DANIEL HOLSINGER, Complainant

v.

K-RAY SECURITY, INC., Respondent.

OHA Case No. LWA-0005, LWA-0009

DECISION REVERSING AND REMANDING INITIAL AGENCY DECISION

This is a request for review by K-Ray Security, Inc., from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA"), finding that reinstatement of Mr. Holsinger as a security guard is a necessary and appropriate action to effect full relief for a retaliatory termination made by the previous security contractor, Watkins Security Agency, Inc., ("WSA"). Based upon my review of the regulatory language, the relevant case law, and the entire record, I conclude that OHA's decision is incorrect.

Mr. Holsinger filed a complaint with the Office of Contractor Employee Protection ("OCEP") on October 7, 1994. R. 103-106. He alleged that he had made protected disclosures when he told his captain that another employee was removing items in five-gallon buckets covered with rags, and that it may have been DOE property. Mr. Holsinger also alleged that he contacted DOE's contracting officer to report the possible thefts. In addition, on August 31, 1994, complainant sent an anonymous letter to DOE reporting the alleged thefts, and alleging that WSA management had not responded to his earlier allegations. The reprisals alleged by Mr. Holsinger included a one-day suspension on September 2, 1994, his prospective rescheduling to the midnight guard shift on September 19, 1994, a three-day suspension on September 19, 1994, and another three-day suspension on September 29, 1994, which resulted in Mr. Holsinger's termination effective October 2, 1994, under WSA's "three-strike" policy. R. 855.

Two of Mr. Holsinger's suspensions were for excessive personal use of the telephone. R. 857-858. OCEP found insufficient evidence to support his reprisal claims concerning these incidents and concluded that the suspensions were justified. R. 022, 033, 858. Although OCEP expressed "concern" that the complainant's allegations of reprisal primarily involve "matters that are normally dealt with as minor workplace concerns (e.g. telephone calls, coffee drinking restrictions)," and further noted that there is "significant evidence in the record indicating that Mr. Holsinger engaged in activities that might have justified the termination of his employment" (R. 035), OCEP ultimately concluded that a reprisal for a protected act had occurred, finding that complainant's anonymous letter "contributed to the actions leading to [his] September 20, 1994 suspension * * * for failure to follow instructions." R. 034.

Mr. Holsinger's complaint sought back pay and benefits and reinstatement from WSA. R. 105. However, while his complaint was pending, K-Ray took over the security function at METC. R. 011. OCEP proposed that WSA pay Holsinger back pay and benefits and that K-Ray reinstate him based on its assessment that, absent the termination, Holsinger would have been hired automatically by K-Ray. R. 035.

Following the issuance of OCEP's investigatory report, complainant, WSA, and K-Ray all requested a hearing before OHA pursuant to 10 C.F.R. 708.9(a). Prior to the hearing, WSA and Mr. Holsinger entered a settlement agreement which satisfied the proposed requirement that WSA pay Mr. Holsinger back pay and benefits. Consequently, WSA was dismissed as a party. R. 859.

In the OHA proceedings, K-Ray did not challenge the factual findings that Mr. Holsinger had made protected disclosures, or that WSA had violated 10 C.F.R. Part 708, since "it was not in a position to either agree or disagree with the analysis, because it had no involvement nor knowledge of any such activities or actions." R. 859. Accordingly, on the basis of the OCEP investigation, OHA affirmed OCEP's finding that Mr. Holsinger's anonymous letter of August 31, 1994, constituted a protected disclosure and that a violation of Part 708 occurred when WSA suspended Mr. Holsinger for three days on September 19, 1994, and terminated him on October 2, 1994. R. 867.

While not addressing the complainant's underlying dispute with WSA, K-Ray objected to OCEP's proposal that K-Ray be required to reinstate the complainant. K-Ray argued that such a remedy would create an unwarranted hardship on K-Ray and require it to terminate an existing employee. R. 859. However, OHA found that reinstatement of Mr. Holsinger was necessary to restore him to the position he would have occupied absent the acts of reprisal by WSA. R. 872. OHA reasoned that Mr. Holsinger would have been hired by K-Ray, since all thirteen of the other WSA security personnel were hired by K-Ray when it assumed the contract in June 1995.

