Case No. VWZ-0007

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioner: META, Inc.

Date of Filing: October 4, 1996

Case Number: VWZ-0007

This determination will consider a Motion to Dismiss filed by Maria Elena Torano Associates, Inc. (META) on October 4, 1996. In its Motion, META seeks the dismissal of the underlying complaint and hearing request filed by C. Lawrence Cornett (Cornett) under the Department of Energy's Contractor Employment Program 10 C.F.R. Part 708.

Beginning in 1991, DOE entered into the first of three contracts with META to obtain its services to help DOE produce a Programmatic Environmental Impact Statement (PEIS). Mr. Cornett's Part 708 complaint arises from his employment with META on the PEIS and alleges that because of disclosures he made regarding the PEIS's deficiencies in risk assessment methodologies he experienced various forms of reprisal culminating with his termination from employment with META. On March 9, 1994, Cornett filed a complaint pursuant to 10 C.F.R. Part 708. The Office of Contractor Employee Protection (OCEP) conducted an investigation of Cornett's allegations and issued a Report of Investigation and Proposed Order (Report) on April 17, 1996. OCEP, in the Report, concluded that Cornett had made protected disclosures regarding health and safety issues and that it had jurisdiction over Cornett's complaint. Further, OCEP concluded that a preponderance of the evidence supported a finding that Cornett's protected disclosures contributed to his selection by META to be terminated and that META had failed to show by clear and convincing evidence that Cornett would have been terminated absent his protected disclosures.(1)

In its Motion, META asks that Cornett's complaint be dismissed for failure to state an actionable claim. Specifically, META argues that Cornett did not make a disclosure protected by Part 708. META asserts that the word "disclose[d]," as used in Part 708, implies that the information communicated must be of a type which is not known by the recipient. META goes on to claim that "[i]n many of his alleged 'protected disclosures,'" Cornett did not disclose anything that the DOE or its contractors did not already know. Consequently, META argues that Cornett failed to make a disclosure under Part 708.

In the Motion, META also argues that Cornett's alleged disclosures did not involve any substantial and specific threat to any person's health or safety as required by Part 708. META points out that Cornett's allegations regarding use of alternative risk assessment methodologies and data would not themselves have revealed dangerous physical conditions at DOE sites and that data regarding these sites were already generally available to the public. Further, META asserts that because of the nature of the methodological drafting concerns raised by Cornett they would have no direct impact on the health and safety of anyone. META notes that the draft versions of the PEIS were subject to peer and public review before the official Draft PEIS was published and that any alleged methodological weaknesses would have been fully reviewed. Further, according to META, the theoretical subject matter of Cornett's alleged disclosures, such as whether a particular risk assessment model should or should not be used in the official Draft PEIS,

does not implicate a substantial and specific risk to anyone as contemplated in Part 708.

After considering the arguments raised by META regarding its Motion, I deny it for the following reasons. Initially, I decline to adopt the META interpretation of the term "disclosed" in Part 708. (2) While Part 708 provides no definition of the word "disclosed," it is clear to me that the agency never intended the word to be construed as narrowly as that proposed by META. An examination of the preamble to the Part 708 regulations finds that the words "allege" and "report" are used synonymously with "disclose." See 57 Fed. Reg. 7533, 7534 (March 3, 1992). The use of the words "allege" and "report" indicates that the drafters of Part 708 never meant to require that the information disclosed had to be unknown to the recipient of the information. Further, the use of the general expression "provides information" in Section 708.3 argues against creating a requirement that a disclosure must contain unique information not known to the recipient.

Adoption of META's interpretation of the word "disclosed" would, in addition, not further the policies behind the Part 708 regulations. It is clear from the text of Part 708, as well as the preamble to these regulations, that the Contractor Employee Protection Program is intended to encourage employees of DOE contractors and subcontractors to make their employers or the DOE aware of concerns about health, safety, mismanagement and unlawful or fraudulent practices without fear of employer reprisal. See Sandia National Laboratories, 23 DOE ¶ 87,501 at 89,003 (1993) (denying Motion to Dismiss) (Sandia). Imposing the interpretation META suggests would require an employee to first ascertain whether his or her information is unknown to DOE or the contractor in order to assure his or her protected status and that process could be an elaborate and difficult one. In any case, it would tend to inhibit employees from freely coming forward with sensitive information and concerns. Consequently, META's interpretation of "disclosed" would be detrimental to employees being able to take advantage of the benefits to be obtained from Part 708. Part 708 is intended to encourage employee concerns regarding substantial and specific dangers to health and safety. Simply because someone employed by DOE or a contractor has knowledge of an employee's information does not in fact mean that the responsible officials involved in a project or at a site are aware of the information and are giving it appropriate consideration. Knowledge at one level in an organization may not translate into appropriate action at the right moment.

I also reject META's argument that, as a matter of law, Cornett's assertions do not involve substantial and specific dangers to public health and safety. In its Motion, META has misconstrued Section 708.5(a)(1). An employee need not establish that a disclosure in fact involved a substantial and specific danger; he or she is protected from reprisal if he or she in good faith believes the disclosure concerns a substantial and specific danger to employees or public health and safety. 10 C.F.R. § 708.5(a)(1)(ii). Thus, a determination as to whether Cornett's disclosures did in fact concern a substantial and specific danger is not dispositive of his Part 708 claim. Further, the question as to Cornett's beliefs regarding his disclosures is a factual issue which OCEP resolved in Cornett's favor in the Proposed Order it issued on April 17, 1996. In the absence of further inquiry and receipt of evidence on this factual issue, granting META's Motion would be inappropriate. See Sandia, 23 DOE at 89,003 ("A motion to dismiss is appropriate where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving issues of fact or law on a more complete record."). Consequently, META's Motion to Dismiss should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by META, Inc. on October 4, 1996, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

(1) This is the second Motion to Dismiss that META has submitted with regard to Mr. Cornett's Part 708 complaint. I denied META's prior Motion to Dismiss. See C. Lawrence Cornett, 25 DOE ¶ 87,504 (1996) (Order to Show Cause); META, Inc., 26 DOE ¶ 87,501 (1996) (Motion to Dismiss).

(2)The pertinent portion of Part 708 cited by META, Section 708.5(a)(1)(ii), states that a contractor employer may not discharge or retaliate against an employee who has:

(1) Disclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences

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(ii) A substantial and specific danger to employees or public health or safety.