *See* 10 C.F.R. § 708.5.

[2]This section relies on the facts alleged in Townsend's September 7, 2007, complaint and in his Appeal submission submitted September 15, 2008.

On May 30, 2007, Townsend received a letter from the Deputy Manager of the Oak Ridge Operations Office. The letter acknowledged a January 31, 2007, E-mail from Townsend praising his supervisor and informed him that his supervisor was receiving a "desk audit" in connection with a possible increase in federal pay grade level.

On June 11, 2007, Townsend sent the Secretary another E-mail (6/11 E-mail) in which he informed the Secretary that due to a lack of funding, Townsend would not be retained in his employment past June 22, 2007, despite the fact that a backlog of security cases had not been completely resolved. He goes on to state his belief that his impending termination was prompted in part by his previous three E-mails[3] to the Secretary. Complaint at 3. He goes on to urge the Secretary to consider his supervisor's request for additional funding especially given that "inspection reports" identified a lack of staff for his supervisor. He then states:

> It is hard for me to understand why you pay a contract[or] $53.19 an hour and the person doing the work gets only $30.00 [per hour]. I understand the need for minority contracts but when an organization is short handed, has backlogs and looks at what is coming up, such as caseloads from OPM, it is hard to understand why she would not be allowed to hire someone on a personal services contract and save the Department a lot of money. Again it was a pleasure working for your organization and if someone finds more money for [his supervisor] maybe I would consider returning to help her.

Complaint at 3.

On June 11, 2007, Townsend was asked by a LRCC supervisor whether he had sent the Secretary an E-mail, to which he replied in the affirmative. The supervisor then instructed Townsend not to send another E-mail to the Secretary. The next day, June 12, the LRCC supervisor went to see Townsend and asked when was the last time he had E-mailed the Secretary. Townsend replied that he had sent an E-mail "yesterday." The LRCC supervisor then asked for a copy of the E-mail. Later that day, Townsend was informed by the LRCC supervisor that he had been terminated from his position at LRCC. September 15, 2008, Appeal submission from Thomas L. Townsend (Appeal) at 2. Townsend subsequently received a letter from LRCC dated June 14, 2007, informing him of the grounds for his termination from LRCC. The letter specifically alleged that Townsend, in three E-mails, had "lobb[ied] on behalf of a federal employee" and had disclosed the firm's billing rate as well as his own pay rate.[4] These disclosures, the letter stated, violated company policies regarding Conflict of Interest, Confidential and Company Sensitive Information and E-mail Access and disclosure. June 14, 2007, letter from LRCC Director of Human Resources to Tom Townsend.

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[3]It is uncertain from the Complaint which three previous E-mails Townsend is referring to in this E-mail.

[4]Presumably LRCC's reference to lobbying referred to Townsend's advocacy in the 12/12 E-mail for a higher pay grade for his supervisor and for another federal employee.

In his Complaint, dated September 7, 2007, Townsend alleged that he had been terminated from his employment because of his previous E-mail communications with the Secretary. The Complaint alleged that his E-mail communications "raised issues relating to substantial violations of law, rule or regulations, dangers to employees and public health and safety and in particular fraud, gross, mismanagement, gross waste of funds and abuse of authority." Complaint at 5. The Manager of the Oak Ridge Operations Office delegated review of the Complaint to the Office of Chief Counsel.[5]