Reinstatement is an equitable remedy, and we agree with OHA that reinstatement, even by a successor employer, may be ordered if the circumstances warrant it. With any equitable remedy, however, an adjudicator "must draw on the ?qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" *Teamsters v. United States*, 431 U.S. 324, 375 (1977) [quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944)]. "Especially when * * * an equitable remedy threatens to impinge upon the expectations of innocent parties, the [adjudicator] must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable.'" *Ibid.*

[quoting Lemon v. Kurtzman, 411 U.S. 192, 200-201 (1973) (plurality opinion of Burger, C.J.)].

In this case, however, OHA failed to conduct a full assessment of the equities. It is undisputed that K-Ray was not the security contractor at the time the alleged retaliatory acts occurred; nor is K-Ray alleged to have committed any violation of Part 708. Instead, OHA's order requiring K-Ray to reinstate the complainant is predicated on a simple finding that "reinstatement is necessary and appropriate because it is reasonable to conclude that Holsinger would have been hired by K-Ray along with all of the other WSA security personnel at METC if he had been an employee of WSA at the time K-Ray hired its security personnel." R. 871-872.

OHA overlooked the undisputed record evidence showing the substantial hardship reinstatement would cause the contractor and innocent third parties. DOE's contracting officer testified without contradiction that under the fixed price contract complainant's reinstatement would require the discharge of one of the twelve security personnel currently on K-Ray's staff. R. 752. This testimony was confirmed by the fact that, following the resignation of one part-time guard (*i.e.*, the original thirteenth employee) after K-Ray's assumption of the contract, DOE's contracting officer advised K-Ray that, due to budget concerns, DOE would not permit the contractor to hire a replacement employee. R. 746-747. K-Ray's president provided additional uncontradicted testimony that complainant's reinstatement would require the company to lay off an existing employee. R. 759. Not only was this evidence uncontradicted in the record, but it was specifically credited by the complainant's own acknowledgment that his reinstatement would require the discharge of another employee. R. 785.

The uncontradicted record on this point is especially significant given OHA's own prior recognition that reinstatement is a "disfavored remedy" when it would "require the displacement of an innocent employee." *Boeing Petroleum Services, Inc.*, 24 DOE ¶87,501 at p. 89,007, citing *Edwards v. Department of Corrections,* 615 F. Supp. 804, 811 (M.D. Ala. 1985). In the instant case, OHA provided no explanation for the Hearing Officer's decision to disregard OHA's precedent. Nor did OHA explain on what basis it could ignore the undisputed record showing that existing employees would be adversely impacted by the complainant's reinstatement. Accordingly, I conclude that OHA's order requiring K-Ray to reinstate the complainant fails properly to consider the equities. Therefore, OHA's decision is reversed and this matter remanded with instructions to OHA to conduct a full assessment of the equities, consistent with the evidence of record.(1)

Dated: December 17, 1996

Charles B. Curtis

Deputy Secretary

(1) Because K-Ray did not address the merits of complainant's dispute with WSA, OHA's findings of reprisal were based solely on its review of the OCEP investigation. As noted, OCEP expressed "concerns" about the substance of the issues presented and the fact that the complainant's conduct may well have justified his termination. Under the circumstances, former Deputy Secretary White's caution that the whistleblower regulations must not be read to "encompass all disagreements between a contractor and its employees" seems particularly apt. *Mehta v. Universities Research Assoc.*, OHA Case No. LWA-0003, LWZ-0023 (1995), slip op. at 6. Thus, although OHA has been prevented from reviewing the merits of the underlying dispute between the complainant and WSA due to the settlement in this case, in weighing the equities of a reinstatement remedy on remand OHA should consider, in addition to the matters described above, that "there must be some assessment as to whether the nature of the disagreement evidences the type of disclosure of mismanagement that the regulation was designed to protect, * * * granting appropriate deference to traditional management prerogatives needed to conduct an organization through teamwork." *Ibid.*