

United States Department of Energy
Office of Hearings and Appeals

In the matter of James E. Doyle)
)
)
Filing Date: February 19, 2014) Case No.: WBU-14-0002
)

)

Issued: June 24, 2014

Decision and Order

Dr. James E. Doyle (the Appellant) appeals the dismissal of his complaint of retaliation (the Complaint) filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.¹ DOE's Whistleblower Program Manager at the National Nuclear Security Administration (NNSA) dismissed Dr. Doyle's Complaint on January 23, 2014. As explained below, we will deny the Appeal.

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 the DOE's government-owned, contractor operated facilities. 57 Fed. Reg. 7533 (Mar. 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.

Dr. Doyle has been employed with the Los Alamos National Security, LLC (LANS), at the Los Alamos National Laboratory (LANL) since 1997. He alleges that he was retaliated against for an article he published in an international journal and his subsequent post-publication challenge of a classification decision relating to the article. According to Dr. Doyle, the information in his article was reviewed prior to publication and authorized for unlimited public release by Ms. Diana Hollis in the LANL classification office on January 29, 2013. Appeal Letter at 1. Subsequently, after publication of Dr. Doyle's article on February 6, 2013, Mr. Dan Gerth,

¹ The 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 the Appellant thinks the dismissal was erroneous).

Chief Classification Officer, determined that a portion of the information disclosed in the article was classified. *Id.* Dr. Doyle asserts that Mr. Gerth misapplied classification guidance and policy with respect to his article. *Id.* He states that a meeting to resolve disagreement over the classification of the article took place on February 7, 2013. According to Dr. Doyle, at the meeting, four derivative classifiers, including Dr. Doyle, judged the article to be unclassified. However, Mr. Gerth's determination became the official LANL determination regarding the classification of Dr. Doyle's article. *Id.* The record indicates that Mr. Gerth's decision was reviewed by classification officials at DOE's Office of Classification and by the Department of State (DOS), and that both DOE and DOS agreed that the information at issue was classified. LANL Response at 1.

Dr. Doyle asserts that he was retaliated against because his article was "found objectionable by LANS . . . and [the] classification policy was misused to classify it when other publications containing the same or similar information were authorized for unlimited public release and no retaliation was taken against their authors." Complaint at 1. He further asserts that he was retaliated against when his programmatic travel was cancelled without justification, he was placed on investigatory leave without pay for one day after filing a complaint with the LANL Employee Concerns Program (ECP), his Q Clearance was suspended for 30 days and his SCI Clearance was revoked. *Id.*

On November 6, 2013, the Appellant filed a complaint of retaliation under Part 708 with Michelle Rodriguez de Varela, the NNSA Whistleblower Program Manager (Manager). The Appellant asserted that he had been subject to retaliation for challenging a classification decision on his publication in an international journal. In his Part 708 Complaint, the Appellant described the retaliation he experienced and requested the following remedies:

- (1) A determination by DOE that the document was classified in error and that the "no comment" policy should apply as advocated by GEN-16 guidance, identical to the manner in which the document I raised as an example was handled.
- (2) Acknowledgement that LANL did not follow proper procedure.
- (3) A letter to DOE personnel security stating that my initial reaction to the SIT investigation was understandable given the unique circumstances and that LANL has no concerns regarding my fitness for a clearance.
- (4) Restoration of pay for one day to cover the day I was placed on leave without pay.
- (5) Assurance of no further retaliation or negative personnel actions against me related to this matter.
- (6) Reimbursement of all personal legal fees that I paid to attorneys related to this matter.
- (7) Restoration of my SCI clearance.

November 6, 2013, Part 708 Complaint at 4.

In a letter dated January 23, 2014 (Dismissal Letter), the Manager dismissed the Appellant's Part 708 Complaint. In the Dismissal Letter, the Manager found that pursuant to Section 708.4(d), "the complaint is based on the same facts in which you, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation." In

addition, the Manager dismissed the Appellant's complaint under Section 708.17(c)(4) for lack of merit on its face. The Manager refers to the Appellant's assertion that there was a "possible" violation of security policy, procedure and classification guidelines, including a potential reportable security infraction, and asserts that a "possible" violation does not describe a law, rule or regulation that was substantially violated. Dismissal Letter at 1. The Manager further asserted the following: "A protected disclosure comes first then the alleged retaliation. They are two separate actions. One follows the other. Therefore, 'abuse of authority' cannot be used as a protected disclosure and the same abuse of authority as the retaliation." *Id.*

In his Appeal, the Appellant contends that the Complaint was erroneously dismissed. He specifically contends that Section 708.4(d) is not relevant to his case and further that the Complaint has been misinterpreted with respect to 708.17(c)(4). Appeal at 1.

II. Analysis

Under the DOE's regulations, an employee of a contractor may file a whistleblower complaint against their employer alleging that he has been retaliated against for:

- (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals-- (1) A substantial violation of a law, rule, or regulation; (2) A substantial and specific danger to employees or to public health or safety; or (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority.

10 C.F.R. § 708.5. The whistleblower complaint must contain:

- (a) A statement specifically describing (1) the alleged retaliation taken against you and (2) the disclosure, participation, or refusal that you believe gave rise to the retaliation; (b) A statement that you are not currently pursuing a remedy under State or other applicable law, as described in § 708.15 of this subpart; (c) A statement that all of the facts that you have included in your complaint are true and correct to the best of your knowledge and belief; and (d) An affirmation, as described in § 708.13 of this subpart, that you have exhausted (completed) all applicable grievance or arbitration procedures.

