

May 10, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Charles Montano

Date of Filing: April 27, 2007

Case Number: TBU-0067

Charles Montano (the complainant), 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. The complaint was dated January 30, 2007. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant, an auditor, has been an employee of the DOE's Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico since 1978. Until June 2006, the University of California (UC) held the management and operations (M&O) contract to run LANL for the DOE. On June 1, 2006, Los Alamos National Security (LANS) LLC assumed control of the management and operations of LANL. In his complaint, the complainant claims that during the period from 1995 through approximately 2004 he made disclosures that are protected under Section 708.5. These disclosures included revelations regarding salary disparities involving women and minorities, as well as procurement improprieties and irregularities at LANL. He claims that in retaliation for these protected disclosures he has been kept in "dead-end" positions and "underutilized" at the Laboratory, because he has not been assigned to work as an auditor, as he was trained to do. He further claims that, he has been blacklisted for career openings and interviews at LANL, and has been kept in a position for which there is no advancement possibility.

In a letter of April 2, 2007, the Whistleblower Concerns Program Manager at the National Nuclear Security Administration Service Center (NNSA) (Program Manager) dismissed the complaint. There were two bases for the dismissal. First, the Program Manager noted

that Section 708.14 provides that a complaint must be filed within 90 days after the complainant has knowledge of the alleged retaliation. The Program Manger determined that the complainant's January 30, 2007 complaint was untimely because the last employment action that the complainant identified occurred when he was reassigned to his present organization in August of 2004, more than two years earlier. In her letter, the Program Manager found this to constitute a basis for dismissing the complaint as untimely. 10 C.F.R. § 708.14.

The Program Manager's April 2 letter gave as a second basis for the dismissal the fact that the complaint raised the same issues that are raised in his current Part 708 complaint in a complaint filed in the Federal District Court for the District of New Mexico. Accordingly, the Program Manager determined that the Part 708 complaint should be dismissed pursuant to Section 708.17(c), which in relevant part provides that:

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

. . .

(3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation;

. . .

On April 19, 2007, the complainant filed a "Request for Reconsideration" of that dismissal with the Program Manager. Interpreting that submission as an appeal of the dismissal, she forwarded the request to the Office of Hearings and Appeals (OHA), which is the office responsible for considering appeals of dismissals of complaints for lack of jurisdiction under Part 708. 10 C.F.R. § 708.18. Accordingly, we will consider the complainant's Request for Reconsideration as an appeal under Section 708.18, and will perform a review of the dismissal based on the record transmitted to us by the Program Manager.

II. Analysis

A. Was the Complaint Timely Filed

Section 708.17(a) provides that a complaint of retaliation may be dismissed by the Head of Field Element or EC Director for lack of

jurisdiction. Section 708.17(c)(1) provides that untimeliness is an appropriate basis for dismissal on grounds of lack of jurisdiction. However, Section 708.14(d) provides a complainant with the "opportunity to show any good reason [he] may have for not filing within that period and the [appropriate DOE official] may, in his or her discretion, accept [the] complaint for processing."

In this case, the Program Manager asked the complainant to provide a reason for the untimely filing, and in an E-mail filing dated February 12, 2007, the complainant provided his reason. Specifically, the complainant asserted that in January 2007 he concluded that his "new" employer, LANS, was retaliating against him in the same manner as his former employer UC had. In the February 12 submission, the complainant indicated that in a January 13, 2007 E-mail message that he sent to a LANS manager, he inquired about whether he had been selected for a position for which he had applied. His message further indicates "I'm more convinced than ever that I'm in a dead end situation, and for this reason am hoping more than ever to return to the audit arena." Thus, he contends that the date on which he became aware of the retaliation was January 18, 2007. Since he filed his complaint of retaliation on January 30, he believes the complaint was submitted well within the 90-day period required by Section 708.14(a). In her dismissal letter, the Program Manager found that the January 18 E-mail did not set forth any actual retaliation, and was simply an ongoing discussion of the complainant's Individual Performance Objectives (IPO).

After reviewing the entire record on this issue, I find that the Program Manager's determination was correct. As an initial matter, the January 18 E-mail certainly does not set forth any new retaliation. It simply reflects the complainant's ongoing concern, which he has had since approximately 2003-2004, that his career has been "stifled."

The complainant also indicates that he waited to raise this complaint against LANS because he was concerned that he might be considered "unreasonable by not giving LANS sufficient time to fix the problem" he had already raised in April of 2006.

A Part 708 complainant is not entitled to delay filing his complaint beyond the 90-day filing period in order to assure himself that his employer has had appropriate time to "fix" the problem. Moreover, as the complainant states, the LANS managers include many of the same managers in place prior to the LANS transition. Therefore, when LANS took over from UC in June 2006,

the complainant had no reason to believe that the "career-stifling retaliations" he complains of would cease. In fact, the retaliations the complainant raises are simply part of the ongoing purported "career-stifling" that he has alleged has been in existence since 2003-2004.¹ In sum, I find that the complainant improperly delayed filing his Part 708 complaint and has failed to provide any good reason for this delay.

