Case No. VBA-0044

April 10, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Rosie L. Beckham

Date of Filing: December 28, 1999

Case Number: VBA-0044

This Decision considers an Appeal of an Initial Agency Decision issued on December 13, 1999, involving a complaint filed by Rosie L. Beckham filed against her former employer, KENROB and Associates, Inc. (KENROB) under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. Rosie L. Beckham, 27 DOE ¶ 87,543 (1999). In her complaint, Ms. Beckham alleges that KENROB, among other things, terminated her employment after she questioned the legality of the company's procurement practices. A Hearing Officer denied relief to Ms. Beckham, finding in the Initial Agency Decision that she had failed to make any disclosures protected under the Part 708 regulations. As set forth in this Decision, I have determined that Ms. Beckham's Appeal must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

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 purpose is 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. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation, an independent fact- finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Factual Background

At all times relevant to Ms. Beckham's complaint, KENROB was a DOE subcontractor that provided technical support services to the agency's Office of Civilian Radioactive Waste Management (OCRWM). For the nine month period May 1995 through February 1996, Ms. Beckham worked as a Contracts Specialist at KENROB where she was responsible for procuring computer equipment, system software, and computer-related training from subcontractors for use by OCRWM. In her position, Ms. Beckman

located vendors to provide services or items for OCRWM's use either through competitive solicitations or sole source awards. She then prepared all the documentation necessary for the DOE's review and approval,(1) including purchase requisitions, source selection justification statements, and abstract of offers (cumulatively referred to as "Purchasing Documentation"). See Letter from Maurice Mountain, Counsel for Ms. Beckham, to the Hearing Officer (July 14, 1999). When the DOE approved the procurement, Ms. Beckham completed the requisite purchase order to effectuate the transaction. Id.

Most, if not all, the procurement-related documents Ms. Beckham prepared were "standard" forms containing pre-printed language referring to the Federal Acquisition Regulations (FAR). When Ms. Beckham prepared and forwarded the Purchasing Documentation to the DOE officials for their review and approval, she believed she was certifying that she had followed the applicable instructions or procedures in selecting a vendor as dictated by the FAR. Tr. at 29-30.

In the late summer or early fall of 1995, Ms. Beckham shared with her immediate supervisor articles from the National Contract Management Journal that discussed the government-wide implementation of the Federal Acquisition Streamlining Act of 1994 (FASA).(2) Tr. at 34, 138. Sometime thereafter, Ms. Beckham reviewed Federal Acquisition Circular Number 90- 32 (September 18, 1995), a circular that described some of the changes to the FAR resulting from the enactment of the FASA. Circular Number 90-32 contained the statement that FASA was applicable to solicitations on or after December 1, 1995, but noted that the changes did not apply to micro-procurements, i.e., procurements under $2,500. Exhibit 28.

After reviewing Circular 90-32, Ms. Beckham repeatedly voiced concern to her immediate supervisor that KENROB's standard Purchasing Documentation might not comply with the law since KENROB had not taken affirmative steps to conform its documents to the new FASA requirements. Ms. Beckham was concerned that (1) she could not, in good faith, prepare and transmit documents for DOE's approval without knowing whether that documentation complied with the FAR and (2) she might violate the law because she did not know how the new procurement law applied to the work she was doing. Tr. at 47, 52-53.

In the December 1995 to January 1996 time frame, Ms. Beckham issued three purchase orders for micro-procurements (i.e. purchases less than $2500) using the same standard forms she had used before December 1, 1995. Ms. Beckham testified that she believed her use of the outdated forms vitiated the certification she made to the DOE that the Purchasing Documentation complied with the FAR. Tr. at 69-70.

In early January 1996, KENROB terminated Ms. Beckham for "blatant insubordination and disregard" for her supervisor. KENROB conditionally reinstated Ms. Beckham on January 10, 1996, contingent upon her adhering to a list of performance criteria. In addition, KENROB expanded Ms. Beckham's job responsibilities to include financial work.

