

January 22, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision
Motion to Dismiss

Name of Case: David P. Sanchez
Dates of Filing: October 30, 2009
December 21, 2009
Case Numbers: TBH-0087
TBZ-0087

This Decision will consider a Motion to Dismiss filed by Los Alamos National Laboratory (“LANL” or “the Respondent”). LANL seeks dismissal of a pending complaint filed by David P. Sanchez (“Mr. Sanchez” or “the Complainant”) against his employer, Los Alamos National Security, L. L. C. (“LANS”),¹ on October 30, 2009, under the Department of Energy’s (DOE) Contractor Employee Protection Program, set for that 10 C.F.R. Part 708. OHA has assigned Mr. Sanchez’ hearing request Case No. TBH-0087, and the present Motion to Dismiss Case No. TBZ-0087. For the reasons set forth below, I have determined that Mr. Sanchez’ complaint should be dismissed.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

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 DOE’s government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 2, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those “whistleblowers” from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including “disclosing to a DOE official ... information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or

¹ Los Alamos National Security, L.L.C., (LANS) manages and operates Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico, pursuant to a contract with the National Nuclear Security Administration (NNSA), a separately organized agency within the Department of Energy (DOE).

safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.” 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. The DOE’s Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include “a statement specifically describing the alleged retaliation taken against [the complainant] and the disclosure, participation, or refusal that [the complainant believes gave rise to the retaliation.” 10 C.F.R. § 708.12.

B. Factual Background

The Complainant is an employee at LANS, the management and operations contractor at LANL in Los Alamos, New Mexico. Mr. Sanchez was assigned to the Quality Assurance Division’s Institutional Quality Group (QA-IQ) as a Quality Assurance (QA) Specialist. This position is a “deployed position,” which means that he can be deployed by his current organization to other LANL organizations in order to provide support in the QA area. Beginning in January 2008, Mr. Sanchez was deployed as a Senior QA Specialist in the Tech Area (TA)-55 Nuclear Facility. In October 2008, Mr. Sanchez participated in an interview with the DOE Office of Inspector General (OIG) regarding the TA-55 QA program. During this conversation, Mr. Sanchez allegedly disclosed concerns regarding deficiencies in the TA-55 QA program, including health and safety concerns. In November 2008, Mr. Sanchez was transferred from his position within TA-55 back to the QA-IQ.

II. PROCEDURAL HISTORY

On July 15, 2009, Mr. Sanchez filed a complaint under 10 C.F.R. Part 708 with the Employee Concerns Program (ECP) office of the National Nuclear Security Administration (NNSA) in Albuquerque, New Mexico. In his Part 708 complaint, Mr. Sanchez alleged that LANS removed him from his position in TA-55, and took several other negative actions against him, in retaliation for his participation in the DOE OIG interview in October 2008 during which he disclosed nuclear facility non-compliance issues. LANL, on behalf of LANS, maintained that it did not engage in any retaliatory conduct against Mr. Sanchez.

On August 24, 2009, the Complainant requested an investigation followed by a hearing conducted by the DOE Office of Hearings and Appeals (OHA). *See* E-Mail from David P. Sanchez to Michelle Rodriguez de Varela, NNSA ECP, August 24, 2009. OHA received the request on September 2, 2009, and the OHA Director appointed an investigator to the case. The OHA investigator issued a report of investigation (ROI) on October 30, 2009. *See* Report of Investigation, Case No. TBI-0087 (2009). The OHA Director appointed me to serve as Hearing Officer on November 2, 2009.

After consulting with the parties, I scheduled a three-day hearing in this case to occur on January 26, 2010, through January 28, 2010, and informed the parties of the hearing dates by letter dated November 5, 2009. *See* Letter from Diane DeMoura, OHA, to David P. Sanchez and Pablo Prando, LANL, November 5, 2009. In the November 5, 2009, letter I also established a

schedule for the submission of pre-hearing briefs. I requested that, by November 25, 2009, the parties submit briefs identifying (i) any disagreements each party had with the October 30, 2009, ROI and (ii) the names of their respective witnesses and a short description of the subject matter of each witness' testimony. *Id.* In addition, because Mr. Sanchez' complaint consisted primarily of general allegations, I stated the following, "Mr. Sanchez include in his brief the substance of his disclosures to the DOE Inspector General in Fall 2009 in detail and specify why he believes those disclosures fall within the ambit of Part 708. Mr. Sanchez should also specify in detail the alleged retaliations to which he was subjected." *Id.* (emphasis in original). I further requested that Mr. Sanchez "specify in detail" the remedies he sought and include a brief statement regarding why he believed each of the claimed remedies was available under Part 708. *Id.* Finally, I afforded each party the opportunity to submit reply briefs, due ten days after receipt of the initial briefs. *Id.* On November 17, 2009, I granted an extension of time to file briefs. Following the extension, the initial briefs were due on December 4, 2009, and reply briefs were due on December 21, 2009. E-mail from Diane DeMoura, OHA, to David P. Sanchez and Pablo Prando, LANL, November 17, 2009.

