

May 2, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Fred Hua
Date of Filing: April 3, 2008
Case Number: TBU-0078

Fred Hua (the complainant), appeals the dismissal of his complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The complaint was filed on January 22, 2008, and was dismissed on March 18, 2008. As explained below, the dismissal of the complaint should be sustained, and the appeal denied.

I. BACKGROUND

The complainant was an employee of AREVA NP, Inc. (AREVA), a subcontractor to Sandia National Laboratories (Sandia) at the DOE Yucca Mountain Project (YMP) in Nevada. Although the complainant was an AREVA employee, his on-site manager was Cliff Howard (the supervisor), the manager of Sandia Lead Lab Engineered Systems. In early September 2007, Sandia informed AREVA that the complainant would be released from YMP, effective September 28, 2007.

The complainant filed a Part 708 complaint with the National Nuclear Security Administration (NNSA) Whistleblower Program Manager (the WP Manager). In his complaint, the complainant states that he was released from YMP in retaliation for making protected disclosures. Specifically, the complainant alleges that he was released from YMP because he raised concerns during various Performance Assessment Systems Integration Team (PASIT) meetings, which were attended by other Sandia employees, as well as individuals from the DOE and Department of the Navy.

According to the complainant, he raised concerns at the PASIT meetings “regarding obstacles for a timely and quality document completion.” Complaint at 8. Among the concerns raised by the complainant were the following: (i) a Technical Work Plan (TWP) was rushed to completion and was later found to have errors; (ii) resources were wasted in correcting errors caused by technical editors because the complainant was not allowed to train the technical editors on the use of an advanced feature in Microsoft Word; (iii) the complainant and his colleagues were unable to adequately utilize a Features and Events Process (FEP) document management software program, Sharepoint, causing problems with the FEP procedure within the Engineered Systems

department; and, (iv) the supervisor refused to provide a courtesy copy of a document to his DOE counterpart prior to making his final submission of the document, requiring Sandia staff to spend time making DOE-required changes after the final submission of the document. Complaint at 12, 15 - 17.

On March 18, 2008, the WP Manager dismissed the complaint for “lack of jurisdiction.” As a basis for the dismissal, the WP Manager stated that the complaint “fail[ed] to describe a ‘protected activity’ under 10 C.F.R. § 708.5.” Specifically, the WP Manager determined that “the facts alleged do not rise to the level of (1) a substantial violation of law, rule or regulation, (2) a substantial and specific danger to employees or public health and safety, or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority.” Therefore, the WP Manager dismissed the complaint, pursuant to 10 C. F. R. § 708.17.

On April 3, 2008, the complainant filed an appeal of the dismissal by the WP Manager with the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

II. ANALYSIS

Section 708.17 provides, in relevant part, that “dismissal for lack of jurisdiction or other good cause is appropriate if ... the facts, as alleged in [the] complaint, do not provide issues for which relief can be granted” under Part 708. 10 C.F.R. § 708.17 (c) (2).

A. The Complaint

We have reviewed the complaint and the WP Manager’s dismissal. Based on the information contained in the complaint, we find no error in the WP Manager’s determination that the complainant failed to make disclosures protected under Part 708.

1. The Technical Work Plan

The complainant’s allegation that his disclosure of the flawed TWP reveals “gross mismanagement” on the part of the supervisor is not persuasive. In a prior decision, OHA stated that gross mismanagement is characterized by

more than *de minimis* wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.

Roger Hardwick, OHA Case No. VBA-0032, 27 DOE ¶ 87,539 (1999); *see also Carolyn v. Dep’t of the Interior*, 63 M.S.P.R. 684 (1994). In his complaint, the complainant gave a long narrative of various difficulties he encountered in his work as the result of the supervisor’s decision to prepare the TWP in a certain manner.

While the information in the complaint indicates that the complainant believed that the supervisor's approach to completing the TWP was incorrect, this does not, without more, rise to the level of mismanagement, much less gross mismanagement. There is no indication in the complaint that the project came to a standstill or that the flaws in the document compromised YMP's ability to complete its mission. Therefore, there is no basis for concluding that the WP Manager erred on this point.

2. Disclosures Regarding Software Applications

As to the complainant's arguments regarding his colleagues' inability to use advanced features in Microsoft Word and Sharepoint, the complainant has failed to establish that the supervisor's decisions concerning those software applications constituted gross mismanagement or resulted in gross waste of funds. Just as gross mismanagement constitutes more than merely a debatable managerial decision, gross waste of funds constitutes a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *See Erika D. Jensen v. Dep't of Agriculture*, 104 M.S.P.R. 379 (2007).

The complainant maintains that there was a "significant waste of project funds" that resulted from the problems with the software applications. He states that had the supervisor followed his recommendations, "millions of dollars" could have been saved. Complaint at 10. However, the complainant provides no details, in either his complaint or his appeal, regarding the alleged waste or mismanagement. The complainant discusses the inconvenience to him and his colleagues of working under conditions with which the complainant disagreed. Other than his own assertions, the complainant does not specify the amount of funds needlessly spent or the difficulties that significantly compromised YMP's ability to accomplish its mission. Stating broadly that "millions of dollars" could have been saved is vague and inadequate. The complainant's assertions do not disclose gross waste of funds or gross mismanagement. Rather, they reveal his disagreement with managerial decisions on the allocation of funds and manpower. On this point, the WP Manager correctly determined that the complainant did not describe a disclosure protected under Part 708.