On January 26 and 30, 1996, Ms. Beckham sent electronic mail messages to her immediate supervisor requesting guidance about the impact, if any, the FASA would have on six upcoming procurements she would be processing. Exhibits 26 and 27. On February 2, 1996, Ms. Beckham's supervisors met with her and expressed their dissatisfaction with her preparation of financial reports and her computer skills. At that meeting, Ms. Beckham's supervisor ordered her to cancel her attendance at a training seminar focusing on the FASA. Ms. Beckham responded that she believed FASA applied to KENROB's procurements after December 1, 1995, and that she had prepared three purchase orders since that time without knowing whether the documentation complied with the FASA regulations.

On February 9, 1996, Ms. Beckham's immediate supervisor asked the KENROB Project Manager whether KENROB had received any guidance from the DOE regarding how or whether the FASA changes affected KENROB's procurement activities under its contract with the DOE. Exhibit 29. The KENROB Site Manager contacted the cognizant DOE procurement official who, in turn, advised that the FASA-mandated changes did not apply to KENROB. The DOE procurement official further informed KENROB that it

should continue “doing business as usual” without reference to the new FAR requirements until DOE’s Policy Office communicated further information to KENROB. Exhibits 8 and 29. KENROB relayed this information to Ms. Beckham on February 9, 1996. Exhibit 29.

On February 23, 1996, KENROB terminated Ms. Beckham, effective March 1, 1996, citing poor performance of her financial reporting duties. Exhibit 22.

C. Procedural Background

1. Ms. Beckham’s Part 708 Complaint and the Investigative Report on the Complaint

Ms. Beckham filed her Part 708 complaint on March 27, 1996, with the DOE’s Office of Employee Contractor Protection (OCEP), the office that had investigatory jurisdiction over whistleblower complaints at the time.(3) In her complaint, Ms. Beckham alleged that KENROB denied her training opportunities and terminated her employ because she raised concerns that KENROB might not be complying with federal procurement law in its contracting activities.

The IG investigated Ms. Beckham’s complaint and issued a report on April 13, 1999 in which it concluded that Ms. Beckham had met her evidentiary burden of proving that she had made protected disclosures regarding KENROB’s possible violation of federal procurement law. The IG’s Office found, however, that the protected disclosures were not contributing factors in KENROB’s decision to deny her training or and to terminate her. Accordingly, the IG recommended that Ms. Beckham’s request for relief be denied.

2. The Hearing on Ms. Beckham’s Complaint and the Initial Agency Decision

Ms. Beckham requested a hearing on her complaint, and on April 30, 1999, the Director of the Office of Hearings and Appeals (OHA) appointed a Hearing Officer. Prior to the hearing, the Hearing Officer offered her preliminary assessment that Ms. Beckham had not made a protected disclosure. For this reason, the Hearing Officer decided to limit the hearing to one issue, i.e., whether Ms. Beckham had made a protected disclosure cognizable under 10 C.F.R. Part 708. During a pre- hearing telephone conference, the Hearing Officer specifically advised Ms. Beckham that she would be expected to testify at the hearing about her beliefs regarding the legality of the three procurements she had issued after December 1, 1995. On July 22, 1999, the OHA Hearing Officer conducted a hearing in this matter. Ms. Beckham was the only witness that testified at the hearing. Following the hearing, the Hearing Officer allowed the parties to file post-hearing briefs. The Hearing Officer issued an Initial Agency Decision that addressed the sole issue she had designated for hearing.