The Complainant filed his initial brief on December 2, 2009. *See* E-Mail from David Sanchez to Diane DeMoura, OHA, December 2, 2009 (transmitting Complainant's Initial Brief, November 30, 2009). In his brief, the Complainant failed to respond to each of the requests in my November 5, 2009, letter. Mr. Sanchez described generally his interview with personnel from the DOE OIG, but provided no specifics regarding his disclosures. *See* Complainant's Initial Brief at 2. In addition, Mr. Sanchez did not describe the alleged retaliations to which he was subjected with any level of specificity, despite my request that he do so. In addition, Mr. Sanchez did not specify which remedies he sought under Part 708. Further, although he included a list of potential witnesses in his brief, Mr. Sanchez did not provide a description of the subject matter of their testimony as requested. *Id.* at 3. Mr. Sanchez identified in his brief various documents which he intended to submit as exhibits at the hearing and made a discovery request in which he requested the production of specific documents from LANL. *Id.* at 4.

LANL submitted its initial brief on December 4, 2009, addressing each of the issues identified in the November 5, 2009, letter. *See* Respondent's Initial Brief, December 4, 2009. LANL submitted a reply brief and the instant Motion to Dismiss on December 21, 2009. In the reply brief, LANL noted Mr. Sanchez' failure to comply with my requests for specific statements regarding his protected disclosures, the alleged retaliations, the remedies sought by Mr. Sanchez, and Mr. Sanchez' potential witness list. *Id.* at 1-3. LANL further requested that a discovery order be entered in this case and noted objections to the Complainant's discovery request, namely that some of the sought documents were either already in Mr. Sanchez' possession or not documents created or possessed by LANL. *Id.* at 3. Mr. Sanchez did not submit a reply brief.

Following receipt of the parties' briefs, I issued a letter to the parties on December 22, 2009, in which I addressed various issues raised in the briefs. *See* Letter from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, December 22, 2009. In that letter, I noted Mr. Sanchez' failure to comply with my requests for specific information regarding (1) the substance of his discussion with the DOE OIG; (2) the alleged retaliations to which he was subjected; and, (3) the remedies he sought. I requested that Mr. Sanchez provide this information no later than January 4, 2010, and I noted that failure to comply with my request may result in adverse

findings or dismissal of the complaint, pursuant to 10 C.F.R. 708.28(b)(5). *Id.* at 1-2. In addition, I requested that Mr. Sanchez provide, no later than January 4, 2010, an amended witness list which included a statement regarding the subject matter of each witness' testimony, and I noted that failure to comply with this request may also result in adverse findings or dismissal of the complaint, pursuant to 10 C.F.R. § 708.25(b)(5). *Id.* at 2. Finally, regarding discovery, I noted that certain documents in Mr. Sanchez' discovery request were not LANS/LANL documents and therefore fell outside the scope of my authority to order discovery. As to the remaining documents, I noted that OHA expects parties to amicably resolve discovery matters among themselves to the extent possible. *Id.* at 2.

LANL requested discovery from Mr. Sanchez on December 23, 2009. LANL requested that Mr. Sanchez produce copies of the documents Mr. Sanchez identified in his initial brief as potential exhibits. Email from Philip Kruger, LANL, to David P. Sanchez, December 23, 2009.

On January 5, 2010, I sent an e-mail to the parties confirming our scheduled pre-hearing telephone conference for January 7, 2010. In that email, I again noted that Mr. Sanchez had failed to comply with the requests in my December 22, 2009, letter and I indicated that he must submit the requested information as soon as possible. *See* E-Mail from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, January 5, 2010.

On January 7, 2010, I convened a pre-hearing telephone conference in this case. *See* Record of Pre-Hearing Telephone Conference, January 7, 2010. At that time, I noted that Mr. Sanchez had failed to comply with my requests for specific information regarding his protected disclosures, the alleged retaliations, the sought remedies, and his witness list, which I requested on November 5, 2009, December 22, 2009, and January 5, 2009. *Id.* LANL raised an objection to Mr. Sanchez' failure to comply with my requests. LANL stated that Mr. Sanchez' lack of cooperation was infringing on its due process rights by hindering LANL's ability to prepare for the hearing. We discussed his allegations during the pre-hearing conference and I again requested that Mr. Sanchez submit a detailed written statement with this information as soon as possible following the pre-hearing conference. *Id.* Mr. Sanchez failed to comply with this request.