On September 5, 2008, Wendy E. Bryant (Bryant), an attorney with the OR Office of Chief Counsel, on behalf of OR, issued Townsend a letter dismissing the Complaint. The letter details the author's investigation of the Complaint including discussions the author had with Townsend and other individuals mentioned in his E-mails. It went on to state that Townsend, at a meeting with Bryant, alleged that he had reported wronging to the Secretary "in other E-mails" but would not tell the author anything specific about the alleged wrongdoing. September 5, 2008, Letter from Wendy E. Bryant, Office of Chief Counsel, OR, to Thomas L. Townsend at 3 (Dismissal Letter). The Dismissal Letter also described how Bryant reviewed a transcript of Townsend's unemployment compensation hearing. As a result of the Bryant's review of the available information, Townsend's Complaint was dismissed. Bryant found that the information contained in Townsend's E-mail communications did not constitute a protected activity under Part 708. Specifically, Bryant found that the difference between what Townsend was paid versus what LRCC charged the DOE "did not demonstrate fraud, waste or abuse." Dismissal Letter at 3. Additionally, Bryant found no evidence that a DOE official had abused his or her authority. Dismissal Letter at 4. Bryant further found that Townsend's employer had a "clear basis for terminating your employment" and cited the unemployment compensation tribunal's Decision in favor of LRCC. In this regard, Bryant cited the tribunal's finding that Townsend, in his E-mail communications, was "lobbying" for his supervisor as well as himself. Dismissal Letter at 3. The Dismissal Letter did not specify under what regulatory provision the Complaint was being dismissed, although the letter provided Townsend with a copy of the regulations for appealing a dismissal of a whistleblower complaint for a lack of jurisdiction or other good cause.

In his Appeal submission of September 15, 2008, Townsend cites a number of instances where he disagrees with the facts and conclusions reported in the Dismissal Letter and with the summation of his discussion with the author of the Dismissal Letter. He reasserts his belief that "Oak Ridge Management told [LRCC] to get rid of me." September 15 2008, Appeal submission from Thomas L. Townsend to Poli A. Marmolejos, Director, OHA, (Appeal) at 3. He also asserts that he did not discuss the nature of the wrongdoing with Bryant because she worked for OR Management. However, he later reported these concerns to DOE's Office of the Inspector General. He asserts his belief that the Secretary, as the official responsible for all DOE operations, was authorized to receive the pay data he sent in the 6/11 E-mail. He also cites an April 11, 2006, Memorandum from the Secretary stating that DOE contractor personnel have the right to report safety and management

[5]The Manager delegated review of the Complaint from the Employee Concerns Manager (EC Manager) at Oak Ridge because of an allegation by Townsend that the EC Manager might have of conflict of interest with regard to the Complaint. *See* September 16, 2008, E-mail from Rufus Smith, EC Manager to Richard A. Cronin, Jr., Attorney-examiner, OHA.

concerns to DOE. Townsend also argues that, with regard to the allegation that he was lobbying for a job, he had previously been in discussion with another firm that would employ him to do similar work. He also challenges LRCC's assertion that it lacked funding to employ him past June 22, 2007, by noting that LRCC has already hired another person for his former position.

II. Analysis

Section 708.17(c) authorizes a DOE EC-Manager to dismiss a whistleblower's complaint in the following circumstances:

> (1) Your [the whistleblower] complaint is untimely; or
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> (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this regulation; or
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> (3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation; or
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> (4) Your complaint is frivolous or without merit on its face; or
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> (5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or
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> (6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation.

10 C.F.R. § 708.17(c). The Dismissal Letter does not explicitly state under which provision under section 708.17(c) the Complaint was dismissed, but from the content of the letter it apparently was dismissed because the Complaint was "frivolous or without merit on its face."[6] *See* 10 C.F.R.§ 708.17(c)(4).

After reviewing Townsend's complaint, we find that OR properly dismissed it since the Complaint was without merit on its face.

Section 708.5 provides in relevant part that protected conduct includes disclosure of information that an employee reasonably believes reveals - a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). As discussed

[6]We note that the Complaint appears to have been filed in a timely manner. The Dismissal Letter did not allege that the Complaint had been untimely filed. Townsend was terminated on June 11, 2007, and the Complaint was dated September 7, 2007. Accordingly, the 90-day deadline for filing a whistleblower complaint set forth in 10 C.F.R. § 708.14 seems to have been satisfied. Nor does this appear to be a case where relief could not be granted.

above, OR found that the E-mails referenced in Townsend's complaint did not meet the requirements for protected conduct.