In the Initial Agency Decision, the Hearing Officer concluded that the disclosures Ms. Beckham made regarding her belief that the FASA applied to KENROB’s procurements did not rise to the level of a “protected disclosure” under Part 708. 27 DOE at 89,220. The Hearing Officer held that Ms. Beckham’s disclosures involve, at most, insignificant violations of law. Id. at 89,219. Moreover, she explained that the three procurements Ms. Beckham issued after December 1, 1995 all involved de minimus amounts. Id. Further, she held that Ms. Beckham’s uncertainty whether the three procurements at issue complied with the FASA is not a disclosure of a “significant” violation of the law under 10 C.F.R. § 708.5(a)(1). Id.

The Hearing Officer also questioned whether Ms. Beckham had a reasonable belief that KENROB was substantially violating the law. The Hearing Officer pointed out that the DOE had opined that the FASA did not apply to KENROB because (1) FASA post-dated the DOE/KENROB contract; and (2) the DOE/KENROB contract did not contain a “flow down clause.” Further, the Hearing Officer noted that the three procurements about which Ms. Beckham had concerns were micro- procurements and would have been exempt from the FASA requirements, even assuming arguendo, FASA had applied to those procurements.

In addition, the Hearing Officer was not convinced that Ms. Beckham's disclosures were made in good faith. The Hearing Officer pointed out that KENROB's procurement work was declining, and that Ms. Beckham was tasked with financial reporting responsibilities. It was the Hearing Officer's view that Ms. Beckham's February 2, 1996 disclosure was made in response to negative comments regarding her shortcoming in the financial reporting area. Lastly, the Hearing Officer commented that Ms. Beckham's emotional demeanor during the hearing evidenced an insubordinate attitude. The Hearing Officer then stated that Ms. Beckham's attitude illustrated her unwillingness to accept information communicated to her in February 1996 that the FASA did not apply to KENROB's procurements. The Hearing Officer further commented that if Ms. Beckham held a good faith belief that her supervisor was requiring her to violate the law, she could have documented her belief in a memorandum or raised the matter with a higher level officials or the DOE. The Hearing Officer concluded that Ms. Beckham's failure to take any such actions cast serious doubt on her good faith.

II. The Appeal

On December 28, 1999, Ms. Beckham filed a Notice of Appeal setting forth the reasons why she disagreed with the finding in the Initial Agency Decision. KENROB filed its Response to Ms. Beckham's Notice on February 8, 2000, at which time I closed the record in this case.

In her Appeal, Ms. Beckham raises a number of contentions to support her position that the conclusions reached by the Hearing Officer in the Initial Agency Decision are incorrect as a matter of fact and law. She argues first that the Hearing Officer confused the sequence of events in this case and thereby erroneously concluded that Ms. Beckham did not raise her disclosures in good faith. Specifically, Ms. Beckham alleges that the Hearing Officer focused only on her February 2, 1996 disclosure, ignoring that Ms. Beckham had raised issues relating to the FASA prior to December 1, 1995. In so doing, contends Ms. Beckham, the Hearing Officer ascribed an improper motive to her, namely that she had raised the disclosure in response to criticism of her work performance in January 1996. In addition, Ms. Beckham submits that she continuously raised concerns about the applicability of the FASA to KENROB's procurement activities well before any question arose concerning her performance of newly assigned duties. She suggests that KENROB's change in her duties and later criticism of her work in January 1996 actually stemmed from her disclosures beginning in the fall of 1995.

Second, Ms. Beckham challenges the Hearing Officer's finding that her "testimony about compliance with the prior and new FASA regulations was so weak that [the Hearing Officer] concluded that (i) she did not have the ability to judge the legality of a procurement under either set of regulations, or (ii) she did not testify candidly." Ms. Beckham asserts that it was not her responsibility to make independent judgments on the legality of a particular procurement, but to apply the regulations in accordance with the procedures that KENROB had established with the DOE in their contract. Ms. Beckham states that since she believed KENROB's procedures appeared to be inconsistent with the new requirements of the FASA, she made her disclosures only to obtain guidance on how to comply with the law as she viewed it. She contends that her confusion about how to handle the situation was not the result of any lack of intellect or good faith, but rather the result of inconsistent instructions she received from KENROB.