In addition, during the January 7, 2010, telephone conference, the Complainant expressed some uncertainty during the pre-hearing telephone conference regarding whether the Part 708 process was the appropriate forum for his complaint and whether he wished to proceed with his complaint. Therefore, I instructed Mr. Sanchez to inform me no later than January 12, 2010, whether he wished to proceed with the hearing. *See* E-Mail from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, January 11, 2010. Mr. Sanchez failed to comply with this request. Rather, he requested that this proceeding be held in abeyance for an indefinite period of time until the DOE OIG issued reports which he believed were relevant to this case. *See* E-Mail from David P. Sanchez to Diane DeMoura, OHA, January 12, 2010. I denied Mr. Sanchez' request for an extension and again requested that he inform me no later than January 13, 2010, whether he wished to proceed. When Mr. Sanchez failed to comply with this request on January 13, 2010, LANL renewed its Motion to Dismiss, citing Mr. Sanchez' refusal to provide a written statement regarding his protected disclosures, alleged retaliations, and requested remedies, as well as his refusal to respond to LANL's discovery requests, despite the

fact that the hearing date was rapidly approaching. *See* E-Mail from Philip Kruger, LANL, to Diane DeMoura, OHA, January 13, 2010.

On January 15, 2010, I ordered Mr. Sanchez to provide specific documents in response to LANL's discovery request. *See* Letter from Diane DeMoura, OHA, to David P. Sanchez and Philip Kruger, LANL, January 15, 2010, at 3. In addition, I ordered Mr. Sanchez to provide an updated and complete witness list. *Id.* at 5. I stated that failure by Mr. Sanchez to comply with these orders by January 20, 2010, would result in immediate dismissal of this proceeding. *Id.* at 3, 5. In addition, I scheduled another pre-hearing telephone conference for January 20, 2010. *Id.* at 6.

During the January 20, 2010, pre-hearing telephone conference, Mr. Sanchez reiterated his desire for an extension of time in this case and stated that he was unwilling to proceed on the scheduled hearing date, January 26, 2010. *See* Record of Pre-Hearing Telephone Conference, January 20, 2010. I stated that no extension had been granted in this case and that the parties should be prepared to proceed on January 26, 2010, as scheduled. *Id.* I further reminded Mr. Sanchez that I had ordered him to produce discovery and his witness list by January 20, 2010. At that time, Mr. Sanchez stated that he would not comply with the pending orders, and would not be present at the hearing as scheduled, because he did not yet have the DOE OIG reports which he was awaiting. *Id.* I stressed to Mr. Sanchez that failure to comply with the pending orders and failure to appear at the scheduled hearing were grounds for dismissal of this case. *Id.* Mr. Sanchez stated that he understood, but repeated that he would not comply with the pending orders and would not appear at the hearing as scheduled. *Id.*

III. ANALYSIS

The Part 708 regulations set forth provisions governing the conduct of Part 708 hearings and enumerating the various powers of the Hearing Officer. *See* 10 C.F.R. § 708.28. Among the powers accorded to the Hearing Officer is the authority "upon request of a party or on his or her own initiative, [to] dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer, or, without good cause, to attend a hearing[.]" 10 C.F.R. § 708.28(b)(5). It is well settled that dismissal of a complaint is "the most severe sanction that we may apply" in Part 708 proceedings and "should be used sparingly." *See Richard L. Urie*, Case No. TBZ-0063 (2007).² Consequently, Motions to Dismiss should be granted "only if supported by clear and convincing evidence." *Id.* (internal citations omitted).

In this case, the Complainant has failed to comply with every request and order issued to him. As set forth above, Mr. Sanchez was afforded numerous opportunities to provide the information that is required of him under the Part 708 regulations and which is critical to the conduct of this proceeding. The Complainant's refusal to comply has unduly prejudiced the Respondent's ability to prepare for the hearing. In addition, the Complainant affirmatively stated that, since his request for an abeyance in the proceeding until the DOE OIG issued specific reports was not

² Decisions issued by the Office of Hearings and Appeals (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>.

granted, he would not attend the hearing as scheduled. The Complainant's refusal to attend the scheduled hearing renders continuing with this proceeding impracticable.

Based on the foregoing, I find that this proceeding should be dismissed based on the Complainant's lack of cooperation and failure to comply with lawful orders of the Hearing Officer. Specifically, I find that the Complainant (1) has refused to provide specific information regarding his protected disclosures and alleged retaliations, as required under 10 C.F.R. § 708.12, despite my repeated requests; (2) has failed to provide a statement as to his requested remedies, despite my repeated requests; (3) has failed to provide discovery, despite LANL's repeated requests and my January 15, 2010, order; (4) has failed to provide a witness list, despite my repeated requests and January 15, 2010, order; and, (5) has informed me and LANL counsel that he will not be present at the hearing, scheduled for January 26, 2010. The above-enumerated conduct constitutes grounds under 10 C.F.R. § 708.28(b)(5) supporting the dismissal of Mr. Sanchez' Part 708 complaint.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Los Alamos National Laboratory on December 21, 2009, Case No. TBZ-0087, is hereby granted as set forth in paragraph (2) below.

(2) The Complaint filed by David P. Sanchez under 10 C.F.R. Part 708 on October 30, 2009, Case No. TBH-0087, is hereby dismissed.

(3) This is an Initial Agency Decision, which shall become a Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: January 22, 2010