

Case No. VWD-0007

August 24, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Petitioner:Linda D. Gass

Date of Filing: August 11, 1999

Case Number: VWD-0007

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by Linda D. Gass. This Motion, dated August 10, 1999, concerns the hearing requested by Ms. Gass under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). She requested this hearing on January 12, 1999 (Case No. VWA- 0041) in connection with the Part 708 complaint she filed against Lockheed Martin Energy Systems, Inc. (LMES).

I. Background

Ms. Gass began working for LMES in March 1982. In her Complaint, Ms. Gass alleged that in 1991 she raised health and safety concerns with the DOE and its contractors regarding the environmental site characterization of a proposed industrial park, and also made disclosures to LMES officials regarding alleged retaliation for activity protected under Part 708.(1) The Complainant alleged that she suffered retaliation as a result of her disclosures.

On December 16, 1998, the DOE Office of Inspector General (IG) issued a Report of Investigation on Ms. Gass' Complaint. The report found that the Complainant failed to establish by a preponderance of the evidence that she had made disclosures protected under Part 708 regarding the

proposed industrial park that are protected under Part 708. The report made no findings regarding the other disclosures included in Ms. Gass' Complaint.

In a letter dated June 22, 1999, Ms. Gass requested from LMES 39 items pursuant to discovery in the pending hearing on her Part 708 complaint. Ms. Gass requested an additional 7 items of discovery on July 9, 1999. LMES provided an initial response to Ms. Gass' discovery requests on July 26, 1999, and a second response on August 4, 1999. LMES responded at least in part to 8 of the 46 items requested by the Complainant, stated that it did not have in its possession of documents responsive to 12 of the items, responded to 15 of the 46 items with objections on various grounds, and stated that the remaining items would be forthcoming.

Based upon LMES's failure to fully respond to the Complainant's discovery requests, on August 9, 1999, the Complainant filed a Motion to Continue the present matter, a hearing in which had been scheduled to begin on August 24, 1999. On August 10, 1999, I informed the parties that I would withhold a ruling on the Motion for Continuance pending my receipt, no later than 5:30 p.m. on Thursday, August 12, 1999, of a Motion to Compel Discovery. The complainant filed a Motion for Discovery on August 11, 1999, to

which LMES responded, and I held telephone conferences on August 16 and 17, 1999, to discuss the complainant's two motions. Attached at Appendix A to this Decision and Order is a copy of the Complainant's two discovery requests.

II. Analysis

The Part 708 regulations state that the “Hearing Officer may order discovery at the request of a party, based on 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). After considering the arguments of both parties on the present Motion for Discovery, I have decided to grant the Motion in part. With respect to most of the items of requested discovery, I find that the Complainant has made the showing required by the regulations and I will therefore order the Respondent to provide the Complainant the items listed at Appendix B to this Decision and Order.(2)

As an initial matter, I will address two specific grounds for objections raised by the Respondent. First, the Respondent objected to two items of discovery as protected by the attorney-client privilege. These items (numbers 8 and 9 on page 2 of Complainant's initial request) seek names and other information regarding individuals interviewed by the DOE Office of Inspector General in its investigation of the present matter. Names provided in response to these items would almost certainly include those of LMES officials, and the content of communications between counsel for LMES and company officials may be protected by the attorney-client privilege. Such privileged material would not be discoverable under the Part 708 regulations. See 10 C.F.R. § 708.28(b)(1) (allowing discovery of materials “not privileged”). However, to the extent that a response to these two items will only reveal the identity of a client of respondent, the information would not be privileged. See, e.g., *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129-30 (9th Cir. 1992); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 505 (2d Cir. 1991); *In re Grand Jury Subpoena*, 913 F.2d 1118, 1123 (5th Cir. 1990); *In re Grand Jury Subpoena*, 906 F.2d 1485, 1488 (10th Cir. 1990); *In re Grand Jury Subpoenas*, 803 F.2d 493, 496-98 (9th Cir.1986); *In re Shargel*, 742 F.2d 61, 62 (2d Cir.1984); *In re Grand Jury Investigation*, 723 F.2d 447, 451 (6th Cir.1983).

Second, the Respondent objected to a number of items on the grounds that they were “so over- reaching as to not be capable of being answered.” Other than certain items in Complainant's request that I find below to be overly broad, I disagree that it is beyond the capability of the Respondent to answer the Complainant's discovery requests. As of yet, the Respondent has not provided evidence that would lead me to conclude that “complying with the discovery request would produce undue delay in this matter or otherwise prejudice” the Respondent. [Lucy B. Smith](#), Case No. VWD-0006 (August 10, 1999).