Third, Ms. Beckham states that the Hearing Officer did not fully comprehend the scope of her disclosure. According to Ms. Beckham, when the Hearing Officer examined the three purchase orders Ms. Beckham processed after December 1, 1995, the Hearing Officer concluded that Ms. Beckham should have known the new FASA regulations did not apply to the three transactions since they were micro-procurements. Ms. Beckham argues that she did not raise her disclosures only in relation to these three micro-procurements, but rather with regard to any future procurement in excess of $2500 she might be required to process.

Finally, Ms. Beckham challenges the Hearing Officer's determination that her disclosures related to "de minimus or insignificant" violations and hence are not protected under Part 708. She argues that the

potential violations of law she first raised in October 1995 were not with reference to any particular procurement in any particular amount. Rather, her concerns related to the process under which KENROB was carrying out its procurement functions, a process that she perceived to be possibly noncompliant with the FASA.

III. Analysis

As noted earlier, Ms. Beckham seeks review of both the Hearing Officer's finding of fact and conclusions of law. It is well settled that factual findings are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. Oglesbee v. Westingouse Hanford Co., 25 DOE ¶ 87,501, 89,001 (1995); O'Laughlin v. Boeing Petroleum Services, Inc., 24 DOE ¶ 87,513, 89,064 (1995). Compare, Pullman Standard v. Swint, 456 U.S. 273 (1982), with Amadeo v. Zant, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). With respect to a Hearing Officer's conclusions of law, they are reviewable de novo. See Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."").

A. Whether the Revised Part 708 Regulations Apply to the Analysis of the Complainant's Protected Disclosure

Before analyzing Ms. Beckham's specific challenges to the Hearing Officer's findings of fact and conclusions of law, a threshold issue regarding the applicability of the revised regulations to Ms. Beckham's Complaint must be examined. Before the Part 708 regulations were revised effective April 14, 1999, a DOE contractor was prohibited from taking reprisals against an employee who "disclosed to . . . the contractor information that the employee in good faith believes evidences (i) a violation of any law, rule, or regulation . . ." 10 C.F.R. § 708.5(a)(1)(i). When the regulations were revised, the section set forth above was changed to protect employees for "[d]isclosing to . . [his/her] employer . . . information that you reasonably and in good faith believe reveals (1) a substantial violation of a law, rule, or regulation . . ." As is evident from the above, the revised Part 708 regulations require that an employee's disclosure be based on a reasonable belief, not just a good faith belief. (4)

It is well established in law that an agency may apply new procedural rules in pending proceedings as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party. 64 Fed. Reg. 12,862, 12,865 (citing Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994); Lindh v. Murphy, 117 S. Ct. 2059, 2063-64 (1997); Natural Resources Defense Council, Inc. v. NRC, 680 F.2d 810, 817, n. 17 (D.C. Cir. 1982) (citing Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966)). Thus, the intent of the drafters of the Part 708 revisions is quite clear that the revised regulations apply to pending cases only "as long as their application does not impair the rights of, or otherwise cause injury or prejudice to, a party." Salvatore Gionfriddo, 27 DOE ¶ 87,544 at 89,224 (1999). I find that the imposition of the revised regulations would cause prejudice to Ms. Beckham since those regulations interpose an element of reasonableness into the disclosure that did not exist at the time she made her disclosures. Accordingly, in evaluating Ms. Beckham's Appeal, I will use the regulations that existed at the time she communicated her concerns regarding KENROB's procurement activities, not the revised regulations used as the basis of analysis in the Initial Agency Decision.

