UNITED STATES DEPARTMENT OF ENERGY

C. LAWRENCE CORNETT, )

)

Complainant, )

)

v. ) OHA Case No. VWA-0007

) VWA-0008

MARIA ELENA TORAÑO ASSOCIATES, INC.)

)

Respondent. )

FINAL AGENCY DECISION

This is a request for review by Maria Elena Torano Associates, Inc. ("META"), a DOE contractor responsible for reviewing and revising the agency's waste management programmatic environmental impact statement ("PEIS"), of the Initial Agency Decision of the Office of Hearings and Appeals ("OHA") finding that Complainant C. Lawrence Cornett established that he had made protected health and safety disclosures under 10 C.F.R. Part 708 and that these disclosures were a contributing factor in his termination and finding further that META had not demonstrated that he would have been terminated absent the disclosures. R. 5064.

On review, META's primary legal argument is that Part 708 is inapplicable because META's employees did not perform work at DOE facilities. This argument was properly rejected by OCEP and OHA. META is a covered "contractor" under Part 708 "only with respect to work performed on-site at a DOE-owned or-leased facility. * * *. [W]ork will not be considered ?on-site' when pursuant to the contract it is the only work performed within the boundaries of a * * * [DOE] facility, and it is ancillary to the primary purpose of the contract (e.g., on-site delivery of goods produced off-site)." 10 C.F.R. § 708.4.(1) META argues that the "primary" purpose of the contract was "the scoping, drafting and production of the report" and that on-site "collection of data is simply what was needed in anticipation of or as preparation for accomplishing what was the primary purpose of the contract" (META reply brief at 4). However, the hearing officer concluded that "site visits made by META employees accomplished important mission-related purposes," serving to "establish personal relationships * * * to facilitate the transfer of needed data for analysis, to discover what data was available and to bring back data from the sites," and thus are not merely ancillary to the primary purpose of the contract. R. 3297. This fact-bound conclusion is consistent with the remedial purpose and text of Part 708 and with the regulatory preambles accompanying its proposal and adoption, and therefore should be sustained.

META also suggests that Part 708's coverage for contracts other than management and operating contracts extends "only with respect to work performed on-site at a DOE-owned or-leased facility (emphasis added) and that this limitation means that the complaint must also be about the on-site work. According to META's reasoning, since Cornett's disclosures had nothing to do with establishing on-site relationships or collecting on-site data, META was not a covered "contractor" with respect to those disclosures (META reply brief at 6).

However, this argument suffers from two fundamental flaws. First, it is unlikely, in light of the remedial purpose of the provisions, that the regulatory authors would have, in effect, required a whistleblower to run the on-site gauntlet twice -- that the contractor must do more than merely ancillary on-site work and that the disclosure must be about on-site work. There is nothing in either of the logical places, the description of the Part's "scope" (§ 708.2) and of a covered "disclosure" (§ 708.5), suggesting such a double hurdle, and the regulatory preamble further undercuts META's argument. For example, the preamble summary simply states that the rules are "applicable to employees of DOE contractors and subcontractors performing work directly related to the activities of the DOE at DOE-owned or-leased sites," but says nothing about the rules being applicable only to disclosures about such work. 57 Fed. Reg. 7533 (March 3, 1992). More reasonably, therefore, we think that the "contractor," "employee," and "on-site work" definitions should be read to establish a single requirement that a contractor perform some on-site work that is not merely "ancillary" to the primary purpose of the contract.

Even if META's construction of the terms were correct, however, a second problem with META's argument is that the hearing officer concluded, as a matter of fact, that Cornett's disclosures did relate to establishing on-site relationships and collecting on-site data. According to OHA's specific finding, Cornett was discharged at least in part because management perceived his efforts to communicate with on-site personnel at Argonne and Oak Ridge as having produced bad relationships there. As is made clear in

the preamble to the proposed new amendments to Part 708 (see note 1, supra), the basic purpose of Part 708 was to remove an employee's disincentive to bring to DOE's attention matters occurring at DOE site that DOE would want to correct. Cornett's disclosures, as the hearing officer found and as the example in the preamble to the proposed new rules illustrates, were of just that ilk.

META also argues that Cornett's disclosures were not covered by Part 708 because they only reflected his opinions about data already available to the public. Such an argument has no basis in the regulatory language or purpose, and the hearing officer properly rejected it. The PEIS largely constituted a collection of expert opinions about waste management, and the thrust of Cornett's disclosures was that some of the PEIS methodology would materially mislead its target audience and the public about the magnitude of waste disposal health risks. Whether Cornett was correct or not -- which is not the issue here -- his professional opinion to that effect, so long as it was both reasonable and in good faith, plainly is the sort of disclosure meant to be protected by the regulations, and was well within the regulatory description of "[a] substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5.

