

Case No. VBR-0002

January 24, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Westinghouse Savannah River Company

Date of Filing: November 12, 1999

Case Number: VBR-0002

This supplemental order concerns a Motion for Reconsideration (Case No. VBR-0002) filed by Westinghouse Savannah River Company (WSRC) on November 12, 1999. The reconsideration motion relates to an Initial Agency Decision issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on November 2, 1999 ([Case No. VBH-0002](#)). In the Initial Agency Decision, I granted relief to the Complainant on the whistleblower complaint he had filed against WSRC under 10 C.F.R. Part 708.(1) I found that WSRC had failed to prove by “clear and convincing” evidence that it would have terminated the Complainant absent his protected disclosure. In its reconsideration motion, WSRC contends that met its evidentiary burden in this case, and urges me to deny the relief to the Complainant.

I. Background

The facts pertaining to the Complainant’s whistleblower complaint are fully set forth in the Initial Agency Decision, [Don W. Beckwith](#), 27 DOE ¶ 87, 534 (1999), and will not be reiterated here. For purposes of the reconsideration request, the following procedural information is relevant. WSRC stipulated at both the investigatory and hearing stages of the Part 708 proceeding that (1) the Complainant had made a protected disclosure as defined in 10 C.F.R. § 708.5, and (2) the Complainant’s protected disclosure can be considered a contributing factor to WSRC’s decision to terminate the Complainant because of the temporal proximity that existed between the protected disclosure and the Complainant’s termination. Decision at 3. In view of WSRC’s stipulations, the Complainant was deemed to have met his regulatory burden of proving “by a preponderance of evidence that there was a disclosure . . . described under § 708.5, and that such act was a contributing

factor in a personnel action taken or intended to be taken against the complainant.” 10 C.F.R. § 708.9(d). The burden then shifted to WSRC to prove “by clear and convincing” evidence that the company would have terminated the Complainant even if he had not disclosed information about alleged misconduct by a WSRC management official.

WSRC’s entire case rested on its assertion that it terminated the Complainant because he allegedly violated WSRC’s short-term disability policy. To support its position, WSRC stated that two of its managers observed the Complainant at a construction site working while the Complainant was drawing 100% disability pay under WSRC’s short-term disability policy. WSRC maintained that it was a violation of its disability policy to work while drawing disability pay. Alternatively, WSRC argued that it terminated the Complainant for lying at a meeting.

II. The Initial Agency Decision

After reviewing all the documentary and testimonial evidence in the case, I held in the Initial Agency Decision that the unresolved conflicting testimony in the record made it impossible to know with any confidence whether the Complainant was working at the construction site on the days in question, as alleged by the WSRC managers.

I also found that WSRC had failed to provide the most probative evidence of the Complainant's alleged violation of WSRC's short-term disability policy, namely the policy itself. Moreover, I determined that the evidence submitted by WSRC did not clearly and convincingly demonstrate that the company consistently terminates employees who violate the terms of WSRC's short-term disability policy.

In addition, I was not convinced by WSRC's alternative purported justification for terminating the Complainant, i.e., that the Complainant had lied in a meeting. I pointed out in the Decision that the WSRC Disciplinary Committee had recommended that the Complainant be terminated one day before the meeting in question had occurred. Moreover, I found that the evidence did not necessarily support WSRC's position that the Complainant had "lied" in the meeting in question.

III. Motion for Reconsideration

In its reconsideration request, WSRC maintains that it produced its entire short-term disability policy prior to the hearing, contrary to a finding set forth in the Initial Agency Decision. Request at 1. WSRC acknowledges that it did not submit its entire Disability Benefits Book but maintains that the two-page document it did provide constituted the company's entire short-term disability policy.

WSRC next highlights a sentence in its short-term disability policy that states, in relevant part, as follows: "[I]f you are disabled and **unable to work . . .**" (emphasis added by WSRC) a worker can qualify for short-term disability benefits. It is WSRC's contention that the short-term disability policy is unequivocal in that "unable" means "incapable." WSRC then reasons that the Complainant clearly was capable of working, as he admitted at the hearing that he had climbed on a homeowner's roof to inspect work that his subcontractors had completed while he was on short-term disability.

In response, the Complainant objects to WSRC's motion on the ground that it is not provided for under the Part 708 regulations and is designed to delay the resolution of the case. Complainant's Objection to Motion (November 18, 1999). It is WSRC's position, however, that while a request for reconsideration is an extraordinary remedy, it is appropriate in circumstances where an error must be rectified.

