

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Earl M. Ballard)
)
Filing Date: September 23, 2013)
_____)

Case No.: WBU-13-0014

Issued: September 30, 2013

Decision and Order

Earl M. Ballard, a former employee of Enercon Federal Services, Inc. (ENERCON) in Portsmouth, Ohio, appeals the dismissal of two whistleblower complaints that he filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. The Portsmouth/Paducah Project Office's (PPPO) Employee Concerns Program Manager dismissed these complaints on July 25, 2013, and September 12, 2013, respectively. As explained below, I find that PPPO erred in dismissing Mr. Ballard's complaints and I remand them to PPPO for further processing.

I. Background

The DOE's Contractor Employee Protection Program was established 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, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18. In reviewing cases such as this, we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist, OHA Case No. TBZ-0080*, at 5 n. 13 (May 7, 2009) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

Mr. Ballard was employed as a technician by ENERCON at the Portsmouth Gaseous Diffusion Site, until May 21, 2013, when he was terminated for “falsifying readings on Daily Background and Source Check Sheet records for radiation measurement instruments.” Appeal at 3. On June 26, 2013, Mr. Ballard filed a one-page complaint (the original Complaint) with the PPPO’s Employee Concerns Manager.¹

On July 25, 2013, the PPPO dismissed the original Complaint filed by Mr. Ballard, finding that he had not specifically alleged that he had made a protected disclosure under 10 C.F.R. §708.12. July 25, 2013, Dismissal Letter at 2. PPPO did not consult with Mr. Ballard or provide him with an opportunity to correct the deficiency in his original Complaint. Memorandum of September 25, 2013, Telephone Conversation Between Susan M. Sparks, Employee Concerns Manager, PPPO and Steven L. Fine, Senior Attorney, OHA.

Instead of appealing PPPO’s dismissal of his original Complaint to OHA, Mr. Ballard attempted to correct the deficiency in his original Complaint by filing a second complaint (the second Complaint) with PPPO on August 16, 2013.² In his second Complaint, Mr. Ballard contended that a management official had directed him to make the changes in the source check sheets. Mr. Ballard further stated that he met with a DOE Office of Inspector General investigator to whom he: “disclosed . . . all the details as I recalled pertaining to the corrections made to one entry on a source check sheet, [discussed] the allegations of falsification of documents, [and] made full disclosure of the facts of my involvement in this situation.”³ Attachment to Second Complaint at 1-2.

On September 12, 2013, PPPO dismissed Mr. Ballard’s second Complaint finding that since it had “reviewed and dismissed this complaint previously, [it was] unable to process another complaint for the same issue.” September 12, 2013, Dismissal Letter at 1. Mr. Ballard filed the present Appeal on September 23, 2013.

¹ The complete text of the substantive portion of Mr. Ballard’s original Complaint reads as follows:

I believe that my participation in following directions from management to make a change to a document led to my termination. I as a technician did not have access to the source sheets after they have been signed by management. Nor did I have any desire to make any corrections to the source check sheet, I had no reason to think I needed to change anything on the record. That particular instrument was not used for any surveys the day the error occurred. The only one who would be concerned about changing the document, would be the one responsible for finding these kinds of errors before they signed the sheet as being satisfactory. Terminating me was a retaliatory action to protect themselves.

Original Complaint at 1.

² Mr. Ballard filed the second Complaint within 90-days after the date he first knew, or reasonably should have known, of the alleged retaliation. See 10 C.F.R. § 708.14(a).

³ The timing of Mr. Ballard’s alleged disclosure to the IG is a crucial element in the present case, since a disclosure made subsequent to an alleged act of retaliation could not form the basis of a complaint under Part 708. Mr. Ballard does not indicate when his alleged disclosures to the IG occurred. However, a letter appearing in the complaint file dated May 10, 2013, from Richard Sober, Manager, Acquisitions, Fluor-B&W Portsmouth LLC, to Peter K. Mast, President, ENERCON, indicates that an IG employee had previously interviewed the technicians who were found to have falsified records.