B. Whether Ms. Beckham Made Protected Disclosures under the Part 708 Regulations in effect in 1995-96.

As an initial matter, I note that the Hearing Officer's analysis of Ms. Beckham's protected disclosures was based, in part, on a finding that Beckham's actions in completing three procurements did not in fact violate procurement law, and that the FASA did not apply to KENROB's contract with the DOE. However, for

purposes of Part 708, it does not matter whether the information a putative whistleblower disclosed is ultimately factually substantiated. See Thomas T. Tiller, 27 DOE ¶ 87,504 (1998), affirmed, Thomas T. Tiller v. Wackenhut Services, Inc., 27 DOE ¶ 87,509 (1999); see also Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995) (good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate). This precept is consistent with that followed in other federal whistleblower cases. See Horton v. Dep't of Navy, 66 F.3d 279 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996); Paul v. Dep't of Agriculture, 66 M.S.P.B. 643 (1995). Rather, the focus must be on the belief of the individual providing the information. In this case, the inquiry must focus on whether Ms. Beckham had a good faith belief that KENROB was violating federal procurement law at the time she raised concerns about KENROB's procurement activities. Thus, to the extent the Hearing Officer evaluated the evidence in this case based in whole or in part on the fact that no violation of procurement law actually occurred, she erred.

The Hearing Officer also appears to have considered that Ms. Beckham may have made her disclosures in response to KENROB's negative comments about her job performance. In evaluating whether a person has made a disclosure in good faith, however, the person's motivations for making the disclosure are irrelevant. See Howard W. Spaletta, 24 DOE ¶ 87,511 at 89,051 (1995) (whether the Complainant was motivated to protect his reputation is irrelevant to the question whether the disclosures come within the ambit of Part 708 protection). Cases decided under the Whistleblower Protection Act also are in accord with this view. See Bump v. Dep't of Interior 69 M.S.P.R. 354 (1996) (WPA makes no provision for considering whether the employee's personal motivation rendered his belief not genuine), Carter v. Dep't of Army, 62 M.S.P.R. 393, 402 (1994), aff'd, 45 F.3d 444 (Fed. Cir. 1995)(Table); see also Frederick v. Dep't of Justice, 65 M.S.P.R. 517, 531 (1994), rev'd on other grounds, 73 F.3d 349 (Fed. Cir. 1996). Hence, to the extent the Hearing Officer considered Ms. Beckham's motivations in communicating her concerns about KENROB's implementation of the FASA in finding that Ms. Beckman did not make a protected disclosure under Part 708, she erred.

The Hearing Officer also opined that the three procurements Ms. Beckham processed were all under $2500 and hence trivial in amount. To be sure, care must be taken not to waste limited resources addressing minor, insubstantial concerns in the context of Part 708 so that whistleblower protection is available to those workers who legitimately need it. Here, however, the three procurements were in the amounts of $2,475, $1,020, and $148. While I believe this is a close question, I am inclined to find that taken together, these procurements are not trivial. I recognize that these procurements were considered to be microprocurements for purposes of the FASA, but I do not necessarily believe they were so de minimus to warrant a finding, on this basis alone, that they were trivial and outside the purview of Part 708. By focusing on the amount of the procurements, the Hearing Officer appears to have been relying, in whole or in part, on the fact that no violation of law could have occurred since microprocurements were exempt from the FASA. As noted above, however, the factual accuracy of Ms. Beckham's belief is irrelevant on the question of whether her communications are entitled to protected status under Part 708. Moreover, as Ms. Beckham notes in her appeal, the concerns she attempted to voice about KENROB's contracting activities were general ones, i.e., the process by which procurements were being processed, not specific procurements themselves.

After carefully reviewing the record on appeal, I find that the Hearing Officer's use of the revised regulations and the other legal infirmities in her analysis are harmless errors. After reanalyzing the evidence under the regulations in effect at the time Ms. Beckham communicated her concerns regarding KENROB's procurement activities, and the correct legal standards, I simply cannot conclude as a matter of law that Ms. Beckham made a protected disclosure cognizable under Part 708. First, the Hearing Officer's determination that Ms. Beckham did not have a good faith belief at any time relevant to this proceeding that KENROB was violating any law is not clearly erroneous. Second, while the record suggests that Ms. Beckham genuinely believed that she had neither the training, guidance, nor ability to discern whether the FASA applied to the work she was doing under the KENROB/DOE contract, I find that Ms. Beckham's broad, speculative concerns about her admitted lack of information and unfamiliarity with the FASA are not the kind of disclosures that are protected under 10 C.F.R. Part 708. The analysis

leading to these conclusions is set forth below.

