

January 26, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Decision of the Director

Name of Petitioner: Clarrisa V. Alvarez

Date of Filing: January 5, 2009

Case Number: TBU-0084

Clarissa Alvarez, an employee of NetGain Corporation (NetGain) in Albuquerque, New Mexico, appeals the dismissal of her whistleblower complaint (the Complaint) filed under 10 C.F.R. Part 708, the DOE Contractor Employee Protection Program. On December 1, 2008, the Whistleblower Program Manager at the DOE's National Nuclear Security Administration Service Center, Albuquerque, New Mexico (NNSA/Albuquerque) dismissed the Complaint. As explained below, dismissal of the Complaint is reversed, and the matter is remanded 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.

Ms. Alvarez was employed as a "Personnel Security Specialist II" by NetGain at the NNSA Service Center in Albuquerque. After being terminated, Ms. Alvarez filed a Part 708 complaint with NNSA/Albuquerque, alleging that she had been terminated in retaliation for raising concerns to NetGain Management about the inappropriate dissemination of personal information from her Personnel Security File. Ms. Alvarez also alleges that her termination occurred in retribution for reporting "harassment" by her co-workers and supervisors.

On December 1, 2008, the Whistleblower Program Manager at NNSA/Albuquerque dismissed the Complaint. Letter from Michelle Rodriguez de Varela, Whistleblower Program Manager, NNSA/Albuquerque, to Clarissa V. Alvarez (“Dismissal Letter”). The Dismissal Letter states, in pertinent part:

I find that your complaint fails to demonstrate that you were retaliated against for disclosing a ‘protected activity’ under 10 C.F.R. § 708.5 to a DOE Official, Member of Congress, a responsible government oversight official. The facts alleged do not rise to the level of (1) a substantial violation of law, rule or regulation, (2) a substantial and specific danger to employees or public health or safety, or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.

There is not any evidence to support that NetGain violated disclosure of sensitive information. Information in the Personnel Security files are only released with those with a need to know and the files and access is also controlled with a need to know. There is not any other evidence presented to support any other violation of any laws covered by 10 C.F.R. Part 708.

None of these allegations you allege constitute a protected activity as described in §708.5 and therefore your complaint is dismissed for lack of jurisdiction per §708.17.

Dismissal Letter at 1.

In her Appeal, Ms. Alvarez contends that the Complaint was wrongly dismissed and requests an extension of time in which to supplement her appeal. Appeal at 1-3.

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).

As an initial matter, the Whistleblower Program Manager does not specify which, if any, of the reasons listed in section 708.17(c) provides the basis for dismissing the Complaint. Instead, the Dismissal Letter appears to address the ultimate validity of Ms. Alvarez's allegations rather than considering whether Ms. Alvarez "reasonably believed" these allegations constituted protected activity under Part 708.

Part 708 protects a DOE contractor employee from retaliation for, among other things, disclosing to her "employer . . . , information that [she] reasonably and in good faith believe reveals . . . a substantial violation of a law, rule, or regulation." 10 C.F.R. § 708.5(a)(3). At the heart of Ms. Alvarez's Complaint are her contentions that her termination resulted from her alleging, in a series of electronic mail messages to Thorne A. Davis, Program Administrator, NetGain Corporation, that she was being harassed by NetGain employees and that this alleged harassment resulted in part from the inappropriate disclosure of derogatory information contained in her Personnel Security File by NetGain employees who had participated in the adjudication of her DOE security clearance.

After carefully reviewing the subject Complaint, I do not find it to be frivolous or without merit on its face. It is possible with further factual development that Ms. Alvarez might meet her evidentiary burden of showing that her allegations constituted protected disclosures under Part 708 as "a substantial violation of a law, rule or regulation." These kinds of matters are the very type of issues that OHA is charged with investigating under 10 C.F.R. § 708.22 and considering through the hearing process described in 10 C.F.R. § 708.28. Accordingly, I conclude that the Whistleblower Program Manager erred in dismissing the Complaint. For this reason, I reverse that dismissal and remand the Complaint for further appropriate processing.¹

III. Conclusion

As indicated by the foregoing, I find that NNSA/Albuquerque incorrectly dismissed the complaint filed by Ms. Alvarez. Accordingly, I direct that the Complaint be accepted for further consideration.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of a petition for Secretarial review or upon

¹ Since I have found in Ms. Alvarez's favor on the existing record, her request for an extension of time in which to supplement the record is denied.

conclusion of an unsuccessful petition for Secretarial review, the decision and order shall be implemented by the affected NNSA element, official or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1) The Appeal filed by Clarissa V. Alvarez (Case No. TBU-0084) is hereby granted and her 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. Part 708.

(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).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 26, 2009