

May 4, 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Arun K. Dutta
Date of Filing: September 7, 2010
Case Number: TBA-0088

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on August 25, 2010, involving a Complaint of Retaliation filed by Arun K. Dutta (Mr. Dutta or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Mr. Dutta alleged that his former employer, Parsons Infrastructure and Technology Group, Inc. (Parsons or the contractor), retaliated against him for engaging in activity protected under Part 708. In the IAD, the Office of Hearings and Appeals (OHA) Hearing Officer determined that Mr. Dutta had engaged in activity that is protected under Part 708, but that Parsons had shown that it would have taken the same personnel action in the absence of the protected activity. Mr. Dutta appeals that determination. As set forth in this decision, I have decided that the determination is correct.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy'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 DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is 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. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant. *See* 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an IAD, as requested by Mr. Dutta in the present Appeal, is performed by the Director of the OHA. 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of the Complaint are fully set forth in the IAD. *Arun K. Dutta*, Case No. TBH-0088 (2010).¹ For purposes of the instant appeal, the relevant facts are as follows:

Parsons is a contractor employed by the DOE to construct a salt waste processing facility (SWPF) at the DOE's Savannah River Site.² Mr. Dutta was employed by Parsons as a Senior Pipe Stress Engineer in March 2007. He was assigned to the Engineering Mechanics Group (EMG). IAD at 2. In the summer of 2007, Mr. Dutta was assigned to work on two specifications (documents requiring that certain equipment meets statutory and regulatory safety requirements), numbered 11818 and 11819. Specification 11818 detailed seismic qualification criteria for PC-3 vessels, and 11819 set forth seismic qualification criteria for PC-1 and PC-2 vessels.³ *Id.* These documents had already been submitted for inter-disciplinary review (IDR), and it was Mr. Dutta's job to review, and make a preliminary disposition of, the IDR's committee's comments.⁴ Mr. Dutta performed this duty, and then gave the specifications to Mr. Richard Stegan, the Lead Discipline Engineer (LDE), for his review. However, instead of approving these documents and forwarding them to his direct report, Mr. James Somma, Mr. Stegan cancelled specification 11818 and assigned another engineer, Anthony Edwards, to revise specification 11819. *Id.* Mr. Edwards incorporated elements from specification 11818, revised the specification given to him, and submitted the finished product, specification 11819, rev. 0, to Mr. Stegan. *Id.* Mr. Stegan forwarded the specification to Mr. Somma, Mr. Somma approved it, and on October 31, 2007, specification 11819, rev.0, was entered in Parsons' document control system (DCS). *See* IAD at 3.

On November 13, 2007, Mr. Dutta sent a letter to David Amerine, Senior vice President/Project Manager, SWPF, alleging that "an inferior quality document [the revised specification 11819, rev.0] was slipped into our Document Control system using fraudulent means." *Id.* Mr. Dutta also alleged that specification 11819, rev. 0 did not go through the IDR process, but was instead improperly substituted for specification 11819, which Mr. Dutta worked on, and which did go

¹ Decisions issued by OHA are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

² A SWPF processes nuclear waste.

³ PC-1, PC-2 and PC-3 are classes of seismic regulatory requirements. PC-1 and PC-2 are very similar, while PC-3 is more stringent.

⁴ The IDR process is a review process for specifications and other documents. An engineer drafts or "initiates" a specification and sends it to a reviewer. If the reviewer "signs off" on the document, it is then sent to the IDR committee, along with an IDR form. The IDR committee returns comments on the form, and the initiator resolves the comments. The reviewer, the Lead Discipline Engineer (LDE), and the Engineering and Design Manager then review the form, and if they all sign off, the specification is then submitted to the document control system (DCS) operator, who verifies the signatures and dates on the specification and on the IDR form, and enters the data into the document control system.

through IDR. *Id.* The IDR form that originally accompanied specification 11819 was passed on with specification 11819, rev. 0. Mr. Dutta claimed that “this is a case of an intentional falsification of [a] safety document since these specs deal with design requirements of safety-related equipment.” *Id.* Mr. Amerine stated that it looked as if Mr. Dutta had identified a problem and forwarded the letter to Mr. Somma. *Id.*

