

December 9, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Glenn Kuswa

Date of Filing: July 9, 2004

Case Number: TBU-0028

Glenn Kuswa, an employee of Sandia National Laboratories (Sandia) in Albuquerque, New Mexico, appeals the dismissal of his whistleblower complaint filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On June 22, 2004, the Employee Concerns Program Manager at the DOE's National Nuclear Security Administration Service Center, Albuquerque, (NNSA/Albuquerque) dismissed Mr. Kuswa's complaint. As explained below, I reverse the dismissal of the subject complaint, and remand the matter to NNSA/Albuquerque for further processing.

I. Background

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 3, 1992). Its primary purposes are 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. The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

Under Part 708, the DOE office initially receiving a complaint may dismiss the complaint for lack of jurisdiction or other good cause. 10 C.F.R. § 708.17. The complainant may appeal such a dismissal to the OHA Director. 10 C.F.R. § 708.18.

Mr. Kuswa was employed as a "general technical manager" at Sandia. After being demoted to "principle [*sic*] member of technical staff," Mr. Kuswa filed a Part 708 complaint with NNSA/Albuquerque, alleging that he was demoted in retaliation for raising concerns within Sandia about "pressures being exerted to produce data that would support an outcome calling for a costly replacement of a weapon component." Complaint at 1. Mr. Kuswa also alleged that the demotion

was in retribution for “the appearance that [he] and/or staff in his department had made statements to the DOE Office of Inspector General.” *Id.*

On June 22, 2004, the Employee Concerns Program Manager at NNSA/Albuquerque dismissed the complaint. Letter from Eva Glow Brownlow, Employee Concerns Program Manager, NNSA/Albuquerque, to J. Edward Hollington, Attorney for Mr. Kuswa (June 22, 2004) (“Dismissal Letter”). The dismissal letter states, in pertinent part:

10 CFR Part 708.12 states that the complainant is required to identify in the complaint the ‘disclosure, participation, or refusal that the employee believes gave rise to the retaliation.’ Mr. Kuswa admits in his complaint that he did not make any disclosure, participate in making a disclosure or refuse to do any particular thing that he thought was dangerous. For this reason, Mr. Kuswa’s complaint fails to meet the requirements of 10 CFR 708.

Dismissal Letter at 1.

In his Appeal, Mr. Kuswa contends that his “complaint contains numerous factual references to protected disclosures he made to his employer of fraud, gross mismanagement, gross waste of funds or abuse of authority as defined in 10 CFR 708.5(a)(3).” Appeal at 1.

II. Analysis

Part 708 provides that the DOE may dismiss a complaint for “lack of jurisdiction or for other good cause . . .” 10 C.F.R. § 708.17.

Dismissal for lack of jurisdiction or other good cause is appropriate if:

- (1) Your complaint is untimely; or
- (2) The facts, as alleged in your complaint, do not present issues for which relief can be granted under this regulation; or
- (3) You filed a complaint under State or other applicable law with respect to the same facts alleged in a complaint under this regulation; or
- (4) Your complaint is frivolous or without merit on its face; or
- (5) The issues presented in your complaint have been rendered moot by subsequent events or substantially resolved; or

- (6) Your employer has made a formal offer to provide the remedy that you request in your complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation.

10 C.F.R. § 708.17(c).

The Dismissal Letter does not specify one of the reasons listed in section 708.17(c) as the basis for dismissing Kuswa's complaint. However, because the Dismissal Letter finds that the complaint lacks an allegation of a disclosure, participation, or refusal to participate which is protected under Part 708, we can only assume that NNSA/Albuquerque found Mr. Kuswa's complaint to be "frivolous or without merit on its face." We disagree with this conclusion.

Part 708 protects a DOE contractor employee from retaliation for, among other things, disclosing to his "employer . . . , information that you reasonably and in good faith believe reveals . . . [f]raud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(3). We find that disclosures allegedly made by Mr. Kuswa would be protected by this provision of the regulations.