B. Is the Part 708 Complaint Precluded Because of the Complaint Filed With the New Mexico Federal District Court

The second basis on which the Program Manager dismissed the instant Part 708 complaint was that the complainant had previously filed a court complaint based on "the same or substantially the same issues." Under Part 708, dismissal is appropriate if a complainant filed a "complaint under State or other applicable law with respect to the same facts as alleged under this regulation." 10 C.F.R. §708.17(c)(3). See, *Gary S. Vander Boegh*, 29 DOE ¶ 87,010 (2006). As discussed below, I find that the Program Manager's determination on this issue was correct.

In October 2005, the complainant filed a complaint with the Federal District Court for the District of New Mexico. *Hook v. The Regents of the University of California*, No. CIV.05-356 (D. N.M. March 6, 2007)[hereinafter *Hook*]. The claim raised by the complainant was that due to his ongoing protected disclosures, UC continued to retaliate against him in his work assignments, pay, and performance evaluations, in violation of the California Whistleblower Protection Act. Cal. Gov't Code Ann. §§ 8547-8547.12. UC counterclaimed that the complainant had breached a release and settlement agreement with UC by filing the complaint with the district court.

1/ The complainant alludes to one position for which he allegedly applied but was not selected. He states that he learned on December 13, 2006 that he was not selected for that position. He seems to believe that this "non-selection" constitutes a new and different retaliation in the context of this proceeding. I do not agree. I find that this unsupported claim in and of itself does not constitute any new retaliation in the scheme of this complainant's overall claims of retaliation. It falls within the "continuing" stream of claims of "career-stifling." In this regard, mere failure to be awarded a new position, in the context of this case, does not constitute a new retaliation.

As the court noted in its dismissal of the complaint, in 1996, the complainant had filed a whistleblower complaint against LANL with the DOE (under Part 708). According to the court, the protected disclosures involved the complainant's revelations about mismanagement of LANL by UC, including improper application of costs, and UC's failure to comply with Equal Employment Opportunity requirements. The complainant alleged, among other retaliations, that UC denied him opportunities for advancement within LANL. The court noted that on May 11, 2000, the complainant and UC reached a settlement of this matter.² The court rejected the complainant's claims that he had suffered new retaliations for new protected disclosures taking place after the settlement date. The court found that the claims set forth in his complaint "arise from, result from, and relate to Defendants' pre-Release actions. . . . Stated another way, Montano's Amended Complaint alleges that pre-Release events motivated the Defendants' alleged post-Release retaliation; therefore, [the] post-Release claims are necessarily a 'continuation of the effects of' pre-Release events and are barred by Paragraph 12 of the Release." *Hook*, slip op. at 11. ³

I find that the protected disclosures and alleged retaliations considered in *Hook* are the very same ones that the complainant attempts to resurrect in the instant case. I reject the complainant's attempt to circumvent the clear prohibition of Section 708.17, which precludes such an action, by claiming a new M&O contractor, LANS, is now the offending employer. The core facts, as I see them, are the same in this case and the New Mexico Federal District Court proceeding: in the 1990s, the complainant made protected disclosures regarding improper cost accounting and

2/ This settlement was reached in the context of an earlier Complaint of Retaliation filed by Montano under Part 708. Based on the settlement with UC, the complainant's previous Part 708 complaint was dismissed. Charles Montano, Case No. VWA-0042, dismissed January 27, 2000.

3/ I am not reviewing here the merits of the court's determination that the issues in the complaint before it are barred by Paragraph 12 of the release. The scope of my decision pertains solely to whether the complainant filed a complaint under "State or other applicable law" with respect to the same facts that are at issue here. As discussed in the text, I find that the issues in the Part 708 complaint and the New Mexico Federal District Court complaint are virtually identical.

improper pay disparities at LANL and, as a result, was kept in a dead-end job. The fact that a new M&O contractor may have stepped in at LANL in the interim does not change these core facts in any meaningful way so as to permit the complainant to avoid the prohibition stated Section 708.17. The complainant has had a determination on the merits of his case by a federal district court with respect to the same issues that he raises here under Part 708. He is therefore precluded from pursuing this matter further with the DOE. 10 C.F.R. § 708.15(a)(1).

III. Conclusion

Accordingly, I find that the complainant has not shown that good cause exists for his failure to file his Part 708 complaint in a timely manner. I further find that his complaint should be dismissed because he has filed a complaint under State or other applicable law with respect to the same facts as alleged in the instant Part 708 complaint, and that the complaint filed in the New Mexico Federal District Court was not dismissed for lack of jurisdiction. 10 C.F.R. §§708.15(a)(1), .17. Accordingly, the Program Manager's determination was correct and the instant Part 708 complaint should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Charles Montano (Case No. TBU-0067) is hereby denied.

(2) This 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. § 708.19.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: May 10, 2007