

March 13, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Fredrick Abbott
Date of Filing: February 21, 2007
Case Number: TBU-0062

Fredrick Abbott (the complainant or Abbott), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, I have determined that the dismissal of the complaint should be sustained and the appeal denied.

I. Background

The complainant is an employee with Washington Savannah River Company (WSRC), which operates the DOE's Savannah River site located in Aiken, South Carolina. Pursuant to Part 708, on April 13, 2006, he filed a complaint of retaliation against WSRC with the DOE's Savannah River Operations Office. In his complaint, he describes two incidents of alleged retaliation for purported protected disclosures, one in 2004 and the other in 2006.

The 2004 Alleged Retaliation

The complainant stated that in May 2004 he made disclosures to his employer that involved violations of safety procedures, and thereafter received an unjustly low performance review. He therefore filed a grievance against his employer. According to his complaint, this matter was investigated by the WSRC employee concerns program, and thereafter he was asked what relief he would like to resolve this matter. The complainant indicates that he requested the following remedy to resolve this grievance: (1) that he be transferred to a position not directly supervised by the management involved in the disclosure matter; (2) that he be given a fair performance evaluation that correctly reflected his work; and (3) that since the original performance rating was tied to an incentive bonus, that he be given the incentive bonus that equated to his revised rating. The complainant does not believe that all

of these requests were correctly implemented, and the issue was never resolved to his satisfaction. He was dissatisfied with the job transfer that he was given. He indicates that received a "special awards" bonus of \$300, which he believes was too low to compensate him fully for his reduced performance rating. Nevertheless, he states that he decided to put this issue behind him in order to minimize the negative effect this "event" could have on his career.

The 2006 Alleged Retaliation

The complainant indicates that on January 15, 2006, he received his "Personal Assessment and Development Process" (PADP) and his "Non-exempt Evaluation Program" (NEEP) rating. He states that the PADP praised him, but the NEEP gave him only an average rating, and that WSRC management could not explain the inconsistency. Based on this purportedly improperly low NEEP rating, Abbott filed his Part 708 complaint. He believed that the low NEEP rating indicated a pattern of retaliation for the 2004 disclosures.

On February 7, 2007, the Acting Director, Office of Civil Rights, of the DOE's Savannah River Operations Office dismissed the complaint for lack of jurisdiction or other good cause. The Acting Director cited 10 C.F.R. § 708.17(c)(6), which provides in relevant part that dismissal is appropriate if "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." In this regard, the Acting Director stated that WSRC had made the following offer in settlement of the complaint: (1) to remove and destroy Pages 1 of 2, and 2 of 2 of the "Individual Non-Exempt Evaluation Program (NEEP) Scoring Form," as well as your comments of January 15, 2006, concerning the scoring, from your WSRC Personnel File; (2) to grant you an interview for the next two First Line Manager positions for which you meet the minimum qualifications and request consideration; and (3) to award you \$500 (an amount equal to that given to those ranked 1-3 on the Individual NEEP Scoring Form for the Radiological Control Inspectors (RCI) group).

According to the dismissal letter, the complainant rejected this offer and stated that he would accept nothing but his own settlement terms as outlined in an e-mail of January 8, 2007. According to the complainant, these terms are as follows: (1) to remove and destroy pages 1 of 2, and 2 of 2 of the Individual Non-Exempt Evaluation Program (NEEP) Scoring form, as well as my comments of January 15, 2006, concerning the scoring from my WSRC

personnel file; (2) to provide me with a letter signed by WSRC legal counsel stating that the NEEP evaluation was deemed retaliatory, was not representative of my performance, and was removed for cause; and (3) to provide me with a "Special Awards Program" bonus of \$3,000 (the maximum amount available under this program). In this regard, the complainant states that in the 2004 grievance proceeding described above, WSRC provided him with a "Special Awards Program" bonus of \$300, the minimum bonus under that program. The complainant contends that since WSRC failed to comply with all corrective actions it was supposed to take as a result of the 2004 grievance process, he should now receive a monetary settlement based on the maximum amount available under the "Special Awards Program."

The Acting Director concluded that the complaint should be dismissed for lack of jurisdiction, citing to 10 C.F.R. § 708.17(c)(6). The Acting Director found that the complainant had received an offer of settlement to provide a remedy that DOE considers to be equivalent to what could be provided under Part 708. On February 21, 2007, the complainant filed the instant appeal of that dismissal with the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.18.