II. Analysis

The relevant regulations provide that the DOE *may* dismiss a complaint for “lack of jurisdiction or for other good cause . . .” 10 C.F.R. § 708.17. They provide further that dismissal for lack of jurisdiction or other good cause is appropriate if: “The facts, as alleged in your complaint, do not present issues for which relief can be granted under this regulation.” 10 C.F.R. § 708.17(c)(2).

Mr. Ballard’s original Complaint fails to include a statement specifically describing the disclosure, participation, or refusal that he believes gave rise to the alleged retaliation, as required by 10 C.F.R. § 708.12(a)(2) (a complaint must include “A statement specifically describing . . . the disclosure, participation, or refusal that you believe gave rise to the retaliation”). Therefore, the facts, as alleged in his original Complaint, do not present issues for which relief can be granted.

Instead of giving Mr. Ballard an opportunity to specifically identify any protected activities that he engaged in or disclosures that he made, the PPPO dismissed the original Complaint when it found that he had not alleged that he had made a protected disclosure, or engaged in protected activity or a protected refusal, without consulting with him. Mr. Ballard’s failure to specifically allege that he had made a protected disclosure, or that he had engaged in protected activity or a protected refusal could have provided a sufficient basis for dismissal of his original Complaint under 10 C.F.R. § 708.17(c)(2). However, once a DOE field element has determined that a complaint filed under Part 708 fails to include all the information required under section 708.12, it should “provide the complainant with an opportunity to make all the statements necessary to constitute a good filing.” *See* Questions and Answers for DOE Field Elements Concerning Jurisdictional Issues Under 10 C.F.R. Part 708. Our past decisions have found that employees who are not familiar with Part 708 are often unable to draft complaints that satisfy all the procedural and substantive requirements of that Part. *See Gary S. Vander Boegh*, Case No. TBU-0007 (2003) (*Vander Boegh*). Prior OHA decisions have found that complainants should be given an opportunity to correct deficiencies before a complaint is dismissed. *See Vander Boegh, as cited in Clint Olson, Case No. TBU-0027* (2004) (*Olson*).⁴ Accordingly, we find that PPPO should have provided Mr. Ballard with an opportunity to correct the deficiency in his original Complaint before dismissing it.

PPPO dismissed Mr. Ballard’s second Complaint without citing any regulatory authority. Instead, it claimed that it had “reviewed and dismissed this complaint previously, [and therefore, it was] unable to process another complaint for the same issue.” However, 10 C.F.R. § 708.17 does not provide regulatory authority for a field element to dismiss a timely filed-complaint because a previous complaint based upon the same facts had been filed. While 10 C.F.R. § 708.17(c)(3) states that dismissal for lack of jurisdiction or other good cause is appropriate if a complaint has been filed “under state or other applicable law with respect to the same facts as alleged in a complaint,” that provision is meant to prohibit a complainant from pursuing the same

⁴ The OHA may then consider jurisdictional issues more fully as the facts are developed in the investigation and hearing stages. In making jurisdictional determinations, managers should bear in mind that they are making only a preliminary determination as to whether further processing is warranted. They are not charged at this early stage of the proceeding with making a final assessment about the worthiness of the overall complaint. *See Olson*.

cause of action in multiple forums. 10 C.F.R. § 708.17(c)(3) is not meant to prohibit the timely re-filing or amendment of a complaint. Accordingly, we find that PPPO erred by dismissing Mr. Ballard's second Complaint for reasons other than those set forth at 10 C.F.R. § 708.17. Moreover, our review of the record indicates that Mr. Ballard may have made a disclosure protected under Part 708 (*see* note 3, *supra*). An inquiry into this matter at the site level is clearly warranted.

III. Conclusion

Because we have found that PPPO did not provide Mr. Ballard with an opportunity to correct his original Complaint's deficiency before dismissing his complaints and improperly failed to consider his second Complaint, we are remanding this matter to PPPO for further processing. On remand, PPPO should provide Mr. Ballard with a reasonable opportunity to supplement his Complaint and then continue to process his Complaint in accordance with Part 708.

It Is Therefore Ordered That:

- (1) The Appeal filed by Earl M. Ballard (Case No. WBU-13-0014) is hereby granted and remanded to the Portsmouth/Paducah Project Office's Employee Concerns Program for further processing as set forth in 10 C.F.R. § 708.21.
- (2) This Appeal 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. 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 30, 2013