

Case No. VWD-0004

July 1, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Supplemental Order

Names of Petitioners: Princeton University

General Physics Corporation

Date of Filing: June 10, 1999

Case Number: VWD-0004

This decision will consider a Motion for Discovery filed jointly by Princeton University (Princeton) and General Physics Corporation (GPC) on June 10, 1999 with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The discovery motion relates to a hearing requested by David Turner under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). The OHA has assigned Mr. Turner's hearing request Case No. VWA-0038, and the discovery request under consideration Case No. VWD-0004.

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 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. The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The Part 708 regulations were revised effective April 14, 1999, and by their terms, apply to all cases which were pending as of the date they became effective, including Mr. Turner's case. See 64 Fed. Reg. 12,862 (March 15, 1999); 10 C.F.R. §§ 708.8, 708.22.

B. Factual Background

From 1991 to 1995, Mr. Turner was employed as a Tritium Shift Supervisor by GPC at Princeton University Plasma Physics Laboratory's (PPPL) Tokamak Fusion Test Reactor in Princeton, New Jersey. At the time, GPC operated as a subcontractor to Princeton, the DOE Management and Operating Contractor at PPPL.

Mr. Turner claims that in April 1995, he disclosed to PPPL and GPC 24 serious inaccuracies in a Final Safety Analysis Report for PPPL's Tritium Regeneration System. Turner also alleges that during this same period, he was instructed to declare PPPL's Tritium Regeneration System operable, despite his having voiced safety concerns about the system. The next month, May 1995, GPC and Princeton removed Mr. Turner from his position, contending that Mr. Turner was no longer physically able to perform his duties as a Tritium Shift Supervisor due to a pre-existing medical condition, i.e., a spinal nerve injury. In June 1995, GPC terminated Turner from its employ.

C. Procedural Background

In August 1995, Mr. Turner filed a complaint under Part 708 with the DOE's Office of the Inspector General (IG) alleging that GPC and Princeton had fired him in retaliation for his having made safety and health disclosures relating to PPPL's Tritium Regeneration System. After making a preliminary determination that the complaint fell within the jurisdiction of Part 708, the IG referred the complaint to the DOE's Chicago Operations Office for informal resolution. After efforts at informal resolution failed, the IG began its investigation into the allegations set forth in Mr. Turner's complaint. (1) On May 26, 1999, the IG issued its Report of Inquiry and Recommendations on Turner's complaint in which it concluded that the available evidence indicated that GPC and PU would have terminated Turner's employment even if he had not made the disclosures about the Tritium Regeneration System.

Mr. Turner filed a timely request with the IG for an administrative hearing on his Part 708 complaint. Shortly after the IG transmitted Turner's hearing request to the OHA Director on April 26, 1999, I was appointed the hearing officer in this case. I have scheduled a hearing in this matter for July 27 and 28, 1999 in Princeton, New Jersey.

II. Motion for Discovery

The Hearing Officer determines, on a case-by-case basis, the necessity and appropriate scope of discovery under the recently revised Part 708 regulations. See 64 Fed. Reg. 12862, 12867 (March 15, 1999). According to the regulations, a Hearing Officer may order discovery at the request of a party if that party shows that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the whistleblower complaint. See 10 C.F.R. § 708.28(b)(1).

In some cases under Part 708, OHA Hearing Officers have requested that the parties work out discovery matters among themselves, only involving the Hearing Officer if a material dispute arises. See [Frank E. Isbill](#), Case No. VWD-0002, 27 DOE ¶ ____ (May 21, 1999); [L&M Technologies, Inc.](#), Case No. LWD-0009, 23 DOE ¶ 87,502 (1993). In this case, I decided after my first telephone conference with all the parties that a different course of action was warranted because Mr. Turner is not represented by legal counsel. It was evident to me that Mr. Turner could easily be overwhelmed with the discovery process due to his unfamiliarity and inexperience with this or any other court or administrative proceeding. In contrast, the contractors in this case are represented by two highly skilled litigators, one a partner in a major Washington, D.C. law firm and the other a lawyer in Princeton's Office of General Counsel. Both of the contractors' lawyers are well versed in all the nuances of civil litigation, including discovery, and are representing their respective clients with great zeal.