However, I find that certain of the items listed in the Complainant's discovery request are broad beyond the scope of that which would be “designed to produce” evidence relevant to the present matter. Thus,

(1) I have narrowed the scope of items 4 through 7 on pages 1 and 2 of Complainant's initial request and item 6 on page 2 of Complainant's second request to refer only to documents related to the specific environmental site characterization of a proposed industrial park relevant to the Complainant's alleged protected disclosures. See *infra* note 1.

(2) I have narrowed the scope of item 14 on page 4 of Complainant's initial request to exclude information requested on the age and sex of employees of the Respondent. While this item and others are designed to produce evidence regarding employees similarly situated to the Complainant, and are thus reasonable items of discovery,(3) I do not find that the age or sex of other employees of the Respondent is relevant in this proceeding, where alleged age or sex discrimination is not at issue. See 10 C.F.R. 708.4(a) (excluding from coverage claims “based on race, color, religion, sex, age, national origin, or other similar basis”).

(3) I have narrowed the scope of items 18 through 24 on pages 4 and 5 of Complainant's initial request. These items reference the process used to review the Complainant's eligibility for a DOE security

clearance. Decisions as to eligibility for DOE security clearances are made by the DOE, not the Respondent. See 10 C.F.R. Part 710. I will nonetheless allow limited discovery on this subject, because it “is possible that retaliation as so defined [in the Part 708 regulations] could include actions by the contractor that cause the questioning, suspension, or termination of a security clearance.” Criteria and Procedures for DOE Contractor Employee Protection Program, 64 Fed. Reg. 12,862 (March 15, 1999) (preamble to revision of Part 708 regulations).

(4) I have narrowed the scope of item 33 on page 7 of the Complainant's initial request to refer only to complaints or lawsuits alleging retaliation for protected activity.

(5) I have narrowed the scope of item 7 on page 2 of the Complainant's second request to include only communications that in any way refer to the Complainant.

Further, two items requested by the Complainant (items 4 and 5 on pages 1 and 2 of the second request) would be relevant to the issue of damages, should the Respondent be found liable for violations under Part 708. However, I have decided to bifurcate this matter into a liability phase and a remedy phase. Thus, discovery regarding the issue of potential damages will be deferred pending a decision on liability. If I issue an initial agency decision in favor of the Complainant, at that time I will determine the most appropriate mechanism to ascertain the extent of the Complainant's damages and the appropriate remedy. See [Princeton University](#), Case No. VWD-0004 (July 1, 1999).

Finally, regarding those instances where the Respondent stated that it did not locate information responsive to the discovery requests, the Complainant has questioned whether the attorney for the Respondent has properly certified his response. The Federal Rules of Civil Procedure require the signature of an attorney on a discovery response. Fed. R. Civ. P. 26(g). This signature constitutes a certification by the attorney. *Id.* “The Advisory Committee's Notes to the 1983 amendments to Rule 26 spell out the obvious: a certifying lawyer must make 'a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.’” *Legault v. Zambarano*, 105 F.3d 24, 27 (1st Cir. 1997). Because the Federal Rules of Civil Procedure do not apply to the present proceeding, but may be used as a guide, I will require that the attorney for the respondent submit a signed statement that he has made a reasonable effort to assure that his client has provided all the information and documents available that are responsive to the Complainant's discovery requests.

For the reasons stated above, I will order the Respondent to provide to the Complainant, no later than September 9, 1999, the items listed at Appendix B to this Decision and Order. In addition, I will order that discovery in this matter be completed by September 30, 1999, and that I receive all witness lists, exhibits, and pre-hearing statements from the parties no later than October 3, 1999. While the Complainant's Motion for Discovery requests that I additionally draw “adverse inferences against Respondent,” I find no basis in the Part 708 regulations for doing so at this time. However, after the present order is issued, both parties should bear in mind that a Hearing Officer in a Part 708 proceeding “may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Hearing Officer.” 10 C.F.R. § 708.28(b)(5).

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Linda D. Gass, Case No. VWD-0007, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) Lockheed Martin Energy Systems, Inc., shall submit to Linda D. Gass, no later than September 9, 1999, the items of requested discovery set forth at Appendix B to this Decision and Order, along with a statement signed by an attorney for Lockheed Martin Energy Systems, Inc., that the attorney has made a reasonable effort to assure that his client has provided all the information and documents available that are responsive to the Complainant's discovery requests.

(3) Linda D. Gass and Lockheed Martin Energy Systems, Inc. shall complete discovery in the present proceeding no later than September 30, 1999.

(4) Linda D. Gass shall submit a list of witnesses that she intends to call to testify at the hearing in the present matter, the exhibits she intends to rely upon, and any pre-hearing statement, to be received by the Hearing Officer no later than October 3, 1999.

