

July 25, 2008

**DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS**

*Appeal*

Name of Case: Donald Searle

Date of Filing: July 8, 2008

Case Number: TBU-0079

Donald E. Searle (Searle or the complainant) appeals the dismissal of his complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. As explained below, the dismissal of the complaint should be affirmed.

**I. Background\***

The complainant is an employee of UT-Batelle, LLC (UT-Batelle), the contractor responsible for operating the DOE's Oak Ridge National Laboratory (ORNL). He claimed that in the spring and summer of 2005 he made protected disclosures to his supervisor regarding beryllium handling at his work site. He further indicated that in September 2005 that same supervisor informed him that he was to be laid off effective February 28, 2006. He was rehired by UT-Batelle on May 15, 2006, although at a reduced salary and pay grade.

On January 4, 2007, Searle filed a complaint of retaliation under Part 708 with the EC Manager (Complaint I). In Complaint I, Searle claimed that the February 28, 2006, termination and the May 15, 2006, rehiring at a lower pay level were retaliations for the protected disclosures that he made to his superiors concerning the beryllium handling. On April 9, 2007, the EC Manager determined that jurisdiction of Complaint I should be accepted, and it was forwarded to the Office of Hearings and Appeals (OHA) for investigation. On April 11, 2007, the Office of Hearings and Appeals received Complaint I. Pursuant to 10 C.F.R. § 708.22, an OHA investigator was appointed.

After reviewing the record in this matter, on April 17, 2007, the OHA investigator determined that Complaint I and the accompanying request for investigation should be dismissed for failure to file

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\*The portion of this section dealing with the history Searle's various Part 708 complaints from January 2007 to May 2007 is taken mostly *verbatim* from a previous Part 708 jurisdictional appeal decision concerning Searle, *Donald E. Searle*, 29 DOE ¶ 87,025 (May 2, 2007) (*Searle I*).

in a timely manner pursuant to 10 C.F.R. § 708.14(a) (90-day deadline for filing complaint from the date of the alleged retaliation).

Searle appealed the investigator's determination that Complaint I should be dismissed for failure to file in a timely manner. On May 16, 2007, the Acting Director of OHA issued a decision regarding Searle's appeal. In *Searle I*, after reviewing Searle's reasons for the late filing of Complaint I, the Acting Director of OHA found that Searle had not "provided a single substantial reason why he could not [have] file[d] in a timely manner." *Searle I* at 29 DOE at 89,132. The Acting Director consequently dismissed Searle's jurisdictional appeal.

On April 7, 2008, Searle filed another complaint of retaliation under Part 708 with the EC Manager. April 7, 2008, Employee Concerns Complaint filed by Donald Searle (Complaint II). His complaint began by asserting that, on receiving his "salary increase card" on January 25, 2008, he "remains in the extreme low end of a pay scale which no longer reflects my job title." Complaint II at 2. Complaint II then details the circumstances of his rehiring in May 2006 at a lower salary and the increasing responsibilities he eventually began to be assigned. His complaint then asserted that he had only been given a 15 percent pay raise in January 2007, thus making his salary only 75 percent of what it had been one year earlier before his discharge. He then relates in Complaint II that during 2007 he began to perform different employment responsibilities from those for which he had been hired and that sometime in 2007 his supervisor "in recognition of his accomplishments and value" reclassified his job title as "Design Engineer." Nevertheless, he asserts that for pay purposes he is still classified as a "Facility Engineer" and is still "well below the midpoint in that pay scale." Complaint II at 2.

Searle alleges in Complaint II that "my salary languishes at the bottom end of the pay scale and at a level less than I was making over two years ago" and that he considers this an act of reprisal for having filed Complaint I. Complaint II at 2. As additional evidence of his employer's animus towards him, he also alleges that, despite having spent considerable time as a community volunteer, he has never been selected by UT-Battelle to be honored, as others have been, for his volunteer efforts.

On June 5, 2008, the EC Manager informed Searle that DOE was dismissing Complaint II because it too was also untimely. The EC Manager believed that the gravamen of Complaint II concerned Searle's "salary disparity" originating from the date when UT-Battelle rehired Searle in May 2006. The EC Manager found that Searle knew of this "salary disparity" in May 2006, when he accepted the new UT-Battelle job and thus, Searle's Complaint II, filed on April 7, 2008, was filed outside the 90-day deadline as provided in 10 C.F.R. § 708.14(a).

## **II. Analysis**

In a submission dated June 30, 2008, Searle appealed the EC Manager's determination dismissing Complaint II. In this submission, Searle argues, in effect, that his substandard pay is a continuing reprisal for his filing Complaint I. Complaint II specifically referenced his January 25, 2008, salary increase card that provided for a less than adequate raise that did not place him above the low end

of his position's pay scale, despite his increasing professional responsibilities in 2007. Because he did not get notice of his new salary until January 25, 2008, he alleges that his filing of Complaint II on April 7, 2008, falls within the 90-day deadline. Further, he alleges that he did not discover until a April 2008 meeting with the UT-Battelle Employee Concern Officer that his salary was not weighted against the collective sum of all other Engineer salaries at UT-Battelle but only with the other seven members of his peer group. Searle alleges that this fact is additional information indicating that his salary has been "unduly suppressed." Appeal Letter from Donald Searle to Poli Marmolejos, Director, OHA (June 30, 2008) at 2. While Searle specifically does not allege that his initial salary on rehire was retaliatory, he states that, given the facts alleged in his complaint, his January 25, 2008, salary increase should have raised his salary to a level reflecting his current increased job responsibilities. He argues that he has presented sufficient information to mandate that OHA conduct a whistleblower investigation to determine if there is a possibility that his less than adequate raise was in retaliation for previously filing a whistleblower complaint.

We concur with the EC manager's overall determination that Complaint II should be dismissed. However, as discussed below, we have adopted a different rationale as the basis for this dismissal. Section 708.17(b)(4) of 10 C.F.R. provides for dismissal where a complaint is frivolous or without merit on its face. In the present case, Searle claims that he has been subject to retaliation for participating in a Part 708 proceeding. Such retaliation is prohibited under 10 C.F.R. § 708.5(b). For a complainant to sustain a whistleblower complaint, he or she must prove by a preponderance of the evidence that the protected activity was a contributing factor in the alleged retaliatory act. 10 C.F.R. § 708.29. In the substantial majority of Part 708 cases, this contributing factor showing is made through establishing a time proximity between the protected activity and the alleged retaliation. *See, e.g., Curtis Hall*, 30 DOE ¶ 87,001 (2008). In the present case, the period of time from the date when Searle filed Complaint I (January 2007) to the date of the alleged retaliation described in Complaint II (January 2008) is approximately 12 months. This is an unusually extended period of time. Searle has not made even a perfunctory showing of a contributing factor here. *See Elaine M. Blakely*, 28 DOE ¶ 87,039 (2003) (no connection found between a protected activity and alleged retaliation 13 months later). Moreover, in this case, we note that UT-Battelle voluntarily rehired Searle after he made the protected disclosure referenced in Complaint I. Consequently, we find that Searle's complaint is without merit on its face and should be dismissed.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Donald E. Searle (Case No. TBU-0079) is hereby denied.

(2) This decision is the final decision of the Department of Energy unless, by the 30th day after receiving the appeal decision, a party files a petition for Secretarial review.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: July 25, 2008