META also challenges the hearing officer's factfinding on the fundamental issue of why Cornett was discharged. META acknowledges that OHA's decision may be overturned only if shown to be "clearly erroneous." META argues that OHA committed clear error by overlooking key facts (META reply brief at 11-12). However, nothing listed by META was overlooked by OHA, but rather was simply rejected.

Concerning whether Cornett would have been discharged absent his protected disclosures, OHA found META's position and the project manager's testimony unpersuasive. First, OHA found that the "evasiveness and contradictions" the hearing officer perceived in the project manager's testimony and other statements and documentary evidence in the record weighed against META's claim that Cornett's allegedly bad relationship with Argonne and Oak Ridge personnel was factor in his termination. To the extent Cornett "annoyed" such personnel, OHA found this factor to be "inextricably intertwined with his protected disclosures" and not a valid basis for his dismissal. R. 5057. It therefore was not clear error for OHA (and OCEP) to conclude that absent reprisal Cornett would not have been discharged before the end of the risk assessment aspect of the project.

The only question that determination left, and it does require some inferences from the record to answer it, was when Cornett's work would have come to an end anyway. Based on the evidence before it concerning how long others with similar skills worked on the relevant tasks, OHA concluded that Cornett's employment would have extended to December, 1995 but for the retaliatory discharge. R. 5060-62. It was not clearly erroneous for OHA to draw this conclusion from the work histories before it.

META further argues that OCEP's delay in processing Cornett's claim prejudiced META.(2) However, it makes no more sense to hold OCEP's delay against Cornett than to hold a court's delay against a plaintiff. In any case, given the number of witnesses to be interviewed and the extensiveness of the record to be reviewed, the delay does not appear unreasonable. Moreover, the prejudice claimed by META is not very compelling.

META quotes preamble language concerning time limitations for filing a claim in support of its claim of prejudice, urging that by the time OCEP's interviews were conducted, memories were no longer fresh (META request for review at 3-4). However, the purpose of claims limitations periods is to give a respondent timely notice of the claim against him. There is no question that META received timely notice of the claim against it, and, having received that notice, it could and should have protected itself by promptly investigating the facts concerning the claim.

META also complains about the delay on another basis, that a timely finding in Cornett's favor would have permitted reinstatement without much obligation for back-pay without the benefit of Cornett's services (META request for review at 3, 5). The irony of this argument is that, according to META's original position on back-pay, it should only have run until January, 1995, anyway, so that even if the regulatory timing requirements had been adhered to by OCEP, OHA's decision would not have come soon enough for reinstatement to be appropriate (see META's request for review at 3 & n.1). In any case, as Cornett points out (Complainant's brief in opposition at 11-12), if META wanted the benefit of his services, the simple solution would have been to reinstate him voluntarily.

Finally, META argues that it should be relieved of some or all responsibility for Cornett's discharge since it was just following DOE's "direct and explicit orders * * * to reduce its work force" (META reply brief at 10). Aside from the fact that the hearing officer did not fully credit the evidence that DOE had "ordered" a reduction (See R. 5058 & n. 22), it is immaterial to the question whether META terminated Cornett's employment in reprisal for protected disclosures. There is certainly no evidence whatsoever that DOE ordered a retaliatory firing.

In sum, there is no basis for overturning the Initial Agency Decision, and that decision is hereby adopted as the Final Agency Decision in this case.

Date: March 23, 1998 /s/ Elizabeth A. Moler

Deputy Secretary

(1)1/ As originally formulated in the notice of proposed rulemaking, the rule elaborated on this definition, excluding "contractors whose on-site performance is ancillary to delivery or furnishing of goods or services normally found at commercial facilities where those goods or services are not directly related to the mission of the facility -- for example, food services, vending machines, etc." 55 Fed. Reg. 9326, 9329 (March 13, 1990). Proposed changes to the rule recently published in the Federal Register would eliminate the on-site requirement and "instead cover employees of contractors performing work directly related to the operation of

programs and activities at DOE-owned or-leased sites, even if the contractor is located, or the work is performed, off-site. An example would be involved in the preparation of environmental impact statements related to programs and activities on DOE-owned and-leased sites." 63 Fed. Reg. 374. (Jan. 5, 1998).

(2)2/ According to a response to a comment in the preamble to the proposed changes to Part 708, "[t]he original rule contained time frame for complaint processing that were not realistic, and therefore led to dissatisfaction with the process. One primary goal of the proposed rule is to streamline, and therefore speed up, the complaint process. The proposed rule therefore has more realistic time frames, and in some cases, processing time frames have been removed where they cannot be estimated." 63 Fed. Reg. 374, 378. Under the proposed rule, for example, if the Deputy Inspector General for Inspections does not issue a report within 240 days, the complainant may request a hearing. Id. at 384.