At the heart of Mr. Kuswa's complaint is his allegation that Sandia personnel briefed NNSA officials with a presentation of data "designed to close the sale for replacing the spin rocket motor, and that the representations made with this data were misleading and inappropriately biased." Complaint at 3. The complaint also alleges that the cost for replacement of the spin rocket motor stands at about \$77 million.

Kuswa's complaint describes a meeting in the fall of 2002 in which he was informed "that we had three months to complete the investigation to provide critical data that would be need[ed] to support the effort to sell the DOE on a replacement program for the SRM [spin rocket motor]. . . . If we could not keep that schedule, management was prepared to make heads roll (that is, jobs would be lost), . . ." Kuswa responded that "[t]hree months would set a record even for the simplest problems, and it would not be possible to conduct a quality operation on the requested time line." Because of what he saw as "the threatening and unreasonable nature of part of the exchanges," Kuswa states that he "reported the incident to Janet Sjulín, manager of the Independent Surveillance Assurance organization, and also to Bill Norris."

Kuswa further alleges that he made his concerns known to Les Shephard, director of Organization 2900 at Sandia, at a lunch meeting in early summer 2003, in which he

remarked that the spin rocket replacement had apparently been sold to NNSA, and that we in Surveillance were unconvinced that the case was strong enough, in view that there had been only one serious problem discovered out of hundreds of tests conducted at weapon quality standards. Clements [a member of Kuswa's staff] and Kuswa had also kept Bill Norris [Surveillance Level II manager] apprised of the pressures and exaggerations of problems from the outset.

Complaint at 4.

The gist of Kuswa’s allegation is that there was pressure on lower level employees from Sandia management to provide data that would “sell” DOE on a weapon component replacement program costing as much as \$77 million, and that when Sandia briefed DOE on this subject, it did so with representations that “were misleading and inappropriately biased.” These allegations clearly raise an issue with regard to at least “gross waste of funds,” the revelation of which is specifically protected under Part 708. And Mr. Kuswa alleges that he raised these very concerns with Sandia management. Thus, we have no doubt that Mr. Kuswa’s activities, as alleged, would fall under the protection of Part 708.*

We emphasize that we are assuming Mr. Kuswa’s allegations to be true for purposes of this appeal, as we must. NNSA/Albuquerque should normally make the same assumption when evaluating whether a complaint brought under Part 708 “is frivolous or without merit on its face.” To do otherwise in the present case “reaches an issue that is at the heart of this case and ends the entire proceeding.” *Mark J. Chugg*, 28 DOE ¶ 87,030 at 89,233 (2002). The complainant’s contention that he was demoted because of his protected activity deserves closer examination, and is still in dispute. “In fact, this is the very type of issue that the OHA is charged with investigating under Section 708.22 and considering through the hearing process described at Section 708.28.” *Id.* I find that the claims raised here present issues for which relief can be granted (e.g., a reversal of Mr. Kuswa’s demotion) and which are not frivolous or without merit on their face. Accordingly, I conclude that this determination by the NNSA/Albuquerque was incorrect. *Daryl J. Shadel*, 27 DOE ¶ 87,561 (2000).

III. Conclusion

As indicated by the foregoing, I find that NNSA/Albuquerque incorrectly dismissed the complaint filed by Glenn Kuswa. Accordingly, the complaint should be accepted for further consideration.

* Because we find that Mr. Kuswa has alleged *actual* disclosures that would be protected under Part 708, we need not consider Mr. Kuswa’s allegation of retaliation for “the appearance that [he] and/or staff in his department had made statements to the DOE Office of Inspector General.” Complaint at 1.

It Is Therefore Ordered That:

(1) The Appeal filed by Glenn Kuswa (Case No. TBU-0028) is hereby granted and his Part 708 complaint is hereby remanded to the National Nuclear Security Administration Service Center, Albuquerque, for further processing as set forth at 10 C.F.R. § 708.21.

(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. § 708.18(d).

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 9, 2004