December 6, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Greta Kathy Congable

Date of Filing: November 8, 2010

Case Number: TBU-0110

Greta Kathy Congable (the Appellant) appeals the dismissal of her complaint of retaliation and request for investigation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.[1] As explained below, the Appeal should be granted in part and remanded for further processing.

I. Background

The Appellant is an employee of Sandia Corporation (Sandia)[2], the contractor responsible for operating the DOE's Sandia National Laboratory (SNL). On September 14, 2010, the Appellant filed a complaint of retaliation under Part 708 with the National Nuclear Security Administration Service Center (NNSA/SC) in Albuquerque, New Mexico. In her complaint, the Appellant asserts that she made the following protected disclosures:

(1) In September 2008 she reported the "loss of control" of Personal Identification Information (PII) contained in collaborative share folders in SNL's internal computer network to her management and to the Sandia legal department (Disclosure 1);

(2) She provided testimony on behalf of two co-workers, Pat O'Neill and Mark Ludwig, who had raised concerns regarding possible misconduct in a formal ethics investigation conducted by Sandia/Lockheed Martin (Disclosure 2).[3]

Because of these alleged protected disclosures, the Appellant further asserted that effective on June 18, 2010, she was transferred from her position as an administrative assistant in the Corporate Investigations Department of Sandia to another department.

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[1] OHA reviews jurisdictional appeals under Part 708 based upon the pleadings and other information submitted by the Appellant. *See* 10 C.F.R. § 708.18(b) (appeal must include a copy of the notice of dismissal, and state the reasons why you [the Appellant] think the dismissal was erroneous).

[2] Sandia is a wholly owned subsidiary of Lockheed Martin.

[3] Neither the Appellant nor the NNSA/SC's Whistleblower Program Manager (WP Manager) specified what were the exact nature of the ethics investigation disclosures.

In a letter dated October 27, 2010, the WP Manager dismissed the Appellant's Part 708 complaint. With regard to Disclosure 1, the WP Manager found that there was no causal connection between the Appellant's disclosure in September 2008 and her subsequent transfer in 2010. Specifically, the WP Manager found that the significant amount of time that elapsed between the two events ("a lack of temporal proximity") led to the conclusion that the two events were unrelated. Accordingly, she found that, to the extent that the complaint was based on Disclosure 1, it should be dismissed.

With regard to Disclosure 2, the WP Manager again found that there was no causal connection between the Appellant's participation in the ethics investigation and the Appellant's 2010 lateral transfer.[4] In making this finding, the WP Manager cited the Lockheed Martin investigator's finding that no misconduct could be substantiated. Thus, according to the WP Manager, none of the disclosures made during the investigation could be considered a "protected disclosure" as defined by Part 708. The WP Manager went on to state that there was no other basis to conclude that the Appellant's lateral transfer was based upon any reason other than the recommendation by the Lockheed Martin investigator that the Appellant be transferred because her relationship with her manager was "irreparably broken." Accordingly, the WP Manager found that, to the extent that the complaint was based on Disclosure 2, it should also be dismissed. [5]

II. Analysis

A. Disclosure 1

In her appeal, the Appellant argues that the WP Manager was incorrect in finding that there was insufficient temporal proximity between her disclosures in September 2008 and her transfer in June 2010 to permit an inference of a causal connection between the two events.

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, the Appellant claims that she has been subjected to retaliation for making a protected disclosure (Disclosure 1). Such retaliation is prohibited under 10 C.F.R. § 708.5(a). 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 present case, the Appellant has alleged no basis for us to conclude that her September 2008 disclosure was a contributing factor in her June 2010 transfer.

A relevant consideration is time proximity between the protected activity and the alleged retaliation. *See, e.g., Curtis Hall*, Case No. TBA-0042 (February 13, 2008).[6] In the present case,

[4] None of the material available to us indicates when the Appellant participated in the ethics investigation.

[5] The WP Manager also justified dismissal of the Appellant's complaint based upon the fact that the Appellant had requested retirement from her position and thus her complaint was rendered moot. The Appellant has since withdrawn her retirement request and thus her complaint cannot now be considered moot.

