

# Case No. VBU-0016

September 15, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Gary Roybal

Date of Filing: June 23, 1999

Case Number: VBU-0016

On October 6, 1998, Gary Roybal (Roybal) filed a complaint under the Department of Energy (DOE) Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. The regulations governing the program were revised in a new interim final rule that took effect on April 14, 1999. Along with other procedural changes, the interim final rule reassigned the investigative function to the Office of Hearings and Appeals. All of the pending whistleblower cases in the investigative stage, including Roybal's case, were then transferred to OHA.

The OHA investigator assigned to the case dismissed Roybal's complaint on June 11, 1999. On June 23, 1999, Roybal filed this Appeal of the dismissal with the Director of OHA. In the Appeal, Roybal requests that OHA reverse the dismissal and reinstate his complaint. 10 C.F.R. § 708.18.

## I. Background

Roybal was formerly employed by Johnson Controls World Services, Inc. (Johnson) at the Los Alamos National Laboratory in Los Alamos, New Mexico. Roybal alleges that he disclosed information regarding safety issues and mismanagement to his employer while employed by Johnson. On July 10, 1998, Roybal's employment was terminated. On this ground, Roybal filed a whistleblower complaint under Part 708 with DOE's Albuquerque Operations Office.

The Part 708 regulations in effect at the time of filing allowed an employee 60 days after the alleged retaliation to file a complaint. 10 C.F.R. § 708.6 (1992). Roybal, however, filed his complaint after the 60-day time period had expired since his July 10, 1998 termination from Johnson. Nonetheless, the complaint was not dismissed by DOE, and was still pending on April 14, 1999, when the interim final rule went into effect. The interim final rule increased the maximum time period for filing a complaint to 90 days after the date of the alleged retaliation. 10 C.F.R. § 708.14 (a). Roybal's complaint was filed within the 90 day time limit.

As noted above, in April 1999, after the effective date of the interim final rule, Roybal's complaint was transferred to the OHA for investigation. The investigator assigned to Roybal's complaint noted that the complaint was filed under the old regulations (which had the 60 day limit) and asked him to provide a reason for the late filing. When Roybal did not provide a reason for filing beyond the 60 day limit, the investigator dismissed his complaint on June 11, 1999. Roybal filed this Appeal on June 23, 1999, requesting that we reverse the dismissal. In his Appeal, he explained that he believed that the last act of alleged retaliation occurred on or about September 28, 1998 (when he was not re-hired by Johnson and

other allegedly less qualified individuals were hired), not on July 10, 1998, when his employment was terminated. Roybal, who is not represented by counsel in this matter, maintains that the regulations mean that retaliation could occur by omission (e.g., not being re-hired for an appropriate vacancy).(1)

## II. Analysis

We find that the complaint was timely filed. This complaint was still pending and had not been dismissed by DOE prior to the effective date of the new interim final rule (April 14, 1999). The interim final rule provides an employee 90 days after the date of the alleged retaliation to file a complaint. § 708.14. According to the new regulations, “[t]he procedures in this part apply prospectively in any complaint proceeding pending on the effective date of this part.” 10 C.F.R. § 708.8. Therefore, because Roybal’s complaint was pending on the effective date of the interim final rule, we find that the 90 day deadline in the interim final rule applies to this case. Section 708.8 was added to the interim final rule in order to explicitly state DOE’s intention that the revised procedures shall apply in any complaint proceeding pending at the investigative stage on the effective date of the rule. 64 Fed. Reg. 12,865 (1999). Roybal filed his complaint 88 days after his termination, which is within the 90 day deadline. The case shall be reinstated and processed in accordance with Part 708.

It Is Therefore Ordered That:

- (1) The Appeal filed by Gary Roybal, Case No. VBU-0016, is hereby granted, as set forth in Paragraph (2) below.
- (2) This matter is hereby reinstated and the complaint shall be investigated under 10 C.F.R. Part 708.

George B. Breznay

Director

Office of Hearings and Appeals

Date: September 15, 1999

(1)/ The regulations clearly state that retaliation is “an *action* . . . taken by a contractor against an employee with respect to employment . . . as a result of [a protected disclosure] . . . .” 10 C.F.R. § 708.2 (emphasis added).