II. Analysis

As indicated above, under Part 708, a DOE office may dismiss a whistleblower complaint for lack of jurisdiction if the employer has made a formal offer to provide the remedy requested in the 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)(6). After reviewing the record in this case, I find that the grounds for dismissal cited by the Acting Director comply with that provision. In my view, the WSRC settlement offer provides the complainant with relief that is equivalent to what he could receive under Part 708. ¹

1/ The complaint states that Abbott is seeking as relief "damages equal to ten percent of Grade 20 base pay (approximate supervisory level compensation), calculated from the time of this event to the earliest date that I am eligible for full retirement benefits." The complainant has requested relief here which he could not receive in any event under Part 708. With respect to monetary relief, Section 708.36 provides that a complainant is eligible for back pay and reasonable costs

(continued...)

As noted above, with respect to his 2006 rating, Abbott has complained that his NEEP rating was too low and that as a result he received a reduced NEEP bonus. Therefore, it appears that the relief he could be entitled to here would be removing the low NEEP rating from his personnel file, and awarding him the maximum NEEP bonus available. I will now consider whether WSRC's offer satisfies those elements.

Proposed Relief Item Number 1

Item Number 1 in both settlement offers is identical: removal of the "low" NEEP score from the complainant's personnel file. In this regard, WSRC will also remove some comments from that file. I believe that this relief is the maximum Abbott is entitled to with respect to adjustment of his personnel file, and his NEEP rating. Moreover, there is no disagreement regarding this Item. Accordingly, it merits no further consideration.

Proposed Relief Item Number 2

WSRC Relief Item Number 2 grants Abbott several managerial-level interviews. We do not believe he would necessarily be entitled to such relief in this proceeding. Therefore, this offer therefore goes beyond what WSRC would be required to provide.

Complainant's Relief Item Number 2 asks that WSRC be required to provide him with a letter signed by WSRC legal counsel stating that the NEEP evaluation was deemed retaliatory, was not representative of his performance, and was removed for cause. The complainant is not entitled to this type of relief. Relief granted under Section 708.36 does not extend to directing DOE contractors to admit to any violations of Part 708 or other rules, or sanctioning of contractors for violating Part 708. They are simply required to make a complainant whole. Accordingly, even if Abbott had prevailed in a Part 708 proceeding, an OHA hearing officer would not have granted his request to order WSRC to admit that the NEEP evaluation was deemed retaliatory, and that it was removed from the complainant's personnel file for cause.

1/ (...continued)
and expenses. The complainant's request for "damages" not tied to any specific monetary losses or expenses is simply not available under Part 708.

Proposed Relief Item Number 3

In his settlement request, the complainant asked for a \$3,000 bonus under the "Special Awards Program." As noted above, he was granted the monetary award of \$300 under the "Special Awards Program" as part of a settlement of his 2004 grievance. He now seeks to maximize that bonus as part of his 2006 Part 708 complaint. He is not entitled to do so. As a rule, a complainant may not in 2006 pursue Part 708 relief based on an alleged 2004 retaliation, since Part 708 complaints must be filed within 90 days of the date that the alleged retaliation occurred. 10 C.F.R. § 708.14(a). In this case, that time has long passed.² Moreover, as stated above, the complainant has admitted that he elected not to contest the \$300 award in 2004 by filing a Part 708 complaint, but instead decided to put that matter behind him. Therefore, we find that he is not permitted to reassert that matter at this point, and attempt to base his relief on the earlier alleged retaliation. The relief that will be considered here relates solely to the 2006 alleged retaliation.

Based on the record, I believe that Item Number 3 of the settlement offer by WSRC represented the monetary remedy that the complainant could be eligible to receive under Part 708 for the 2006 alleged retaliation: \$500, the maximum bonus given to those ranked highest under the 2006 NEEP evaluation.

I see no other relief available to the complainant under 10 C.F.R. § 708.36, based on the facts associated with the 2006 purported retaliation. Accordingly, I find that the dismissal by the Acting Director was correct, and that the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Fredrick Abbott (Case No. TBU-0062) is hereby denied.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: March 13, 2007

2/ In this case, there is no evidence that any of the exceptions to the 90 day rule set forth in Section 708.14 are applicable.