

# Case No. VWZ-0017

November 10, 1999

## DECISION AND ORDER

### OF THE DEPARTMENT OF ENERGY

#### Motion to Dismiss

Name of Petitioner: University of California

Date of Filing: October 6, 1999

Case Number: VWZ-0017

This decision considers a Motion to Dismiss filed by the University of California (the University) on October 6, 1999. In its Motion, the University seeks dismissal of the complaint filed against it by Charles Montañó under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Montañó's complaint under Part 708 has been assigned Office of Hearings and Appeals (OHA) Case No. VWA-0042. The present Motion has been assigned Case No. VWZ-0017.

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. The regulations should be construed in a manner that furthers this policy.

Montañó has been employed by the University as a Senior Auditor from June 12, 1987 to the present. On February 14, 1996, Montañó filed a complaint under Part 708 with the DOE's Albuquerque Operations Office (Albuquerque). In this complaint, Montañó alleged that he was retaliated against for disclosures of possible fraud and mismanagement. On April 4, 1996, Montañó filed a second complaint under Part 708 alleging further retaliation.

After conducting an investigation of Montañó's allegations, the DOE's Office of Inspector General (the IG) issued a Report of Investigation (the Report) on April 14, 1999. The Report found that: "The evidence in the record indicates that [Montañó] made protected disclosures to Los Alamos National Laboratory Management (LANL) at public forums, to members of Congress, the DOE, and [the IG] regarding possible violations of law, rule, or regulation related to non-compliance with the terms and conditions of the LANL contract." Report at 31. The Report further found that: "[Montañó] has established by a preponderance of the available evidence that his protected disclosures contributed to the alleged retaliatory actions taken against him." *Id.* The Report further states: "We also find that [the University] has failed to show by clear and convincing evidence that the adverse actions taken against [Montañó] would have occurred absent his protected disclosures." *Id.*

In its present motion, the University claims it has made Montañó a formal offer to provide him with remedies that are substantially equivalent to or exceed those set forth in the Report of Investigation (the

Report) issued by the DOE's Office of Inspector General (the IG).

On August 27, 1999, the University submitted a document captioned as an "Offer of Judgment." In an order dated August 31, 1999, I found:

This Offer of Judgment appears to be an attempt to moot the issues at bar in the present case by agreeing to provide the remedies requested by [Montaño]. If [the University's] Offer of Judgment provides each of the remedies requested in Mr. Montaño's complaint, the issues raised in the complaint are mooted. 10 C.F.R. § 708.17(c)(6).

\* \* \*

Accordingly, [Montaño] is hereby directed to show cause as to why I should not dismiss the present case on the grounds of mootness.

August 31, 1999 Order. On September 7, 1999, I received Montaño's response to my order. On September 8, 1999, I wrote the parties stating in pertinent part:

After careful consideration of [Montaño's response to my order of August 31, 1999,] as well as the [University's] Offer of Judgment, it is apparent that substantial differences remain between the parties. Therefore, I am of the opinion that the present case should not be dismissed at this time.

September 8, 1999 letter from Hearing Officer Fine to Merit Bennett and Ellen Castille.

It is well settled that a Motion to Dismiss in a Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. [\*Lockheed Martin Energy Systems, Inc.\*](#), 27 DOE ¶ 87,510 (1999); [\*EG&G Rocky Flats\*](#), 26 DOE ¶ 82,502 (1997) (*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely used it. [\*Boeing Petroleum Services\*](#), 24 DOE ¶ 87,501 at 89,005 (1994).

The University has not set forth any argument or evidence convincing me that my previous ruling was in error. (1) Accordingly, the Motion to Dismiss filed by the University of California on October 6, 1999, should be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by the University of California on October 6, 1999, Case No. VWZ-0017, is hereby denied.

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

Steven L. Fine

Hearing Officer

Office of Hearings and Appeals

Date: November 10, 1999

(1)10 C.F.R. § 708.17(c)(6) states that : "Dismissal [of a complaint] for lack of jurisdiction or other good cause is appropriate if: . . . 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 the equivalent to what could be provided as a remedy under this part." My review of the record indicates that there are several legal and factual issues concerning remedies which remain to be resolved.