1. Communications regarding the FASA prior to December 1, 1995

Ms. Beckham complains in her appeal that the Initial Agency Decision does not recognize that she made protected disclosures to KENROB prior to December 1, 1995. According to the record, Ms. Beckham speculated to her supervisor about the impact of the FASA on KENROB's procurement activities in general and Ms. Beckham's responsibilities in particular on several occasions prior to December 1, 1995. In so doing, Ms. Beckham sought clarification and guidance from her superiors on how to implement the FASA in the future. Appeal at 3.

It is evident from the record that Ms. Beckham's communications during the period prior to December 1, 1995 are not protected under Part 708. Seeking guidance from, and expressing confusion to, one's supervisor on how to handle work-related tasks simply do not equate to the disclosure of information evidencing a violation of law under 10 C.F.R. § 708.5(a)(1)(i). Moreover, the record is devoid of any evidence that would support a finding that Ms. Beckham actually believed that KENROB was violating procurement law during this time frame. The concerns she articulated were vague and speculative, not specific allegations of wrongdoing rising to the level of a Part 708 protected disclosure. The hearing transcript reveals that Ms. Beckham's testimony regarding why she thought KENROB might be violating some law prior to December 1, 1995 is convoluted and unconvincing. In the end, the record on appeal suggests that Ms. Beckham's communications prior to December 1, 1995 can be more accurately described as "cries for help" in which she sought guidance and assistance from her supervisors on how to perform her contracting- related duties, not disclosures of information evidencing a violation of federal contracting law. Accordingly, while the Initial Agency Decision did not directly address whether Ms. Beckham made any protected disclosures prior to December 1, 1995, the record on this point is clear that she did not.

2. Communications regarding the FASA between December 1, 1995 and February 9, 1996

It was during the period December 1, 1995 through February 9, 1996 that Ms. Beckham completed processing three procurements without the benefit of information on how and whether the FASA impacted her work product. Ms. Beckham argues in her appeal that during this time period she was not complaining about the three specific procurements she completed, but rather the process under which KENROB carried out its procurement functions. She further points out that it was not her responsibility as a contract specialist to interpret the law, but rather to follow instructions on how to comply with the law. Further, Ms. Beckham contends that her inability at the hearing to explain how she thought the FASA would affect her job responsibilities stemmed not from her lack of good faith but the inconsistent instructions KENROB required her to follow in preparing the Purchasing Documentation.

After thoroughly reviewing the record in this case, I find that there is substantial evidence to support the Hearing Officer's determination that Ms. Beckham did not prove that she had a good faith belief that KENROB's standard procurement documentation violated any law. At the hearing, the Hearing Officer thoroughly questioned Ms. Beckham about her beliefs regarding KENROB's "process" of completing the standard forms that comprised its Purchasing Documentation. Specifically, the Hearing Officer painstakingly inquired about the FASA's impact on various aspects of the procurement process, including market research, source selection, preference for "labor surplus," price analysis, vendor performance history, and set-asides for women-owned businesses. Tr. at 52- 54, 100-01, 175-83. Ms. Beckham's responses to inquiries on each of these matters was somewhat confusing. For example, Ms. Beckham stated that one of the changes to the FAR was a requirement that a product "ensure the maximum practical use of recovery material and promote energy conservation and energy efficiency." Id. at 93. In responding to the Hearing Officer's question whether Ms. Beckham thought the revised FAR provision would have changed the manner in which she performed her job, Ms. Beckham responded:

