

March 3, 2011

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

Appeal

Name of Case: Gennady Ozeryansky

Date of Filing: January 27, 2011

Case Number: TBU-0113

Gennady Ozeryansky (hereinafter referred to as 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 Appeal should be dismissed without prejudice and the matter should be remanded for further processing.

I. Background

During the period 2006 until 2009, the complainant was an employee of SupraMagnetics, Inc. (SupraMagnetics). SupraMagnetics designs and develops semiconductors for use in particle acceleration applications. The complainant states that during the period of his employment, SupraMagnetics received grants from the DOE's Small Business Innovation Research (SBIR) funding stream. The complainant contends that this funding brings SupraMagnetics under the jurisdiction of 10 C.F.R. Part 708. In March 2008, SupraMagnetics gave the complainant a written warning not to make unauthorized contact with DOE officials. On April 16, 2009, the complainant e-mailed DOE contracting officials and expressed concerns that SupraMagnetics had not provided him with information accounting for DOE funds connected with a failed project that the complainant halted in April 2008. On June 2, 2009, SupraMagnetics discharged the complainant for contacting the DOE on this matter.

On April 26, 2010, the complainant contacted the DOE's Employee Concerns Program Manager (the ECP Manager) and made a complaint of retaliation under Part 708 (the Part 708 Complaint). The complainant alleges that due to his protected disclosures, he was terminated from his employment with SupraMagnetics. He seeks relief from the DOE for this termination.

On December 29, 2010, the ECP Manager informed the complainant that the DOE was dismissing his Part 708 Complaint because it was untimely. In this regard, the ECP Manager finds that 10 C.F.R. § 708.14(a) establishes a filing deadline of 90 days from the date that the complainant knew or reasonably should have known of the alleged retaliation. The ECP Manager finds that the period of nine months from the complainant's termination by SupraMagnetics until his filing of a Part 708 Complaint surpasses this required time frame. The ECP Manager also finds that 10 C.F.R. § 708.15 (c) does not permit the processing of a Part 708 complaint if, with respect to the same facts, a complainant chose to pursue a remedy under state or other applicable law. In this regard, the ECP Manager finds that the complainant pursued his termination case with the State of Connecticut Employment Security Appeals Division Board of Review, and subsequently received a decision on the merits of his case.

II. Analysis

In a submission dated January 12, 2011, and received by the DOE on January 27, 2011, the complainant appealed the ECP Manager's determination dismissing his Part 708 Complaint (the Appeal). In the Appeal, the complainant contends that his termination case before the State of Connecticut and his delay in filing his Part 708 Complaint should not preclude the DOE from accepting jurisdiction of his complaint.

Ordinarily, I would conduct an analysis of the substance of the ECP Manager's findings and the information and arguments provided in the complainant's Appeal, and would issue a determination based on that analysis. However, information contained in SupraMagnetics' response to the Appeal and in the complainant's reply to that response leads me to conclude that it would be inappropriate for me to proceed. In its response, SupraMagnetics contends that during the time period relevant to this proceeding, it was not a DOE subcontractor subject to Part 708 or the DOE's notification provisions for employee concerns under DOE Order 442.1A. The complainant contends that SupraMagnetics was a DOE subcontractor, because it received SBIR grants from the DOE, and because it also supplied materials to the DOE's Brookhaven National Laboratory. I find that resolving this preliminary jurisdictional issue will require further investigation by the DOE. Accordingly, I find that it is premature to consider the issues raised by the ECP Manager in his December 29, 2010, letter and in the complainant's Appeal. For that reason, this matter will be remanded to the ECP Manager for further processing to address the issue whether SupraMagnetics was a "subcontractor" within the meaning of Part 708 at the time that the alleged protected activity and the alleged retaliation took place. The complainant's Appeal is dismissed without prejudice to refiling after the ECP Manager has issued a revised determination.

IT IS THEREFORE ORDERED THAT:

The Appeal filed by Gennady Ozeryansky (Case No. TBU-0113) is hereby dismissed without prejudice and his Part 708 complaint is hereby remanded to the Department of Energy's Employee Concerns Program Manager, for further processing as set forth in this Decision and Order.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 3, 2011