[6] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case

the period of time from the date when the Appellant made her disclosure about the loss of control of PII material, September 2008, to the date of the alleged retaliation – her June 2010 transfer - is approximately 20 months. This is an unusually extended period of time which does not support an inference that a causal connection exists between the September 2008 disclosure and the Appellant's transfer in June 2010. *See Donald Searle,* Case No. TBU-0079 (July 25, 2008) (no connection found between a protected activity and alleged retaliation 12 months later).

In her Appeal, the Appellant directs our attention to *Sue Rice Gossett*, Case No. VBZ-0062 (May 8, 2002) (*Gossett*), and *Russell P. Marler*, Case No. VWA-0024 (August 31, 1998) (*Marler*), for the proposition that a finding of temporal proximity may be found between protected conduct and retaliation occurring as much as a one and one-half years and four years apart, respectively. In *Gossett*, however, the whistleblower made a series of disclosures during her one and one-half year tenure with her employer and had a series of reassignments leading to her termination. Thus, unlike in the present case, there was not a one and one-half year gap between the protected activity and the alleged retaliation. With regard to *Marler,* we note that the decision was an initial agency decision issued by a hearing officer. Subsequent appellate decisions issued by various Directors of OHA, as cited above, have declined to follow the finding made in *Marler*. Consequently, we find reliance on *Gossett* and *Marler* to be unpersuasive.

Based on the foregoing, we affirm the WP Manager's finding that the September 2008 disclosure (Disclosure 1), as a matter of law, cannot be considered a contributing factor to the Individual's subsequent transfer in June 2010. Accordingly, to the extent that the Appellant's Part 708 complaint is based upon this disclosure, the WP Manager correctly determined that the complaint should be dismissed.

B. Disclosure 2

In her October 27, 2010, determination letter, the WP Manager found that there was no causal connection between Disclosure 2 and the Appellant's subsequent transfer. This finding was based upon the WP Manager's reasoning that the Lockheed Martin investigation found that the allegation of misconduct that was the subject of the investigation "could not be substantiated" and therefore "any disclosures [the Appellant] made during the investigation [were] not 'protected disclosures' within the meaning of 10 C.F.R. § 708.5(a)(1)-(3)."[7] Letter from Michelle

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number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[7] We were not presented a copy of the investigation or any information related to the nature of the disclosures the Appellant made during the ethics investigation. Nonetheless, in reviewing cases such as this we consider all materials in the light most favorable to the party opposing the dismissal. *See Billie Joe Baptist*, Case No. TBZ-0080, *slip op.* at 5 n. 13 (May 7, 2009) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). Consequently, we will consider that, for the sole purpose of deciding this appeal, the substance of the Appellant's alleged disclosures in the ethics investigation is of a nature that would meet the requirements for a protected disclosure pursuant to 10 C.F.R. § 708.5(a) (A Part 708 protected disclosure must reference: a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority). In this regard, we note that the WP Manager did not make a finding that the substance of the Appellant's failed to meet the requirements of section 708.5(a). If this matter proceeds to

Rodriguez de Varela, Whistleblower Program Manager, NNSA, to Greta Kathy Congable (October 27, 2010). We disagree.

Section 708.5(a) of Part 708 defines the act of making a "protected disclosure" as follows:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
> (1) A substantial violation of a law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority;

As subsection (a) reveals, the only qualification for a disclosure to be protected under Part 708 is that the whistleblower "*reasonably believes*" that the substance of the disclosure reveals a substantial violation of a law, rule or regulation; a substantial and specific danger to employees, public health or safety; or fraud, gross mismanagement, gross waste of funds or abuse of authority. 10 C.F.R. § 708.5(a). The ultimate truth of protected disclosure is immaterial with regard to Part 708 if the whistleblower reasonably believed that his or her disclosure referenced one of the concerns listed in section 708.5(a). Consequently, the findings of the Lockheed Martin investigation are not determinative on the issue of whether the Appellant's disclosures in the investigation are protected under Part 708. We thus remand this matter to the WP Manager for further processing of the Appellant's complaint with regard to Disclosure 2 alone.

This decision and order has been reviewed by the NNSA, which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Greta Kathy Congable (Case No. TBU-0110) is hereby granted in part 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 as set forth above.

(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).

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investigation, the OHA investigator can examine the content of these alleged disclosures to make a factual finding regarding the sufficiency of these disclosures to support a Part 708 claim.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 6, 2010