To ensure the integrity of the process, and prevent Mr. Turner from feeling intimidated by the opposing parties, I instructed all parties in writing on June 4, 1999 that any motions for discovery must be submitted to me for my evaluation and approval or denial. See Letter from Ann S. Augustyn, Hearing Officer, to David M. Turner, Charles Wayne, Esq. and Katherine Buttolph (June 4, 1999) (June 4 Letter). (2) I also advised the parties at that time that administrative proceedings under Part 708 are intended to be informal in nature and are not intended to emulate formal trial proceedings. 57 Fed. Reg. 7533, 7537-38 (March 3, 1992). Hence, I noted that the discovery requirements, notices, and procedures that are embodied in the Federal Rules of Civil Procedure do not govern discovery in Part 708 proceedings.

On June 10, 1999, I received the Motion for Discovery under consideration consisting of 16 extensive requests for the production of documents, 11 multi-part interrogatories, and a request to depose Mr. Turner. I convened a conference call on June 11, 1999 to discuss, and rule on, the specific discovery requests of the motion. (3) During the conference, I first advised the parties of my decision to bifurcate this proceeding into two phases, a liability phase and a remedial phase. I then announced that all discovery regarding the issue of potential damages will be deferred, reasoning that Mr. Turner should not be burdened with extensive discovery requests regarding damages when it is unclear whether any liability will be found against the contractors in this case. If I issue an initial agency decision in favor of Mr. Turner, at that time I will determine the most appropriate mechanism to ascertain the extent of Mr. Turner's damages. For now, Mr. Turner has complied with my request that he furnish me and the contractors with an approximate amount of monetary damages he is seeking so the parties can add this factor to their assessment of potential exposure in this case, and decide whether to pursue mediation, settlement, or none of the aforementioned options.

A. Request for Production of Documents and Interrogatories

The following discovery requests, all of which relate to the remedial phase of this proceeding, are deferred in their entirety for the reasons set forth above:

- Document Request No. 7 requesting “[a]ll documents that relate to any suits, complaints, bankruptcy petitions, charges or claims, including but not limited to, any claim for loss of income, any workers’ compensation claims, unemployment compensation claims, disability benefits claims and claims for monetary damages to which you have been a party or witness, including any such actions against Princeton and General Physics other than the instant case.”
- Document Request No. 12 requesting “[p]ay stubs, payroll records, earnings records, and all other documents relating to any and all sources of income or earnings for the period from 1990 to the present, including, but not limited to, your state, federal, and local income tax returns, W-2 and 1099 forms, documents pertaining to retirement benefits and plans, health insurance, wage, salary and any other compensation from any source whatsoever.”
- Document Request No. 16 requesting “[a]ll documents that support or otherwise relate to the amount of damages claimed to have been suffered by you and the method of computation used to determine that amount.”
- Interrogatory No. 2 which asks Mr. Turner to “[i]dentify each person by whom you have been employed or performed services since the end of your employment with General Physics and describe the nature of your employment, including, but not limited to, the position(s) held, the dates each position was held, job duties and responsibilities in each position, the identity of your supervisor(s), and the compensation (including salary, bonuses and fringe benefits) received by you, including the date and amount of any raises.”
- Interrogatory No. 6 which asks Mr. Turner to “[s]tate and itemize the precise amount of damages claimed to have been suffered by you, describe in detail the factual basis and method of computation used to determine that amount, and identify all documents that support, were relied on or otherwise relate to such computation.”
- Interrogatory No. 7 which asks Mr. Turner to “[d]escribe in detail all income or other earnings, including, but not limited to, all salaries, bonuses, and fringe benefits, that you have received since your employment with General Physics ended and state the precise amount, nature and source of all such income or earnings.”

Portions of other discovery requests are deferred in part to the extent they relate to the issue of damages. Those discovery items are the following:

- That portion of Request for Production of Documents No. 1 that seeks documents pertaining to Mr. Turner's claim for damages.
- That portion of Interrogatory No. 5 that seeks the identity of each person having personal knowledge

of any facts that support Mr. Turner's claim for damages.

- That portion of Interrogatory No. 10 that seeks the identity of health care providers who have knowledge about Mr. Turner's claim for damages.