To the extent that Townsend's 12/12 E-mail might attempt to identify an abuse of authority, a violation of law, rule, or regulation or a substantial and specific danger to employees or to public health and safety by virtue of its statement that "[t]his operations office has held back people for reasons you are not aware of," we find that this allegation is too vague to be considered a protected disclosure. The E-mail does not specify the nature of the alleged wrongdoing or the parties involved. In this regard, the Dismissal Letter records OR's request that Townsend disclose details as to alleged wrongdoing, yet Townsend failed to provide any information to the OR attorney processing his Complaint. The 12/12 E-mail fails to reasonably identify a violation of law, a substantial and specific danger to employees or public health and safety, gross mismanagement or a gross waste of funds. Consequently, OR properly found that 12/12 E-mail did not constitute a protected disclosure under Part 708.

The 2/15 E-mail alleges that various OR security supervisors instructed security personnel to grant security clearances to personnel despite the analyst's view that the clearance should not be granted. This disclosure might conceivably describe a substantial violation of a law, rule, or regulation or reporting an abuse of authority. 10 C.F.R. § 705(a)(1),(3).[7] However, the 2/15 E-mail does not contain any specific details as to who allegedly was pressuring analysts to grant inappropriate security clearances or the extent of the perceived problem. The 2/15 E-mail does not contain any facts as to the nature or identity of the rule, regulation or law which is alleged to have been violated. Consequently, we cannot find that the 2/15 E-mail disclosed a "substantial violation of law, rule or regulation."

Nor can we find that the 2/15 E-mail sufficiently describes an abuse of authority to sustain Townsend's Complaint. An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. *See Frank E. Isbill*, 27 DOE ¶ 87,529 at 89,159 (Case No. VWA-0034) (September 27,1999). As discussed earlier, the Complaint does not contain any specific details regarding the pressuring of analysts to grant inappropriate security clearances. A disagreement between a supervisor and an analyst regarding security clearance eligibility does not, by itself, reflect an abuse of authority. Consequently, we agree with OR's determination that the 2/15 E-mail can not be considered a protected disclosure referencing an abuse of authority. [8]

The 6/11 E-mail references a potential waste of funds regarding the contracting out of security functions. As noted above, the Part 708 regulations provide that an employee may not be retaliated against for reporting a "gross" waste of funds. 10 C.F.R. § 708.5(a)(3). OHA has defined a "gross

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[7]The 2/15 E-mail does not reference a specific danger to employees or to public health and safety.

[8]Townsend later reported his concerns to the Inspector General but such a subsequent disclosure does not make the 2/15 E-mail a protected disclosure referencing a "substantial" violation of law, rule or regulation for Part 708 purposes.

waste of funds" as "a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *See See Fred Hua*, 30 DOE ¶ _____ (Case No. TBU-0078) (May 2, 2008) (*Hua*) (*citing Jensen v. Dep't of Agriculture*, 104 M.S.P.R. 379 (2007)).

While Townsend did identify specific per hour cost figures contrasting the difference between what his contractor employer charged the government and what they actually paid their employees, the 6/11 E-mail is essentially silent as to how this is a waste of funds, much less a "gross" waste of funds. As OR noted in its dismissal letter, it is a normal contracting practice to pay a contractor more than it pays its employees. Even though there might be more economical ways to perform the services involved, such as through a personal services contract, there is no information here to suggest any waste at all, much less an expenditure out of proportion to the benefit to be gained. Consequently, we find that OR properly found that the 6/11 E-mail did not constitute a protected disclosure as to a gross waste of funds. *See Hua*, slip op. at 3 (complaint stating only that "millions of dollars" could have been saved found to be vague and inadequate for purposes of determining that it fell under section 708.5(a)(3), or could survive dismissal pursuant to section 708.17).

Given the preceding considerations, we find that OR properly determined that the E-mails referenced in Townsend's Complaint could not be considered protected disclosures and thus properly dismissed the Complaint as being without merit on its face.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Thomas L. Townsend (Case No. TBU-0082) is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 6, 2008