

# Case No. VWD-0006

August 10, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Petitioner: Lucy B. Smith

Date of Filing: August 2, 1999

Case Number: VWD-0006

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by Lucy B. Smith. This Motion, dated July 20, 1999, concerns the hearing requested by Ms. Smith under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). She requested this hearing on May 5, 1999 (Case No. VWA-0041) in connection with the Part 708 complaint she filed against Westinghouse Savannah River Company (WSRC).

## I. Factual Background

Ms. Smith's Part 708 complaint arises from her employment as a chemist with WSRC at DOE's Savannah River Site. Ms. Smith alleges that she was selected for termination by a Reduction-in- Force (RIF) as a result of making three protected disclosures involving alleged health and safety concerns to WSRC officials during the last half of 1996. On March 26, 1997, Ms. Smith filed the present Part 708 complaint. On April 1, 1997, Ms. Smith retired from WSRC.

After conducting an investigation, the Department of Energy's Office of the Inspector General issued a document entitled Report of Inquiry and Recommendations (Report) regarding Ms. Smith's Part 708 complaint. The Report concluded that Ms. Smith had made protected disclosures to WSRC officials and makes the assumption that the disclosures contributed to Ms. Smith's selection for termination. However, the Report also concluded that WSRC had proved by clear and convincing evidence that Ms. Smith would have been selected for termination by RIF absent the protected disclosures.

## II. Request for Discovery

In a letter dated July 8, 1999, Ms. Smith requested the following three items pursuant to discovery in the pending hearing on her Part 708 complaint:

1. A copy of the Westinghouse Savannah River Site Policy regarding rehire of personnel who have been selected for layoff, as the policy relates to salaried exempt employees.
2. Provide the names, positions, dates of hire, and summary of qualifications for each chemist hired at the Savannah River Site since January 1, 1997.
3. Identify by name, position, date of hire, date of layoff, and date of rehire of all chemists, at the Westinghouse Savannah River Site for the period January 1, 1995, to date.

July 8, 1999 Letter from Herbert W. Louthian, Esq., Counsel for Lucy B. Smith, to Michael L. Wamsted, Esq., Counsel, WSRC. In a letter dated July 14, 1999, WSRC replied that it was formally objecting to this discovery request since the requested material was not relevant to the subject matter of the complaint. See July 14, 1999 letter from Michael Wamsted, Esq., Counsel, WSRC, to Herbert Louthian, Esq., Counsel for Lucy B. Smith.

Ms. Smith submitted a Motion for Discovery dated July 20, 1999. In her Motion, Ms. Smith argues that she was selected for layoff for raising safety related issues to her manager. Further, Ms. Smith contends that because she was the best qualified and most experienced chemist in her work area, she would be eligible for rehire. With regard to Item No. 1, Ms. Smith argues that since she was selected for layoff pursuant to this policy, it would be relevant to the hearing. The requested items would indicate if WSRC rehired lesser qualified chemists instead of Ms. Smith. Item Nos. 2 and 3 are needed so that Ms. Smith can compare the qualifications of any chemists rehired by WSRC with Ms. Smith's qualifications to see if chemists with lesser qualifications were rehired over Ms. Smith.

WSRC argues that none of the requested items are relevant to Ms. Smith's Part 708 hearing. Ms. Smith's complaint alleges that the sole reprisal she suffered for her disclosure was her termination by RIF. Nowhere in her Part 708 complaint does she allege retaliation stemming from "preference in hire" or "rehire" policies. WSRC argues that 10 C.F.R. § 708.6(c) of the rules in effect require that the complainant be specific as to the nature of the retaliatory act. WSRC also notes that Ms. Smith failed to raise the issue of failure to rehire when questioned by the Office of the Inspector General (OIG) or when she submitted her typewritten statement to the OIG. Finally, WSRC argues that to comply with the discovery request would unduly burdensome.

### **III. Analysis**

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). The newly revised regulations more specifically lay out the types of discovery that can be ordered. See 10 C.F.R. § 708.28(b). The regulations grant the Hearing Officer authority to arrange for the issuance of subpoenas for witnesses to attend the hearing

on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing that the requested discovery is "designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1).

It is within the spirit of the DOE Contractor Employee Protection Program regulations that arrangements for pre-hearing discovery be worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer. However, the OHA is prepared to issue a discovery order if necessary to ensure compliance with any reasonable discovery request. Since there are material disputes regarding Ms. Smith's discovery request, this Discovery Order is necessary.

The fundamental question raised by this Motion is whether discovery related to whether Ms. Smith was improperly not rehired by WSRC is relevant to the allegations contained in her Part 708 complaint. Each of the discovery items at issue here could lead to the discovery of information regarding rehiring policies or the identities of chemists who were rehired by WSRC. However, Ms. Smith's Part 708 complaint only alleges one retaliatory action - being selected for termination by RIF. There is no mention in her complaint or the Report alleging that Ms. Smith was not rehired in retaliation for her protected complaints. Thus, I do not find any of the three discovery items to be relevant to Ms. Smith's Part 708 complaint.

In the normal course, Ms. Smith's Motion for Discovery would be denied. However, I note that while Ms. Smith did not allege retaliation by virtue of not being rehired in her complaint, she could seek to amend her Part 708 complaint or file another complaint with DOE alleging this type of reprisal. See 10 C.F.R. §§ 708.10-708.14. At the time she filed her Part 708 complaint, Ms. Smith could not have known about future WSRC actions regarding a failure to rehire. To avoid piecemeal administrative litigation regarding Ms.

Smith's Part 708 complaint and to further the purpose of the Part 708 regulations to provide a venue to deal with allegations of retaliation against contractor employees, I have decided to grant Ms. Smith's Motion for Discovery so that the issue of whether Ms. Smith suffered a reprisal by not being rehired can be litigated in the current proceeding.(1) WSRC shall submit to Ms. Smith, no later than two weeks from the date of this Supplemental Order the information requested in Ms. Smith's July 8, 1999 discovery request. Within two weeks of receiving the requested discovery materials from WSRC, Ms. Smith shall submit a statement to WSRC and to OHA specifically alleging what, if any, reprisals Ms. Smith experienced by reason of not being rehired by WSRC. WSRC will then have an opportunity to respond to these allegations and to conduct discovery concerning these allegations. Additionally, since this order potentially expands the scope of the requested hearing on this matter, I will consider any request to delay the scheduled start of the hearing. In light of the above discussion, Ms. Smith's Motion for Discovery should be granted.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Lucy B. Smith, Case No. VWD-0006, is hereby granted.

(2) Westinghouse Savannah River Company (WSRC) shall submit to Lucy B. Smith, no later than two weeks from the date of this Order, the information requested in Ms. Smith's July 8, 1999 discovery request.

(3) Within two weeks of receiving from WSRC the requested materials specified in Ms. Smith's July 8, 1999 discovery request, Ms. Smith shall submit to WSRC and OHA a statement specifically alleging what, if any, reprisals Ms. Smith experienced by reason of not being rehired by WSRC.

(4) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.

Hearing Officer

Office of Hearings and Appeals

Date: August 10, 1999

(1)While WSRC has stated that complying with this request would be unduly burdensome, it has not provided any facts where I could conclude that, in fact, complying with the discovery request would produce undue delay in this matter or otherwise prejudice WSRC.