In November 2007, Parsons divided the EMG group into two groups: the vessel design group, under the supervision of Mr. Stegan, and the pipe stress group, under the supervision of Calvin Hughes. Mr. Dutta was placed in the pipe stress group which became official as of January 2008. *Id.* On January 3, 2008, Mr. Somma met with Mr. Dutta, Mr. Stegan and Mr. Edwards to discuss Mr. Dutta’s allegations. *Id.* After the meeting, Mr. Dutta initiated a Condition Report (CR) at Mr. Somma’s suggestion.⁵ In November 2008, Mr. Dutta discussed a concern with Mr. Hughes that, although design of the SWPF was 90% complete, the pipe support design had not been completed. On January 15, 2009, Parsons terminated Mr. Dutta’s employment. *Id.*

On April 6, 2009, Mr. Dutta filed a Part 708 Complaint with the Director of the DOE’s Office of Civil Rights at the DOE’s Savannah River Operations Office. This matter was referred to OHA for an investigation followed by a hearing. An OHA investigator issued a Report of Investigation on December 4, 2009. 10 C.F.R. §§ 708.22, 708.23. Subsequent to the investigation, an OHA Hearing Officer held a hearing in this matter over a period of three days. Over the course of the hearing, 14 witnesses testified. Mr. Dutta introduced 47 exhibits into the record, and Parsons submitted 68 exhibits.

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the Initial Agency Decision that is the subject of this appeal.

II. The Initial Agency Decision

The Hearing Officer set forth the burdens of proof in cases brought under Part 708. He stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. 10 C.F.R. §§ 708.5, 708.29. The Hearing Officer further noted that if an employee meets this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s protected disclosure or activity. 10 C.F.R. § 708.29. He considered the application of these elements to the Dutta proceeding.

⁵ A Condition Report is a pre-printed form that an initiator used to identify issues and provide recommendations. An evaluator signs off on it, beginning an action plan. The last step verifies the action.

A. Protected Activity and Contributing Factor Analysis

The Hearing Officer found that Mr. Dutta made two protected disclosures regarding: (1) Parsons' failure to send the revised specification 11819, Rev.0 through IDR, and (2) Parsons' failure to complete the pipe support design before the construction phase of the SWPF. *Id.* at 5. He found that the complainant had a reasonable belief that Parson's failure to send the revised document through IDR violated company procedure. Likewise, with respect to the second disclosure, the Hearing Officer noted that the complainant reasonably believed that Parsons' failure to complete the pipe support design prior to the construction phase of the SWPF would result in a gross waste of funds. *Id.* at 6.

The Hearing Officer further noted that the complainant alleged that two negative personnel actions were retaliations for his making protected disclosures: (1) he claimed that his assignment to the pipe stress group was in retaliation for his first protected disclosure, and that while working in this group, he was not given work that was commensurate with his abilities and level of experience, and (2) he alleged that he was retaliated against by being terminated in January 2009. *Id.* at 7.

Regarding whether the protected disclosures were a contributing factor to the alleged retaliations, the Hearing Officer found that Mr. Dutta's November 13, 2007, disclosure to Mr. Amerine was not a contributing factor to his assignment to the pipe stress group. *Id.* at 8. The Hearing Officer based this finding on the fact that Mr. Stegan made the decision to place Mr. Dutta in the pipe stress group before November 13, 2007, thus finding that Mr. Dutta's protected disclosure on that date could not have been a contributing factor to this personnel action. Regarding Mr. Hughes' alleged treatment of the complainant, the Hearing Officer found no evidence in the record that Mr. Hughes had actual or constructive knowledge of the complainant's first disclosure until after he had filed his Complaint. Thus, he could not conclude that Mr. Dutta's first disclosure was a contributing factor to Mr. Hughes's alleged assignment of tasks to the complainant that Mr. Dutta believed not to be commensurate with his skills and experience. *Id.* at 9. However, the Hearing Officer determined that Mr. Dutta's second disclosure was a contributing factor to Parson's decision to terminate his employment. The Hearing Officer based this finding on Mr. Somma's constructive knowledge of the complainant's protected disclosure, as well as the fact that Mr. Dutta's November 2008 disclosure was sufficiently close in time to the January 2009 termination such that a reasonable person could conclude that the disclosure was a contributing factor to the termination. *Id.* at 10.