In addition, I have decided that two of the contractors' discovery requests are too broad and must be limited in scope, i.e., Request for Production of Document No. 13 and Interrogatory No. 11. Request for Production of Document No. 13 relates, in general, to Mr. Turner's medical records. I am restricting discovery on this matter to the time period beginning when Mr. Turner commenced his employment with GPC in Princeton, New Jersey until June 11, 1999, the date of the telephone conference regarding discovery. In addition, I will limit the documents Mr. Turner must produce in response to Request for Production of Document No. 13 to those documents he has in his possession, or can reasonably obtain from his numerous health care providers. Mr. Turner has advised that he has had scores of doctors in four states during the last decade and may not be able to locate them all. In addition, Mr. Turner has expressed concern that he may not have the financial resources to pay for the photocopying of the relevant documents. I have instructed Mr. Turner to determine from his health care providers the cost of reproducing the subject documents. Mr. Turner will immediately notify me if he is unable to bear the financial cost associated with complying with this discovery request.

Interrogatory No. 11 seeks information regarding Mr. Turner's medical care. I will restrict discovery in this respect as follows: the first clause in of Interrogatory 11 which reads, "During the past ten (10) years" is deleted. Inserted in its place is the following language, "From the date of your employment with GPC in Princeton, New Jersey, until June 11, 1999."

The remaining interrogatories and production of document requests will be granted in their entirety. Those include Document Production Request Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 14, 15; and Interrogatory Nos. 1, 3, 4, 8 and 9.

Summary

To summarize the disposition of all the discovery requests, except request deposition request, I make the following rulings:

Document Production Request No. 1 Granted in part; deferred as to damages.

Document Production Request No. 2 Granted

Document Production Request No. 3 Granted

Document Production Request No. 4 Granted

Document Production Request No. 5 Granted

Document Production Request No. 6 Granted

Document Production Request No. 7 Deferred in its entirety

Document Production Request No. 8 Granted

Document Production Request No. 9 Granted

Document Production Request No. 10 Granted

Document Production Request No. 11 Granted

Document Production Request No. 12 Deferred in its entirety

Document Production Request No. 13 Granted in part

Document Production Request No. 14 Granted

Document Production Request No. 15 Granted

Document Production Request No. 16 Deferred in its entirety

Interrogatory No. 1 Granted

Interrogatory No. 2 Deferred in its entirety

Interrogatory No. 3 Granted

Interrogatory No. 4 Granted

Interrogatory No. 5 Granted in part; deferred as to damages

Interrogatory No. 6 Deferred in its entirety

Interrogatory No. 7 Deferred in its entirety

Interrogatory No. 8 Granted

Interrogatory No. 9 Granted

Interrogatory No. 10 Granted in part; deferred as to damages

Interrogatory No. 11 Granted in part

Mr. Turner will respond to the interrogatories I have granted in whole or in part, and provide the documents responsive to the Document Production Requests I have granted in whole or in part no later than July 12, 1999.

B. Request for Deposition

GPC and Princeton also seek to depose Mr. Turner in this proceeding. Prior to the submission of the discovery request under consideration, I advised the parties of my concern that any deposition of Mr. Turner not yield cumulative or duplicative information. See June 4 Letter. I pointed out that Mr. Turner has already provided five hours of testimony to the DOE's Office of Nuclear Safety Enforcement and that a copy of the transcript containing Mr. Turner's sworn testimony is included as a part of the record in this case.

In their joint discovery request, GPC and Princeton claim that the earlier examination of Mr. Turner by the DOE's Office of Nuclear Safety Enforcement did not explore, or adequately explore, the following subject areas:

1. The exact nature of Mr. Turner's allegations of unlawful reprisal or retaliation by Princeton and General Physics respectively;
2. The factual basis for each claim of unlawful reprisal or retaliation made by Mr. Turner against Princeton and General Physics respectively;
3. The damages claimed by Mr. Turner, including, but not limited to, each item of damages, the amount of each item, the components of each item, the calculation of each item or component, and the causal connection between each items and the alleged unlawful actions of Princeton and General Physics;

4. The steps taken, if any, by Mr. Turner to mitigate damages following his removal from the position of Tritium Shift Supervisor at Princeton University Plasma Physics Laboratory.