As an initial matter, the Complainant is correct that the filing of motions for reconsideration is not specifically enumerated by the Part 708 regulations. Nevertheless, Hearing Officers have all the powers necessary to regulate the conduct of proceedings which would include ruling on requests such as the one before me. See 10 C.F.R. § 708.28(b). Since WSRC is suggesting I made an error in reviewing the evidence, I deem it appropriate at this juncture to examine that issue.

WSRC's Short-Term Disability Policy

Prior to the hearing, WSRC submitted a two-page document (numbered as pages 2 and 3) bearing no title but having the heading mid-way down the first page "How the Plans Work" and a subtitle, "Short-Term Disability." See Exhibit 23a. At the hearing, WSRC's Policy Representative testified that she implemented all of WSRC's Human Resource policies from 1994 through 1998 and ensured, among other things, that WSRC's recommendations regarding disciplinary actions and termination were consistent throughout the site. Hearing Transcript (Tr.) at 210. In this regard, she testified that WSRC's "disability policy requires an employee to be at home, be available at any point in time for management or medical to get in touch with

him. Our disability policy does not allow any other type of work.” Id. at 221. The two-page document WSRC submitted as Exhibit 23a, however, did not contain any language to support the WSRC’s Policy Representative’s testimony. Therefore, at the hearing I questioned the WSRC Policy Representative about a reference she had made in her earlier testimony to a 20-page disability policy:

Q: . . . you mentioned that there’s a 20-page written policy that details an employee’s obligations when they’re on short-term disability; is that correct?

A.: Um-hum [yes]

Q: . . . I want to hand you what we’ve marked as Document 23a . . . is that two-page document a part of this 20-page brochure that you’re referring to?

A: It’s just a short glimpse of the policy. This is in a handbook, benefits handbook that’s given to the employee when they’re employed out at Westinghouse.

Q: Can you take a minute to look at that and see where, if anywhere, it mentions the employee’s obligations?

A: In this two-page, I do not see --[it].

Tr. at 232. From the testimony of WSRC’s own policy representative recounted above, I inferred that there must be more to WSRC’s short-term disability policy than the two-page document the company submitted. Otherwise, the WSRC Policy Representative’s testimony regarding the restrictions placed on employees drawing short-term disability and the employee’s obligations under WSRC’s short-term disability policy made no sense to me.

On December 9, 1999, WSRC submitted a 14-page document entitled, “Disability, WSRC & BSRI” (2) that describes the three programs comprising WSRC/BSRI’s disability benefits. The three programs mentioned in the 14-page document are Short-Term Disability, Total and Permanent Disability, and Special Benefits. Of particular note is the section entitled, “Short-Term Disability” which appears to be identical to Exhibit 23a. Assuming the 14-page document submitted by WSRC after the hearing was the disability policy in effect at the time the Complainant was employed by WSRC, it now appears that Exhibit 23a constituted the company’s entire short-term disability policy. If I accept Exhibit 23a as WSRC’s complete short-term disability policy then I must reject as unfounded the WSRC Policy Representative’s testimony regarding the contents of that policy. The policy, by its own terms, simply does not support her assertions as recounted at the hearing.

I turn now to WSRC’s assertion in its reconsideration request that Exhibit 23a prevented the Complainant from “working” while on short-term disability. WSRC points out that its policy states that “[I]f you are disabled and **unable to work** . . . (emphasis added by WSRC),” an employee may obtain short-term disability. According to WSRC, there is no qualifier, and it is clear from the context that “unable” means “incapable.” Furthermore, WSRC contends that the fact the Complainant admitted at the hearing that he climbed up the ladder on a Saturday to inspect his subcontractors’ work means he was capable of working. I disagree.

I find it curious that WSRC fails to mention the bolded definition of “disabled” in its short-term disability policy. The definition states in its entirety as follows:

“Disabled” under Short-Term Disability means that you are unable to perform the normal duties of your own job and are not at work. Medical evidence of disability may be required.

In the 14-page document WSRC submitted on December 9, 1999, there is a table entitled, “Disability Benefits at a Glance” that highlights, among other things, the key provisions in WSRC’s Short-Term Disability program, its Total and Permanent Disability program, its Special Benefits’ program, and its

Incapacity Benefit program. Under the short-term disability column, it is stated, "Must be unable to perform your **own** job." The policy highlights the word "own." In contrast, in the Total and Permanent Disability column, it is stated, "Must not be able to perform **any** job." The policy highlights the word "any."