I believe it could have. My position is I did not fully understand all of the FAR - - all of these changes

and what they really translated to. That, I did not have the opportunity to discover, but I was trying to keep up with the purchase orders that was mandated be issued, and I was also trying to educate myself on what the changes were, and what

were the differences, and what were the ramifications, and I was trying to get the training I needed to understand this, and much of my concern was that I was doing it in the blind as anything because I'm saying I have -- these purchase orders meet the requirements of the law that had changed, and I didn't know how . . . That's the bind that I was in, and I would like to be able to answer the questions more precisely, but that was the predicament that I was in.

Id. at 94. Moreover, Ms. Beckham revealed at the hearing that she never discussed the details of her concerns regarding the applicability of the FASA to KENROB's standard procurement documents. The most she ever did was to provide a copy of Circular 90-32 to her supervisor with instructions, "look at this, this is what is effective. [w]e need to dig into the specifics." Id. at 125. The Hearing Officer concluded after listening to Ms. Beckham's testimony and observing her demeanor at the hearing that either Ms. Beckham did not have the ability to judge the legality of a procurement under either set of regulations or she did not testify candidly. 27 DOE at 89, 218. Moreover, the Hearing Officer questioned whether Ms. Beckham made her disclosures in good faith, noting that her emotional demeanor at the hearing evidenced an insubordinate attitude. Furthermore, the Hearing Officer opined that she might have been convinced that Ms. Beckham was acting in good faith at the time she made her alleged disclosures had she documented her belief in a memorandum or raised the matter with higher level contractor officials or the DOE. Id., 89,220.

It is well established that factual findings of these types are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier-of-fact's unique opportunity to judge the credibility of the witnesses. Compare, Pullman Standard v. Swint, 45 U.S. 273 (1982), with Amadeo v. Zant, 486 U.S. 214, 223 (1988). Measured against this standard, my review of the Hearing Officer's findings regarding Ms. Beckham's credibility and demeanor at the hearing discloses no basis for overturning these fact-based determinations as "clearly erroneous." The concept of good faith is closely linked to one's honesty. Ronny J. Escamilla, 26 DOE ¶ 87,508 (1996), aff'd, 27 DOE ¶ 87,508 (1997). Similarly, an alleged whistleblower's credibility is quite relevant in assessing whether he/she held a good faith belief that the information disclosed fell within the purview of Part 708. Cf. Harden v. Dep't of Navy, 66 F.3d 279 (Fed. Cir. 1995) (under the Whistleblower Protection Act, a person's credibility is relevant in determining his reasonable belief). In this case, the Hearing Officer expressed reservations about Ms. Beckham's honesty when she suggested that she might not have testified candidly. Further, it is clear from reading the Initial Agency Decision that the Hearing Officer did not find Ms. Beckham a credible witness. (5) The Hearing Officer found Ms. Beckham's testimony to be unclear at points and her demeanor insubordinate. In addition, the Hearing Officer found suspect Ms. Beckham's failure to specifically communicate her concerns to her superior or others. In the end, it was Ms. Beckham's burden to show by a preponderance of evidence that she had a good faith belief that the information she disclosed evidenced a violation of the law. In the Hearing Officer's view, Ms. Beckham did not meet a critical element of her burden, i.e., the good faith showing. There is nothing in the record that requires me to supplant my judgment for the credibility determination of the Hearing Officer.