As a preliminary matter, I will not permit Mr. Turner to be deposed regarding the issue of damages for the same reasons I articulated above. Unlike the Requests for Production of Documents and Interrogatories relating to damages, however, I am denying, not deferring, the request to depose Mr. Turner on the issue of damages. If a remedial phase of this case is necessary, I believe any information regarding Mr. Turner's damages can be documented in writing without the need for deposition testimony. I will, of course, permit GPC and Princeton to provide comments to me regarding any documentation Mr. Turner might submit to support his claim for damages during the remedial phase of this proceeding, if there is one.

As for GPC and Princeton's request to depose Mr. Turner regarding the factual underpinnings of Mr. Turner's alleged protected disclosures and the alleged unlawful reprisals and retaliation he experienced, I have carefully considered the request and have decided to deny it for several reasons. First, GPC and Princeton's assertion that they need the deposition to explore "other pertinent issues" not adequately examined by the DOE's Office of Nuclear Safety Enforcement is simply too broad a justification. That explanation does not satisfy my instruction to the parties that any discovery request "explain . . . how . . . information [sought] is germane to the issues raised in the Turner's whistleblower complaint." See June 4 Letter at 2. Second, Mr. Turner has already tendered a pre-hearing submission in response to my request in which he has clarified, among other things, what the protected disclosures at issue are, and to whom he made those disclosures. See Letter from David M. Turner to Ann S. Augustyn, Hearing Officer (June 1, 1999). Third, Mr. Turner is already providing GPC and Princeton with extensive materials pursuant to this discovery order. At a minimum, those materials should allow GPC and Princeton to isolate, gather evidence and develop the key factual issues in this proceeding. Lastly, I remind GPC and Princeton that Mr. Turner will be available for examination under oath at the hearing. At that time, the parties will have sufficient opportunity to direct any relevant questions to Mr. Turner.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed jointly by General Physics Corporation and Princeton University on June 10, 1999, Case No. VWD-0004, be and hereby is granted as set forth in paragraph (2) below; be and hereby is deferred as set forth in paragraph (3) below; and be and hereby is denied as set forth in paragraph (4) below;

(2) David Turner shall submit to General Physics Corporation and Princeton University no later than July 12, 1999 documents responsive to the General Physics Corporation and Princeton University Request for Production of Documents Nos. 1 (except as to damages), 2, 3, 4, 5, 6, 8, 9, 10, 11, 13 (only for the time period set forth in the foregoing Decision), 14 and 15. Mr. Turner shall also respond to Interrogatories Nos. 1, 3, 4, 5 (except as to damages), 8, 9, 10 (except as to damages), and 11 (as amended in the foregoing Decision).

(3) Discovery is deferred with respect to that portion of Document Production Request No. 1 relating to damages; Document Production Requests Nos. 7, 12 and 16 in their entirety; Interrogatory Nos. 2, 6, and 7 in their entirety, and those portions of Interrogatories Nos. 5 and 10 that relate to damages.

(4) The Request to Depose Mr. Turner filed jointly by General Physics Corporation and Princeton University is denied.

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

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: July 1, 1999

(1) In the interim, the DOE's Office of Nuclear Safety Enforcement initiated a separate investigation into the safety issues raised by Turner as they related to the Tokamak Fusion Reactor project at PPPL. During its investigation, the Nuclear Safety Enforcement investigators conducted a five-hour deposition of Mr. Turner. In May 1996, the Office of Nuclear Safety advised the IG of its conclusion that Mr. Turner had some valid observations regarding the need for clarification and enhanced descriptive language in the Final Safety Analysis Report for the Tokamak Fusion Test Reactor. See Memorandum dated May 29, 1996 from R. Keith Christopher, Director, Enforcement and Investigation Staff, to James E. Sheldon, III, Investigation Team Leader, Office of Employee Protection.

(2) This situation exemplifies the wisdom of the DOE's decision not to mandate discovery in all situations as suggested by one of the commenters to the proposed interim final rule revising the Part 708 regulations. See 64 Fed. Reg. 12862 at 12867 (March 15, 1999). To do so in this case might have, in my opinion, unduly burdened the whistleblower, and delayed this proceeding beyond reason.

(3) The attorney for Princeton, Ms. Buttolph, did not participate in the conference call. Rather, she permitted GPC's attorney to act in her stead. I later informed Ms. Buttolph of all my rulings, as did Mr. Wayne, the attorney for GPC.