Since the Complainant was drawing short-term disability at all times relevant to this proceeding, the focus must be on whether the Complainant was able to perform his own job at WSRC, not whether he was incapable of working at any job. At the time he was placed on short-term disability, the record reflects that the Complainant was employed as a tritium maintenance mechanic. Exhibit 2b, Tr. at 73. The Complainant's medical records reflect that he has a long history of chronic back pain and suffers from degenerative arthritis of the spine. Exhibits 2b, 2d, 2f, 2g and 2h. According to medical documentation in the record, a WSRC physician opined in January 1998 that the Complainant was unable to perform his normal work assignment because he had difficulty sitting or standing for a long period and lifting over 40 pounds. Exhibit 2a. The Complainant's first-line supervisor testified at the hearing that tritium maintenance mechanics work on valves and pumps, are required to lift up to 50 pounds of weight, and use torquing wrenches that require twisting and turning. Tr. at 73-74. It seems reasonable to conclude from the evidence in the record, namely the documentation about the Complainant's medical condition and the medical opinion that the Complainant was unable to perform the duties of a tritium maintenance mechanic, that the Complainant was properly placed on short-term disability.

Next, I must look at what restrictions, if any, were placed on the Complainant by the terms of WSRC's short-term disability policy. After reviewing the policy, it appears that there were no restrictions placed on him. That having been said, it is only logical that if the Complainant were working at a construction site performing the same functions expected of him as a tritium maintenance mechanic, i.e., twisting and turning, and lifting 50 pounds of weight, that he should have been working in his position at WSRC. However, the evidence in the record that I deemed credible does not demonstrate that the Complainant was performing physical labor of the same kind required of him in his tritium maintenance mechanic position.

To be sure, there is the Complainant's own testimony that he hobbled up a ladder at the construction site to inspect the roof work his subcontractors had performed for a homeowner. (3) I am not convinced, however, from the evidence submitted by WSRC that the Complainant's actions in this regard were inconsistent with his short-term disability status. I therefore will not disturb my finding in the Initial Agency Decision that WSRC has failed to prove by clear and convincing evidence that it would have terminated the Complainant for having violated WSRC's short-term disability policy.

In conclusion, the new evidence submitted by WSRC supports its position that WSRC had submitted its entire short-term disability policy into the record of the proceeding prior to the hearing. Since it is now clear that Exhibit 23a constitutes WSRC's complete short-term disability policy, I must find that the testimony of the WSRC Policy Representative regarding the content of WSRC's short-term disability policy is unfounded and entitled to no weight. I make this finding because the WSRC Policy Representative's assertions about the restrictions placed on those drawing short-term disability are not supported by the terms of the policy itself or by any other credible evidence presented in this proceeding. I find further that WSRC has not presented "clear and convincing" evidence that it terminated the Complainant for his violation of the short-term disability policy or any other credible reason except for his protected disclosure.

It Is Therefore Ordered That:

- (1) The Motion for Reconsideration filed by Westinghouse Savannah River Company on November 12, 1999, Case No. VBR-0002, be and hereby is granted as set forth in paragraph (2) below and denied in all other respects.
- (2) The Initial Agency Decision issued on November 2, 1999, Case No. VBH-0002, be and hereby is modified to reflect as follows: (1) Westinghouse Savannah River Company (WSRC) submitted its entire

short-term disability policy prior to the hearing; (2) the contents of the short-term disability policy do not support the testimony of the WSRC Policy Representative; (3) the testimony of the WSRC Policy Representative regarding the contents of WSRC's short-term disability policy appears to be unfounded and hence will be accorded no weight; (4) the terms of WSRC's short-term disability policy did not place any restrictions on outside employment; and (5) WSRC has not presented "clear and convincing" evidence that the Complainant, Don W. Beckwith, violated the terms of its short-term disability policy.

(3) This is a final Order of the Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: January 24, 2000

(1)The regulations codified at 10 C.F.R. Part 708 govern the DOE's Contractor Employee Protection Program, a program 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). The Program's 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.

(2)It is unclear to me what the initials "BSRI" stand for, or the interrelationship between WSRC and BSRI. It is also not clear to me whether the 14-page document submitted by WSRC on December 9, 1999 is a part of the 20-page Disability brochure the WSRC Policy Representative alluded to in her hearing testimony, whether the 20-page document is another Disability Policy WSRC has, or whether the WSRC Policy Representative was mistaken as to the length of WSRC's Disability Policy. On December 10, 1999, WSRC tendered some documents relating to the remedial phase of this proceeding. Among the documents it submitted was a 14-page document entitled, "Disability WSRC & BSRI" and a 15-page document entitled, " General Information, WSRC & BSRI." The 14-page document WSRC submitted on December 10 is almost identical to the 14-page document it tendered on December 9. However, the version WSRC submitted on December 10 does not contain one page that is included in the December 9 version. The page in question contains a chart entitled, "Disability Benefits at a Glance."

(3)I point out that the Complainant's admission in this regard does not support WSRC's contention that the Complainant lied about working at the construction site on two other days. It is not even clear to me that the individual's act of hobbling up a ladder should be considered work in the sense of "physical labor."