Even assuming arguendo that Ms. Beckham had convinced the Hearing Officer that she made her disclosures in good faith, the record is clear that the information communicated by Ms. Beckham to her supervisors during the period October 1995 through February 9, 1996 is not the kind of disclosure contemplated for coverage under Part 708. The hearing transcript is replete with testimony from Ms. Beckham that the substance of her communications was nothing more than a request for training and assistance in doing her work. Tr. at 55 (she needed training to fully understand and implement changes to the "boilerplate"); id., 63 ("I was in the process of trying to learn precisely what it is that needed to be done."); id., 68 ("I was trying to apprise KENROB that there [are] all these federal regulations that you've required me to abide by that have been changed, deleted, eliminated. Help me. Sit down now and tell me what to do."); id., 75 (she wanted someone at KENROB to sit down with her and go through every item in

the Procurement Documentation because she did not fully understand it); id., 93 ("My position is I did not fully understand all of the FAR - all of these changes and what they really translated to. . .") Further, Ms. Beckham was simply unable to articulate any credible basis for her belief that KENROB's procurement "process" and purportedly outdated documentation ran afoul of any law. 10 C.F.R.§ 708.5. In the end, Ms. Beckham cannot bootstrap her own admitted confusion about the FASA and her repeated requests for assistance in discerning how to do her job into any kind of disclosure that KENROB was violating the law.

C. Conclusion

On the basis of the foregoing, I conclude that there is substantial evidence in the record to support the Hearing Officer's conclusion that Ms. Beckham failed to meet her evidentiary burden in this case. I therefore concur with the finding that Ms. Beckham did not disclose information in good faith that evidenced a violation of the law under the Part 708 regulations in effect at the time she communicated the information at issue in this case. Accordingly, Ms. Beckham's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Rosie L. Beckham on December 28, 1999 (Case No. VBA-0044) of the Initial Agency Decision issued on December 13, 1999 (Case No. VWA-0040) be and hereby is denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Rosie L. Beckham on March 27, 1996, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, be and hereby is denied.

(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. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: April 10, 2000

(1)Under the terms of the contract between the DOE and KENROB, KENROB was required to obtain the DOE's consent for all purchase orders in excess of $50. Transcript of Hearing (Tr.) at 64.

(2)FASA was enacted "to streamline the acquisition process and minimize burdensome government-unique requirements." Exhibit 34.

(3)Later, OCEP was reorganized and assimilated into the DOE's Office of Inspector General, Office of Inspections.

(4)The revised regulations also require that information disclosed relate to a substantial violation of the law, not just a violation of the law. The Initial Agency Decision does not appear to reject Ms. Beckham's disclosure on the basis that the alleged procurement irregularities do not rise to the level of a substantial violation of the law. Rather, the Initial Agency Decision finds that Ms. Beckham's disclosures did not relate to a "significant" violation of the law. To the extent the Hearing Officer equated the term "significant" with "substantial," she erred. The plain language of Part 708 prior to its revision in 1999 is unambiguous on its face; it neither explicitly nor implicitly required the perceived violation of the law to be substantial or significant. This is not to say, however, that petty, trivial matters would necessarily be encompassed by Part 708. The determination whether a communication regarding a violation of law is petty or trivial turns on the facts of a particular case. See Herman v. Dep't of Justice, 193 F.3d 1375, 1380 (Fed. Cir. 1999) (finding the complainant could not have reasonably believed that his memorandum

concerning the photocopying of telephone logs constituted the disclosure of a non-trivial law, rule, or violation under the Whistleblower Protection Act (WPA)). Cf. Eidmann v. Merit Sys. Protection Bd., 976 F.2d 1400, 1402-03, 1407 (Fed. Cir. 1992) (affirmed the Board's finding that a whistleblower's disclosure of an agency's repeated refusal to enforce even minor rules or regulations, i.e. ban on smoking in general office, can constitute a protected disclosure under the WPA).

(5)In reviewing the Hearing Officer's opinion regarding Ms. Beckham's "good faith," I have discounted the Hearing Officer's comments regarding Ms. Beckham's possible motivation for making her alleged disclosures. I do not believe that the Hearing Officer's findings regarding motivation are so inextricably intertwined with her finding on the "good faith" issue to prevent me from reaching a finding on "good faith." As will be explained, the Hearing Officer had other bases on which she concluded Ms. Beckham had not acted in good faith.