B. Whether Parsons Would Have Terminated Mr. Dutta Absent the Protected Activities

The Hearing Officer analyzed the alleged retaliation in light of the protected disclosures and determined that Parsons had established by clear and convincing evidence that it would have taken the same action in the absence of Mr. Dutta's protected disclosures. In examining the alleged retaliatory action taken against Mr. Dutta, the Hearing Officer considered several factors, including: "(1) the strength of the employer's reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees." *Id.* at 20 (*citing Kalil v. Dep't of Agriculture*, 479 F. 3d 821, 824 (Fed. Cir. 2007)).

Neither party disputed at the hearing that after the SWPF project moved from the design stages into the construction stages, a substantial number of layoffs of Parsons employees and contractors who were involved in design-related activities were necessary. Parsons maintained that a Reduction-in-Force (RIF) was necessary because it was only given limited funds to complete the project and it needed to stay within budget. IAD at 10. According to Parsons, 17 of the 22 employees in the pipe stress group were terminated, including Mr. Dutta. The Hearing Officer found that Parsons had substantial reasons for terminating Mr. Dutta's employment. The Hearing Officer also found that the RIF was conducted using facially-neutral standards, that the quality of Mr. Dutta's work in the pipe stress group was average, and that the number of calculations that Mr. Dutta completed compared to other engineers who were retained, was below average. The Hearing Officer further concluded in the IAD that these factors suggest that Parsons would have terminated Mr. Dutta in the absence of his protected disclosures. *Id.* at 14.

The Hearing Officer also examined the strength of any motive on the part of Parsons management to retaliate against Mr. Dutta. Although the Hearing Officer found that there was some evidence of a motive to retaliate on the part of Mr. Somma, who made the final decision to terminate the complainant, the Hearing Officer determined that the motive did not appear to have been particularly strong. *Id.* at 15. He further found no motive to retaliate on the part of the other Parsons management officials involved in the termination of Mr. Dutta. Finally, the Hearing Officer examined the treatment of similarly-situated employees who were selected to be laid off, and found that most, if not all, of the analysts who were in situations analogous to Mr. Dutta were also terminated. He further found, however, that a number of analysts who were selected to be laid off were either able to locate another job within Parsons or were subsequently re-hired by Parsons. *Id.* at 16. Based on the evidence in the record, these analysts re-applied for their positions, whereas Mr. Dutta did not. The Hearing Officer concluded that Parsons would have terminated the complainant's employment even in the absence of his protected disclosures. *Id.*

III. Analysis

It is well established in appeals brought under 10 C.F.R. Part 708 that factual findings of a Hearing Officer are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *See Curtis Hall*, Case No. TBA-0042 (2008). With respect to a Hearing Officer's conclusions of law, they are reviewable *de novo*. *Id.*; *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion').")

Mr. Dutta filed a statement identifying the issues that he wished the OHA Director to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). His Statement focuses exclusively on his contention that the Hearing Officer erred in finding that Parsons met its evidentiary burden in this case. Parsons filed a Response to the Statement arguing generally

that there is no merit to Mr. Dutta's appeal.⁶ 10 C.F.R. § 708.33. As fully discussed below, after carefully reviewing the voluminous record in this case, as well as the arguments raised in the Statement of Issues, I find that there is no basis for overturning the findings in this case.