3. The Supervisor's Refusal to Provide Courtesy Copy of Document

Finally, the complainant's disclosure regarding the supervisor's refusal to provide a courtesy copy of a document to his DOE counterpart prior to making his final submission of the document, does not constitute a disclosure of gross mismanagement. It appears that the submission of the document to the DOE counterpart was not a requirement, but rather a courtesy. The supervisor did not follow that course. While the complainant may have disagreed with the supervisor's decision, it does not constitute mismanagement, much less gross mismanagement. In addition, there is no indication that, even had a copy of the document been provided to the DOE counterpart prior to its final submission, the complainant and his colleagues would not have been required to spend time revising the document. Consequently, we find this purported disclosure to be frivolous on its face. There is no error in the WP Manager's determination on this point.

B. The Appeal

In his appeal, the complainant presents arguments that he did not make in his complaint. Specifically, in addition to his arguments that his disclosures reveal gross mismanagement and gross waste of funds, the complainant now states in his appeal that the supervisor's preparation of the TWP also posed a danger to public health or safety and constituted a violation of law, rule, or regulation. It appears that these arguments are an effort on the part of the complainant to use the same language used by the WP Manager in her dismissal in order to meet the requirements of 10 C.F.R. § 708.5, and overcome the deficiencies the WP Manager cited under 10 C.F.R. § 708.17. These arguments were not raised during the initial complaint. However, in order to give this case thorough consideration, we will exercise our discretion and review the new arguments.

1. Danger to Public Health or Safety

The complainant maintains in his appeal that his disclosures were not mere disagreements between him and the supervisor. Rather, according to the complainant, his disclosures revealed a danger to public health and safety. Appeal at 6.

I find no merit in this argument. Under Part 708, a disclosure is protected if it reveals “a *substantial and specific* danger to employees or to public health or safety.” 10 C.F.R. 708.5 (a) (2) (emphasis added). Vague and indistinct allegations of government wrongdoing do not amount to protected conduct. See *Julie K. Johnston v. Merit Systems Protection Board*, 518 F.3d 905 (Fed. Cir. 2008). In *Johnston*, the court determined that the petitioner's allegations were detailed and well-supported. Johnston disclosed a substantial and very specific danger regarding the threat of serious injury to employees during training should inadequately trained personnel be tasked with managing training activities. *Id.* at 910. Such is not the case here. The danger that the complainant alleges is neither substantial nor specific.

In his appeal, the complainant gives a long narrative of the relationship between his work and the public welfare. He maintains that the flawed TWP was a direct input into other, more important, models and reports. He states that those models and reports are used in projects which may directly impact public health and safety. Therefore, according to the complainant, preparing a flawed TWP is tantamount to creating a danger to public health and safety.

The alleged relationship between the TWP and health and safety is far removed. Moreover, the complainant does not allege any *specific* danger resulting from the flaws in the TWP. Alleging a general and remote danger, that may or may not occur, simply does not meet the Part 708 standard of disclosing information which reveals a *substantial and specific* danger to employees or to public health or safety.

2. Violation of Law, Rule, or Regulation

In his appeal, the complainant cites to various DOE and Nuclear Regulatory Commission (NRC) quality assurance regulations that are intended to protect the public. He maintains that the fact that there were errors in the TWP, which he says was “rushed” to completion, indicates that the supervisor violated the DOE and NRC quality assurance regulations. This broad statement is not

supported by any factual references in the appeal. Even if the TWP may have contained errors, and required subsequent revisions, this does not indicate a substantial violation of law, rule or regulation.

First, the complainant did not point to any specific provision of the regulations that the allegedly flawed TWP violated. Rather, he gave a long, circuitous discussion of the connection of the TWP to other documents and procedures, and of those documents and procedures to other models and reports, and of those models and reports to other work at YMP which is, in fact, governed by the quality assurance regulations. That purported connection is so vague and remote that we cannot conclude that an allegedly flawed TWP is a violation of the regulations. Second, even assuming that the regulations do remotely apply to producing TWPs, the complainant has not shown with any specificity either that the alleged flaws in the TWP were anything more than minor errors, or that the subsequent revisions to the TWP did not correct the purported violations. The complainant's argument therefore fails to establish a *substantial* violation of law, rule or regulation, as set forth in 10 C.F.R. § 708.5 (a) (1).

As a final matter, we fail to see why, if the complainant did believe that his concerns disclosed both a danger to public health or safety and a substantial violation of law, rule, or regulation, he did not make those arguments in his initial 32-page complaint. As stated above, the complainant's arguments in his complaint were that his concerns disclosed gross mismanagement and gross waste of funds. His failure to raise arguments concerning an alleged danger to public health or safety and an alleged violation of law, rule or regulation in his complaint suggests that these new arguments on appeal are nothing more than the complainant's attempt to bolster his disclosures in light of the WP Manager's dismissal. Having considered these arguments, however, we see nothing in the appeal which would warrant reversing the WP Manager's dismissal and accepting jurisdiction over the complaint.

III. CONCLUSION

As stated above, we find that the complainant's arguments in his complaint reflect his disagreement with managerial decisions, and do not disclose gross mismanagement or gross waste of funds. Therefore, the complainant has failed to establish that he made disclosures protected under section 708.5, and the WP Manager properly dismissed the complaint. In addition, the complainant's new arguments on appeal do not indicate that the complainant disclosed information which revealed either a substantial violation of law, rule or regulation or a substantial and specific danger to employee or public health or safety. No matter how argued, there is no getting around the fact that, in this case, there was no protected disclosure. Accordingly, the arguments on appeal do not establish that the complainant made disclosures protected under section 708.5. Based on the foregoing, we find that the determination of the WP Manager should be sustained, and the instant appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Dr. Fred Hua, Case No. TBU-0078, is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.19.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 2, 2008