

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Frank T. Clark)
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Filing Date: February 28, 2014)
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Case No.: WBU-14-0005

Issued: March 28, 2014

Decision and Order

Frank T. Clark (the Appellant) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.¹ As explained below, I will deny the Appeal.

I. Background

The Appellant was a Security Operations Analyst employed by NCI Information Systems (NCI) between the years 2005 and 2010 at the National Nuclear Security Administration's (NNSA) Infrastructure Assurance Response Center (IARC).² The Appellant, while working at the IARC between 2008 and 2010, alleges that he had made several disclosures to his employer that he believed revealed substantial violations of law, rule or regulation, gross mismanagement, and abuse of authority. During that period, the Appellant's security clearance was suspended and he underwent an administrative review hearing as described in 10 C.F.R. Part 710. While the DOE eventually restored the Appellant's security clearance, the Appellant was ultimately laid off from his position at NCI when, in June 2010, CACI International, Inc. (CACI), was awarded the contract to perform the services that NCI had provided to the IARC.³

¹ The Office of Hearings and Appeals (OHA) reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. *See* 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why you [the Appellant] think the dismissal was erroneous).

² The Appellant was unsure as to the exact date and year he was laid off from NCI employment. A submission from CACI indicates that the Appellant worked at the IARC from 2005 through 2009. January 15, 2014, Response Letter from CACI to Michelle Rodriguez de Varela, NNSA Whistleblower Program Manager, at 1. In her Dismissal Letter, the Manager stated that the Appellant worked at the IARC until 2010. For the purposes of this decision only, we will assume that the Appellant worked until 2010.

³ CACI is a subcontractor for OnPoint Consulting, Inc. (OnPoint). OnPoint is the contractor that is responsible for operating the IARC.

On October 30, 2013, the Appellant submitted an application package to CACI for employment as a Security Operations Center (SOC) Analyst in the IARC. On November 1, 2013, CACI informed the Appellant that the OnPoint management team declined to consider him for employment at the IARC.

The Appellant filed a complaint of retaliation under Part 708 (Part 708 Complaint) with Michelle Rodriguez de Varela, the NNSA Whistleblower Program Manager (Manager) on November 6, 2013. The Appellant claimed that he had been subject to retaliation because of disclosures he had made during his employment at the IARC during the period 2008 to 2010. In his Part 708 Complaint, the Appellant described the retaliation he experienced and requested the following remedies:

I lost employment, position and promotion, my clearances was [sic] suspended, experienced extreme difficulty in finding ongoing employment, training, and opportunities for advancement.

I am seeking primarily reinstatement, along with back pay, costs and expenses involved in my defense, compensation for the personal and professional losses, educational opportunities, and a full investigation that happened at the facility

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November 6, 2013, Part 708 Complaint at 2. In a document entitled “Statement of Complaint,” the Appellant also alleged that he had suffered retaliation in the “ongoing refusal to hire me back to my job based on issues that previously happened” November 6, 2013, Part 708 Complaint at 5.

In a letter dated February 12, 2014 (Dismissal Letter), the Manager dismissed the Appellant’s Part 708 Complaint. In the Dismissal Letter, the Manager found that the Appellant had failed to present issues to which relief could be granted under Part 708 since “[t]he present contractors [CACI and OnPoint] are not the responsible parties for the action for the time frame 2008-2010 when you were employed by NCI [and] when your security clearance was suspended.” Dismissal Letter at 2. Further, the Manager held that a Part 708 Complaint was not the appropriate forum “to appeal the [Administrative Review] process.” Dismissal Letter at 2.

II. Analysis

The Manager dismissed the Appellant’s Part 708 Complaint based upon Section 708.17(c)(2). This section provides that the Head of a DOE Field Element or an Employee Concerns Director (such as the Manager) may dismiss a Part 708 Complaint if it the alleged facts in the complaint “do not present issues for which relief can be granted under this part.” 10 C.F.R. § 708.17(c)(2). In support of this determination, the Manager found CACI and OnPoint were not the contractors at the IARC when the Appellant alleges he experienced retaliation and thus these firms could not

be liable under Part 708 for any retaliation the Appellant may have experienced while employed by NCI.⁴

We agree with the Manager's conclusions. We note that the Appellant seeks reinstatement from the position he was laid off by NCI in June 2010. Reinstatement is not an appropriate remedy under Part 708 when there is a new contractor that has no connection with the firm that actually terminated the complainant. *Boeing Petroleum Services*, Case No. LWZ-0026 (1994) (*Boeing*). OHA has recognized that under certain specific conditions it may be equitable for a successor contractor to provide a remedy for past retaliation committed by a predecessor firm, for instance if the successor contractor remains substantially in control of the predecessor corporation. *See Boeing; Holsinger v. K-Ray Security, Inc.*, Case No. VWA-0005 (1996) (decision of Deputy Secretary); *Stutts v. Am-Pro Protective Agency, Inc.*, Case No. VWA-0015 (2000) (decision of Deputy Secretary). However, after examining the record of this case, we find that the Appellant has failed to demonstrate sufficient circumstances to justify the imposition of Part 708 liability on OnPoint and CACI for alleged retaliations by NCI. The only nexus between OnPoint/CACI and NCI is the Appellant's bare allegation that ex-NCI employees, who were referenced in the Appellant's protected disclosures during 2008 to 2010, continued to be employed by NCI. Under these circumstances, we cannot find that sufficient equitable grounds exist to impose Part 708 liability on OnPoint or CACI for alleged retaliations by NCI.⁵

The Appellant also claims that OnPoint/CACI retaliated against him when the firms denied his employment application in November 2013, purportedly because he was blacklisted by NCI. We find this claim to be highly speculative, particularly in view of the time that has elapsed since the change in contractors in 2010 and the very tenuous connection between NCI and OnPoint/CACI. Moreover, to the extent that the Appellant's Part 708 Complaint alleges that OnPoint and CACI directly retaliated against the Appellant, the Part 708 Complaint fails to state a cause of action since there is no allegation that the Appellant was ever employed by OnPoint/CACI or made any type of protected disclosure to cognizant officials at these firms or engaged in any protected activity while employed by them. *See* 10 C.F.R. § 708.3 (“[t]his regulation applies to a complaint of retaliation filed by an *employee of a contractor* that performs work on behalf of DOE, directly related to activities at a DOE-owned or -leased site . . .”).

Because I find that the Appellant's Part 708 Complaint does not state a claim under Part 708, I will deny the Appellant's Appeal.

⁴ As mentioned *supra*, the Manager also found that Part 708 does not allow an individual to challenge the adjudication of a security clearance under 10 C.F.R. Part 710 in the context of a Part 708 proceeding. Because we will affirm the Manager's determination as to the inapplicability of imposing Part 708 liability to a successor-contractor in this case, we need not decide the propriety of the Manager's finding with regard to the Appellant's security clearance.

⁵ Further, the time deadline contained in Sections 708.14(a) and 708.17(c)(1) would prevent the Appellant from pursuing claims relating to retaliations occurring during 2008 to 2010. Specifically, section 708.14 states that an employee must file a complaint within 90 days after “the date the [complainant] knew, or reasonably should have known, of the alleged retaliation.” Our examination of the Appellant's Part 708 Complaint seemingly indicates that almost all of the alleged retaliations, except OnPoint/CACI's failure to hire him, occurred during the period 2008 through 2010.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Frank T. Clark (Case No. WBU-14-0005) is hereby denied.

(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: March 28, 2014