Barry Stutts, Complainant v. Am-Pro Protective Agency, Inc., Respondent, OHA Case No. VWA-0015

DECISION DENYING REVIEW OF INITIAL AGENCY DECISION

This is a request for review by Complainant Barry Stutts, from the Initial Agency Decision by the Office of Hearings and Appeals ("OHA"), finding that reinstatement of Mr. Stutts as a security guard is a necessary and appropriate action to effect full relief for a retaliatory termination made by the previous security contractor at Forrestal and Germantown, Am-Pro Protective Agency, Inc. Based upon my review of the regulatory language, the relevant case law, and the entire record, I conclude that this request should be denied.

In his complaint filed with the Office of Contractor Employee Protection ("OCEP"), Mr. Stutts alleged that he had made protected disclosures when he and another officer (who did not file a complaint) reported two supervisors, including his own, for not writing an incident report concerning a top secret safe Complainant and his fellow officer had found open and that Am-Pro thereafter engaged in retaliatory actions against them culminating in Stutt's discharge. Am-Pro did not dispute that Stutts made a protected disclosure, but rather urged that he and his co-worker would have been discharged in any case for other reasons. OCEP concluded that Complainant's discharge had been in reprisal for his protected disclosure, and Am-Pro requested a hearing before OHA.

After a hearing, OHA concluded, in a fact-bound analysis involving credibility assessments, that Complainant had shown that his discharge was at least partially in reprisal for his protected disclosure and that Am-Pro had not shown that Complainant would have been discharged in the absence of the disclosures. lAD at pp. 7-17. However, although OHA awarded reinstatement and back pay, it postponed decision on the amount of back pay to permit briefing on whether other earnings should be subtracted and other expenses should be added to Complainant's entitlement. ld.at 17-19.

In the meantime, Am-Pro filed a bankruptcy petition and sought relief under the automatic stay provisions of the Bankruptcy Code. Although OHA was in doubt whether the automatic stay provisions applied to forbid issuance of its decision. OHA's decision (signed on June 13, 1997) was not issued until September 30, 1997. See Memorandum of September 30, 1997, from Janet N. Freimuth to Sandra L. Schneider and lAD at 1-2. By then, Am-Pro was dissolved, the bankruptcy case was dismissed, and a new contractor was providing security services at Forrestal and Germantown. Thus, Complainant is seeking to have the relief he was awarded charged against the successor contractor. This issue was not examined by OHA. However, in light of the time that has passed since OHA's decision and in the interest of concluding this matter, I have proceeded to .review his request.

As recognized in the recent decision of Holsinger v. K-Ray Security. Inc., 26 DOE ¶ 87,506 (l996)(decision of Deputy Secretary), reinstatement is provided for by the regulations in order to remedy a violation of Part 708. 10 C.F.R. 708.10 (c) /1 expressly provides:

> The initial agency decision may include an award of reinstatement, transfer, preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses * **

See also 10 C.F.R. 708.11(c) ("Relief ordered * * * may include reinstatement"). However, it is important to remember that, unlike the Department of Labor, the Department of Energy ("DOE") has no statutory regulatory power with respect to contractor employees engaging in "whistleblowing." Rather, Part 708 is premised entirely upon the contractual relationships between DOE and its contractors.

Reinstatement is an equitable remedy, and, as with any equitable remedy, 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 (I973)(plurality opinion of Burger, C.J.)].

Based upon these principles, it was determined in Boeing Petroleum Services. Inc., 24 DOE ¶87,501 at p. 89,007 (1994), that reinstatement generally is not "an appropriate remedy under Part 708 where * * * there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract." Rather, the normal rule is that a wrongfully discharged contractor employee is not entitled to relief for the period after the contract under which he is employed is terminated. Id. at p. 89,006-89,007, citing Holley v. Northrop Worldwide Aircraft Services. Inc., 835 F.2d 1375 (11th Cir. 1988), and Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992). These principles were recently re-affirmed in Holsinger v. K-Ray Security. Inc., 26 DOE ¶ 87,506 (1996)(decision of Deputy Secretary).

In this case, moreover, the problem of providing relief to Stutts is compounded, since, unlike the complainants in Boeing and Holsinger above, Stutts is seeking not merely to impose the reinstatement obligation, but also the back pay obligation on the successor contractor. Although Stutts is apparently unable to collect back pay from Am-Pro in light of its bankruptcy and

dissolution, that does not justify imposing the back pay liability on Am-Pro's innocent successor.

Accordingly, the request for review is denied.

T. J. Glauthier

Deputy Secretary

Issued: January 19 2000

/1 DOE recently issued an Interim Final Rule amending Part 708 which became effective April 14, 1999. 64 Fed. Reg. 12,862 (March 15, 1999). Relief available is now outlined in 10 C.F.R. 708.36 in the Interim Final Rule. 64 Fed. Reg. 12862, 12875 (March 15, 1999). The decision in this case is unaffected by the changes in the Interim Final Rule.