10 C.F.R. § 708.12.

The DOE may dismiss a complaint for lack of jurisdiction or good cause if:

- (1) Your complaint is untimely; or (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this part; or (3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this part; or (4) Your complaint is frivolous or without merit on its face; or (5) The issues presented in your complaint have been

rendered moot by subsequent events or substantially resolved; or (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 part.

10 C.F.R. § 708.17(c). 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)).²

In his Complaint, the Appellant alleges that he engaged in a protected activity when he publicized information in an international journal and challenged a subsequent classification decision. He also alleges that he made a protected disclosure when he communicated “a possible violation of security policy, procedure and classification guideline, including [a] potential reportable security infraction.” The Appellant asserts that his article was reviewed prior to publication and authorized for unlimited public release by a LANS classification officer on January 29, 2013. However, on February 6, 2013, the Chief Classification Officer determined that a portion of the information disclosed in the article was classified. The Chief Classification Officer’s decision was subsequently reviewed by classification officials at the DOE’s Office of Classification and by the Department of State, both of which agreed that the information was classified. The Appellant unsuccessfully appealed the classification determination. Appeal at 1.

A. Whether Section 708.4(d) Applies to the Appellant’s Complaint

The Manager first determined that the present Complaint must be dismissed under Section 708.4(d) of the Part 708 regulations. We do not agree. Section 708.4(d) provides that a complaint is not covered by Part 708 if “the complaint is based on the same facts in which you, in the course of a covered disclosure or participation, improperly disclosed Restricted Data, national security information, or any other classified or sensitive information in violation of any Executive Order, statute, or regulation.” 10 C.F.R. § 708.4(d).

As stated above, Section 708.4(d) applies to the dismissal of complaints based on the same facts in which an employee improperly discloses restrictive data, national security information or classified information “*in the course of a covered disclosure or participation*.” In this case, however, the Appellant did not disclose restrictive data, national security information or classified information to “a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site . . .” as the course of a covered disclosure or participation is defined in Section 708.5, but rather the Appellant disclosed information, later determined to be classified, in an article that he published in an international journal. Accordingly, we find that Section 708.4(d) does not apply to Appellant’s Complaint.

² Decisions issued by the DOE Office of Hearings and Appeals (OHA) are available on the OHA website at: <http://energy.gov/oha>.

B. Whether the Manager Properly Dismissed Appellant's Complaint Pursuant to Section 708.17(c)(4)

The Manager concluded that the Appellant's Complaint was dismissed for lack of merit on its face. Dismissal Letter at 1. She concluded that the Appellant's reference to a "possible" violation does not describe a law, rule or regulation that was substantially violated. *Id.* The Appellant asserts that his Complaint was misinterpreted by the Manager.

After carefully reviewing the subject Complaint, we agree with the Manager's conclusion that the Complaint lacks merit on its face and should therefore be dismissed. In his Complaint, the Appellant asserts that his publication in an international journal was "improperly classified by the LANL [Classification Officer] after it had been reviewed and released for publication by LANL classification." Complaint at 1. The Appellant further asserts, in his Appeal letter, that LANL misapplied classification guidance or policy. He specifically states that, "specific misuse of guidance was to use DOE Classification Bulletin WPN-136 as the most relevant guidance in making a classification determination on my published article rather than following DOE Classification Bulletin GEN-16 Revision 'No Comment' Policy for Classified Information in the Public Domain," and asserts that disclosure of this misapplication was made to a number of LANL organizations and managers. Appeal Letter at 1. It is clear from the record that what the Appellant is asserting in his Complaint is his disagreement with the classification decision related his article. At most, he asserted his opinion that the LANL Chief Classification Officer misapplied classification guidance. In our view, a debatable assertion that an official misapplied classification guidance does not rise to the level of disclosing a "substantial violation" of a law, rule or regulation. Accordingly, we conclude that the Appellant has not met his evidentiary burden of showing that he disclosed information which he reasonably believes revealed a substantial violation of a law, rule or regulation. For this reason, we will uphold the dismissal.³

III. Conclusion

As indicated by the foregoing, we find that NNSA/Albuquerque correctly dismissed the complaint filed by Dr. James E. Doyle. As clearly proscribed by the jurisdictional provisions of Part 708, the Complaint cannot be accepted for further consideration at this time.

³ Although not explicit, the Appellant also appears to assert that Mr. Gerth "abused his authority" regarding his classification decision of the Appellant's article. Complaint at 1. The OHA has defined an abuse of authority as "an arbitrary or capricious exercise of power by an 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 *Thomas L. Townsend*, OHA Case No. TBU-0082 (2008). Based on this definition, we conclude that the Appellant has not sufficiently alleged a claim of abuse of authority. He has not demonstrated that, as Chief of Classification, Mr. Gerth made an "arbitrary or capricious exercise of power." Rather, it was inherently part of Mr. Gerth's job responsibilities as a Chief Classification Officer to make classification decisions. In addition, the Appellant has not demonstrated that his rights were adversely affected by Mr. Gerth's actions. As noted above, the Appellant appealed Mr. Gerth's determination and the classification was upheld by the DOE's Office of Classification and by classification officials at the Department of State.

It Is Therefore Ordered That:

- (1) The Appeal filed by Dr. James E. Doyle (Case No. WBU-14-0002) 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: June 24, 2014