(5) Lockheed Martin Energy Systems, Inc. shall submit a list of witnesses that it intends to call to testify at the hearing in the present matter, the exhibits it intends to rely upon, and any pre-hearing statement, to be received by the Hearing Officer no later than October 3, 1999.

(6) 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.

Steven J. Goering

Hearing Officer

Office of Hearings and Appeals

Date: August 24, 1999

(Appendix A not available electronically)

Appendix B - Case No. VWD-0007

1. With respect to the interrogatory items below, provide the name, title, and length of time in current position of the individual answering these questions on behalf of the Respondent.
2. With respect to the interrogatory items below, identify all documents referred to by any individual in answering these requests. For each document listed, state:
 - a. Date each document was written;
 - b. Name and address of the author of the document;
 - c. Recipient of the document; and
 - d. Summary of contents of the document.
3. Name, title, and length of employment of all individuals with whom any employee of the Respondent has discussed the subject matter of this hearing. For each individual, state:
 - a. His or her name, residential address, and business address; and
 - b. His or her title or position with the Respondent.
4. Describe completely all policies or formalized procedures which the Respondent had or maintained between 1990 and 1997 with reference to:
 - a. Employee protections from retaliation for protected activity;
 - b. Layoff procedures, specifically, any policies regarding how layoff decisions are made.

For each policy or procedure, state when and where posted, and when and how otherwise disseminated to employees.

5. Provide copies of occurrence reports of the Respondent created between 1990 and 1997.
6. With respect to any geotechnical reports related to Elza Gate, please state the beginning and ending dates for said documents that are currently in the possession of the Respondent.
7. For any geotechnical reports related to Elza Gate not currently in the possession of the Respondent, please indicate:
 - a. The current location of these documents;
 - b. Date upon which these documents were last in the possession of the Respondent; and
 - c. Why the Respondent no longer has possession of these documents.
8. With respect to survey books related to Elza Gate containing coordinates of burial trenches, please state beginning and ending dates for said documents that are currently in the possession of the Respondent.
9. For any survey books related to Elza Gate containing coordinates of burial trenches, not currently in the possession of the Respondent, please indicate:
 - a. The current location of these documents;
 - b. Date upon which these documents were last in the possession of the Respondent; and
 - c. Why the Respondent no longer has possession of these documents.
10. Name, title, and dates of employment of any and all persons known to Respondent to have been interviewed by any person associated with the Inspector General's office in connection with the investigation of the complaint filed by the Complainant.
 - a. Specifically, were either Jill Freeman or Anthony Wylie interviewed?
11. Name, title and length of time in position of all individuals in Respondent's employ who provided signed or recorded statements concerning Complainant's complaint.
 - a. Attach hereto a copy of any such statement that was not included in the IG Report.
12. Provide a copy of all documents created between May 1, 1990 and November 30, 1996, related to layoffs, which documents contain the name of the Complainant, or otherwise make reference to the Complainant.
13. With respect to computer operations, please state:
 - a. How old e-mail files and/or records are stored since 1990; and
 - b. Name and position of person(s) responsible for handling the disposition and/or maintenance of such files.
14. Has the Respondent at any time employed an individual by the name of Mike Pung. If so, please state:
 - a. Dates of employment and position; and
 - b. Whether he at any time in the past dealt with the disposition and/or maintenance of employee E-mail files.
15. List all work assignments given to Complainant during Fiscal Years 1990 through 1992. For each

assignment, please state:

- a. Name and position of person who assigned tasks;
- b. Specific duties performed by Complainant in completing tasks;
- c. Number of hours charged by Complainant on said task;
- d. Whether Complainant was accountable for a specified number or percentage of billable hours per week, month, or project; if so, specify the terms of accountability; and
- e. Name and position of individual who supervised Complainant's performance of said task.

16. Please provide the following information for all individuals employed by Respondent who performed duties under the direction of Bill Manrod between May 1990 and November 1996:

- a. Name;
- b. Job Title;
- c. Salary Grade;
- d. Job Function Skills;
- e. Time in position(s);
- f. Education level and field; and
- g. Any certification and or specialized training.

17. For each individual listed in response to the preceding request, please list all assignments made and tasks performed while the individual worked under the direction of Bill Manrod. Please identify the assignments and/or tasks by:

- a. Nature of task(s) assigned;
- b. Name and position of person who assigned task(s);
- c. Number of hours spent by each individual on said task(s);
- d. Name and position of individual who supervised each individual's performance of said task; and
- e. Overtime records, including:
 1. Number of overtime hours worked;
 2. Assignment(s) for which overtime was worked.