A. Whether the Hearing Officer Erred in Making Credibility Determinations

Mr. Dutta contends that the Hearing Officer erred in finding that Parsons met its evidentiary burden and asserts that the Hearing Officer gave Parsons "every benefit of the doubt" when making his credibility determinations. Statement at 1. Mr. Dutta points to several instances where the Hearing Officer incorrectly determined that the contractor's testimony in the record was credible. Specifically, Mr. Dutta asserts that the Hearing Officer erred in finding credible Parsons testimony: (1) about "the competency of Helton" [a pipe stress engineer]; (2) that the engineers had been "rated fairly by Hughes and Neidbolski [Parsons management] based on the number of calculations they performed;" and (3) that Mr. Dutta was "an average engineer and not capable of doing checker work . . ." In addition, Mr. Dutta argues that the Hearing Officer incorrectly gave little weight to the testimony of the complainant or his primary witness in finding that Parsons would have terminated Mr. Dutta's employment even in the absence of his protected disclosure. *Id.* at 2 and 3. As explained below, I find no merit to any of Mr. Dutta's arguments. I find that the record clearly shows that the Hearing Officer analyzed all of the testimony in the case in detail regarding these issues, and clearly explained his conclusion that Parsons had substantial reasons for terminating Mr. Dutta's employment.

With regard to Mr. Dutta's view that he was more qualified than at least three of the five pipe stress analysts who were retained, including Mr. Helton, and his contention that he should have been retained over Mr. Helton, the Hearing Officer adequately explained why he found Mr. Hughes' testimony to be entitled to more weight than Mr. Dutta on the issue of whether other engineers had less problems than Mr. Dutta with their calculations. Tr. at 155-158, IAD at 12. The Hearing Officer also noted that Mr. Helton had the highest cumulative score in Mr. Somma's ranking of the eight remaining pipe stress engineers. *Id.* Based on the testimony in the record, the Hearing Officer provided reasons why he could not conclude that Parsons would have retained Mr. Dutta instead of Mr. Helton in the absence of Mr. Dutta's protected disclosures. *Id.*

Second, I find that the Hearing Officer adequately assessed the validity of Mr. Dutta's claim that he was more qualified than some of the five pipe stress analysts who were retained. Specifically, the Hearing Officer reviewed the testimony of Mr. Somma who prepared a Group Assessment Summary consisting of the names of the eight remaining engineers in Hughes' pipe stress group, and ratings of each engineer in five separate skill areas. IAD at 11. Mr. Dutta received the lowest cumulative score of the eight engineers. *Id.* The Hearing Officer determined that Mr. Somma's assessment of Mr. Dutta was based in part on input from Mr. Hughes and Mr. Niedbalski regarding the work that

⁶ In general, in its Response, Parsons maintains that Mr. Dutta identifies no specific issues for review by the OHA Director and points to no testimony or evidence that the Hearing Officer failed to consider, but rather asserts that Mr. Dutta misconstrues the findings made by the Hearing Officer. It presents numerous citations to the record to support its position. *See* Parsons Response.

was performed after Mr. Dutta joined the pipe stress group, primarily pipe stress calculations. *Id.* The record reflects that the Hearing Officer thoroughly analyzed the testimony of Mr. Hughes, Mr. Neidbalski and Mr. Dutta regarding the number and quality of the pipe stress calculations produced by Mr. Dutta . The Hearing Officer attributed more weight to the testimony of Mr. Hughes and Mr. Niedbalski characterizing Mr. Dutta’s technical skills as being “average,” specifically indicating that the number of calculations Mr. Dutta produced was “below average.” IAD at 13, Tr. at 733, 752, 758. He based his finding in part on the fact that Mr. Niedbalski had more opportunity to observe the quality of Mr. Dutta’s work. *Id.* at 13. The very essence of the role of the Hearing Officer is to listen to the testimony of witnesses, observe their demeanor, and make a judgment as to their credibility. The Hearing Officer explained why he weighed the evidence and testimony on these issues as he did. There is no evidence that the Hearing Officer abused his discretion in determining that the Parsons witnesses testimony regarding these issues was credible.

