

Case No. VBH-0034

September 29, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Jennifer S. Gentry

Date of Filing: August 24, 1999

Case Number: VBH-0034

This Initial Agency Decision concerns a whistleblower complaint filed by Jennifer S. Gentry, a former employee (hereinafter the employee) of Golder Federal Services Incorporated, formerly Golder Associates, Inc. (Golder). Golder was a subcontractor for EG&G, then the managing and operating contractor at DOE's Rocky Flats site (hereinafter the term "contractors" refers to both Golder and EG&G). The employee alleges that she made protected disclosures concerning health and safety matters, and as a result, the contractors took retaliatory actions against her. For the reasons explained below, I have determined that the employee's request for relief should be denied.

I. Background

The Department of Energy (DOE) Contractor Employee Protection Program governs this matter. The DOE recently revised the regulations governing this program. See 64 Fed. Reg. 12862 (March 15, 1999) (amending 10 C.F.R. Part 708, effective April 14, 1999) (the whistleblower regulations). Under the regulations, the DOE's Office of Hearings and Appeals (OHA) conducts investigations, issues initial agency decisions, and hears appeals.

The whistleblower regulations prohibit a contractor from retaliating against a contractor employee who engages in certain protected conduct. Protected conduct includes disclosing information that the employee believes reveals a substantial violation of a law, rule, or regulation. If a contractor retaliates against an employee for making a protected disclosure, the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that (1) the employee made a protected disclosure and (2) the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to prove, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure. If the employee prevails, the OHA may order employment-related relief such as reinstatement and back pay.

The events involved in the complaint took place during the period August 1993 through December 1993. On August 10, 1993, the employee began working for Golder in a temporary job as a "Health and Safety Specialist" at the Main Decontamination Facility at Rocky Flats. The EG&G project for which she was hired was scheduled to last through June 30, 1995. However, on November 23, 1993, the employee received a poor performance evaluation, and on December 10, 1993, her employment with Golder was terminated.

On February 3, 1994, the employee filed a Part 708 complaint with the DOE Rocky Flats Manager,

seeking relief against Golder and EG&G for alleged retaliatory acts including her termination," poor employee evaluations, chastisement and reprimands...." The complaint does not allege any specific protected disclosures, other than "reporting to and providing information to EG&G Radiological Engineering regarding Health and Safety issues and violations." The employee's complaint sought formal written apologies from Golder and EG&G, reinstatement to her former position as an HSS at the same rate of pay, and back pay from the date of her termination to the date of reinstatement. At some point in 1994, the complaint was referred to DOE's Office of Inspector General (OIG) for investigation under Part 708. The OIG did a detailed investigation of the allegations in the complaint and the contractors' affirmative defenses. The investigative record includes 14 interviews of persons who had personal knowledge of the events involved, and nearly 40 documents.

On April 6, 1999, the DOE Assistant Inspector General for Inspections (Assistant IG) issued a "Report of Inquiry and Recommendations," based on the record compiled during the investigation of the complaint. The report concluded that the complaint was without merit. The report found that the employee did communicate concerns to contractor management officials including safety issues that were protected disclosures under Part 708. While the report did not specifically discuss whether the employee met her burden before considering the contractors' affirmative defenses, there was a "temporal proximity" between the alleged protected disclosures and the alleged acts of retaliation, and this was sufficient to shift the burden to the contractors to show that they would have taken the same actions in the absence of any protected disclosures. Based on the evidence developed during the investigation, the Assistant IG was clearly convinced that the contractors did prove that they would have taken the same actions against the employee in the absence of any protected disclosure. The report determined that the employee made significant, job-related errors that resulted in the circulation of misinformation and unnecessary confusion, and that the employee created additional problems by failing to follow established procedures. According to the report, the employee's low performance evaluation and subsequent termination were justified by the facts in evidence, and were not based on retaliation. The report advised the employee and the contractors of their rights to a hearing. None of the parties requested a hearing. Accordingly, the OHA Director appointed me to review the investigative report and issue an initial agency decision.

II. Analysis

The employee has not requested a hearing, nor submitted any evidence and arguments that would contravene the determination in the investigative report to recommend against relief under Part 708. I have carefully reviewed the report and the lengthy investigative record on which it is based. I find that the findings and conclusions in the report have a rational basis in fact, are supported by substantial evidence, and I agree that the complaint for relief under Part 708 is without merit. Therefore, based on my independent consideration of the record in this matter, I find that the disposition recommended in the report should be adopted as the initial agency decision in this matter.

It Is Therefore Ordered That:

- (1) The request for relief under 10 C.F.R. Part 708 submitted by Jennifer S. Gentry, OHA Case No. VBH-0034, is hereby denied.
- (2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date: September 29, 1999