18. With regard to James Moore, Chris Rogers, Ronnie Brewer, and Kathy Lett, if not included as part of Respondent's response to the previous request, please state:

- a. Dates of employment;
- b. Positions held, including dates of each; and
- c. Records of overtime.

19. List all persons either hired into Bill Manrod's department as direct employees, or employed as subcontractors performing work for his department, between May 1, 1990 and November 30, 1996. For each individual or subcontractor, please include:
- a. Reason for hiring or employing as subcontractor; and
 - b. Projects/work assigned, including dates and number of hours worked on each.
20. Please provide a copy of any and all written policies and/or procedures of the Respondent regarding investigation for security clearance that were in effect between January 1985 and November 1996.
21. Please provide a copy of all forms utilized by the Respondent in security clearance review between January 1985 and November 1996.
22. Please provide any and all records in the possession of the Respondent pertaining to Complainant's security clearance and/or review between January 1985 and November 1996. Include all writings (memos, notes, letters, forms, etc.), as well as tape recordings.
23. Please list any and all individuals employed by Respondent who participated in the investigation of Complainant for security clearance purposes. For each individual, please include:
- a. Name, position, and dates of employment; and
 - b. Nature of participation in the investigation
24. List any and all individuals employed by Respondent who were contacted by any person involved in the investigation of Complainant regarding her security clearance. For each individual, please state:
- a. Name, position, and dates of employment of said individual; and
 - b. Information requested of and/or provided by said individual.
25. List the names of any and all individuals employed by Respondent from 1990 to the present that have filed a complaint (formal or informal) or lawsuit against the Respondent alleging retaliation for protected activity. For each such individual, state:
- a. Nature of complaint or lawsuit, i.e. allegation(s) and relief sought;
 - b. Date filed; and
 - c. Disposition of complaint or lawsuit, i.e. settlement, judgment, pending, etc.
26. List all witnesses the Respondent proposes to call in this action. For each individual listed, please state:
- a. Name, title or position, and address; and
 - b. Nature of the testimony anticipated from the witness.
27. Identify any person whom you intend to call as an expert witness at the time of hearing of this action, including in your answer with respect to each such person:
- a. Subject matter upon which the expert is expected to testify;
 - b. Substance of the facts and opinions to which the expert is expected to testify; and
 - c. Summary of the grounds for each such opinion of the expert.

28. Explain how Gail Sewell calculated Complainant's attendance records in her (Sewell's) response to the Complainant's EEOC complaint;

29. List any position openings of the Respondent during the period May 1991 through November 1997, the existence of which position opening was not otherwise made known to all employees of the Respondent.

30. Any and all communication regarding Elza Gate between LMES (and/or predecessors) and any agency with environmental regulatory/oversight functions, including, but not limited to:

a. EPA, Region IV;

b. Tennessee Oversight Agreement;

c. Tennessee Department of Environment and Conservation (TDEC); and

d. Ohio EPA.

31. Any and all notes, documents or other communications regarding the departure of Anthony Wylie from employment with Respondent, if such communications in any way refer to the Complainant.

32. Name all persons, not heretofore mentioned, having personal knowledge of facts material to this case, and provide their current position held with Respondent, dates of employment with Respondent, and their last known residential address.

(1)Although the Complainant originally alleged that she made additional disclosures protected under Part 708, I found that these other disclosures were not so protected, and on March 12, 1999, ordered that the Complaint “be dismissed as to all but (1) the alleged disclosures to the DOE and its contractors regarding the environmental site characterization of a proposed industrial park and (2) the alleged disclosures to LMES officials regarding alleged retaliation for activity protected under Part 708.” [Lockheed Martin Energy Systems](#), 27 DOE ¶ 87,510 (1999).

(2)Several of the items of the Complainant's initial discovery request (item 10, page 2; item 13, page 3; item 15, page 4; item 16, page 4) have been modified as discussed in the August 16, 1999 telephone conference.

(3)See [David M. Turner](#), Case No. VWD-0003 (July 8, 1999) (ruling on Motion for Discovery) (“OHA Hearing Officers have found it extremely helpful in evaluating Part 708 claims to examine how a company has treated employees similarly situated to the whistleblower. See [Ronald Sorri](#), 23 DOE ¶ 87,503 (1993); [Ronny J. Escamilla](#), 26 DOE ¶ 87,508 (1996), [aff’d](#), 27 DOE ¶ 87,508 (1997). Courts have also examined the treatment of similarly situated employees in determining whether ostensibly legitimate bases for adverse personnel actions are pretexts for punishing or getting rid of a whistleblower. See, e.g., *Kansas Gas & Electric Co. V. Brock*, 780 F.2d 1505 (10th Cir. 1985) (requiring whistleblower to document his educational requirements while not applying similar requirements to other employees).”)