Third, I find that the Hearing Officer explained why he relied on and gave considerable weight to testimony that Mr. Dutta was an “average” engineer in determining that Parsons had substantial reasons for terminating Mr. Dutta’s employment. By way of example, the Hearing Officer highlighted evidence that Mr. Dutta was not able to complete as many calculations as other engineers in the pipe stress group, and that Mr. Dutta’s calculations were not more difficult than those performed by other pipe stress engineers. IAD at 12; Tr. at 166-167. The Hearing Officer did not make a finding, as Mr. Dutta asserts, that he was not “as capable of doing checker work;” rather the Hearing Officer concluded, based on the evidence taken as a whole, that the quality of Mr. Dutta’s work in the pipe stress group was average at best and the number of calculations he completed was below average.⁷

Finally, I find that the Hearing Officer reviewed all of the testimony in detail, including that of Mr. Dutta and his witness, regarding Mr. Dutta’s job performance. The Hearing Officer examined the number and level of difficulty of calculations Mr. Dutta had performed, as well the variation and level of difficulty of calculations performed by other engineers who were retained by Parsons. *See* IAD at 13. Again, based on his analysis of the testimony, the Hearing Officer concluded that the quality of Mr. Dutta’s work was average, and the number of calculations that he completed was below average. Mr. Dutta has failed to show that the factual findings made by the Hearing Officer were “clearly erroneous.” Further, after carefully reviewing the evidence, I find no evidence to suggest that the Hearing Officer abused his discretion in making credibility determinations or weighing any evidence in the case.

B. Whether the Hearing Officer Erred in Finding Motive to Retaliate

The complainant contends in his Statement that the Hearing Officer erred in finding that there was “no evidence of a strong motive to retaliate on the part of Mr. Somma.” Statement at 3. He contends

⁷ In his Statement, Mr. Dutta further asserts that the Hearing Officer’s finding that he was an average engineer was “based on the testimony of the two engineers that set up a contradictory methodology for rating the engineers.” Statement at 2. The Hearing Officer found no evidence in the record of a “contradictory methodology” for the rating engineers.

that out of the eight individuals who were considered for layoff, he was the “only Parsons Employee selected for layoff.” *Id.* Mr. Dutta’s assertions are again misplaced. I find that the Hearing Officer thoroughly examined the strength of any motive on the part of Mr. Somma and other Parsons’ management to retaliate against Mr. Dutta for his whistleblowing. The record reflects that the Hearing Officer found that there was some evidence of a motive to retaliate on the part of Mr. Somma. He noted that Mr. Somma signed off on a document (specification 11819, rev.0) that the complainant called “fraudulent.” He further testified that he was “a little disappointed” when the complainant presented his concerns directly to Mr. Amerine (Senior Vice President/Project Manager, SWPF) rather than coming to Mr. Somma first. However, the Hearing Officer ultimately concluded that Mr. Somma’s motive to retaliate against Mr. Dutta did not appear to have been “particularly strong.” *Id.* at 14. He noted that it was Mr. Stegan, who was the primary actor in the series of events that led to Mr. Dutta’s first disclosure, not Mr. Somma. The record shows clearly that the Hearing Officer carefully analyzed the actions and involvement of each Parsons’ management official and based his conclusions on those findings. In addition, I find no error in the Hearing Officer’s analysis of the strength of a motive to retaliate on the part of Mr. Somma. Mr. Dutta’s assertion that he was the only Parsons employee selected for layoff is contradicted by the evidence in the record which indicates that at least two other Parsons employees were either laid off at the same time as Mr. Dutta or scheduled for layoff, but able to obtain another position with Parsons. Again, the Hearing Officer thoroughly analyzed the record and I find no error in his findings.

In sum, I am convinced that there was sufficient evidence in the record in this case to support the Hearing Officer’s conclusion that Parsons met its evidentiary burden and clearly and convincingly established that it would have terminated Mr. Dutta absent his protected activity.

IV. Conclusion

As discussed above, I find no merit to any of the arguments advanced by Mr. Dutta. Therefore, I find that Mr. Dutta’s appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

- (1) The Appeal filed by Arun K. Dutta on September 7, 2010 (Case No. TBA-0088), of the Initial Agency Decision issued on August 25, 2010, be and hereby is 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. § 708.35.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2011

