

August 3, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Gary S. Vander Boegh
Date of Filing: July 11, 2006
Case Number: TBU-0049

Gary S. Vander Boegh (Vander Boegh or the complainant) appeals the dismissal of his February 21, 2006 complaint of retaliation filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program.¹ He filed the complaint with the Office of Civil Rights and Diversity of the DOE's Environmental Management Consolidated Business Center (EMCBC) located in Cincinnati, Ohio. As explained below, the EMCBC June 29, 2006 dismissal of the complaint should be sustained, and the appeal denied.

I. Background

The complainant was employed by Weskem, LLC, a subcontractor of Bechtel Jacobs Company, LLC (BJC). BJC was the management and integration (M&I) contractor at the DOE's Paducah, Kentucky plant. The complainant was a landfill manager at a landfill site related to that plant. On April 23, 2006, he was terminated from that position, and on April 24, a new M&I contractor, Paducah Remediation Services (PRS), and a new subcontractor, Duratek, took over operation at the site.

The complainant's Part 708 history before the DOE dates from 2002. In that year, he filed a complaint claiming that in 2001 he made disclosures regarding the procedures used at the landfill that could result in environmental and regulatory violations. He contended that his employer, Weskem, then retaliated against him for making the disclosures. In an Initial Agency Decision issued on July 11,

1/ On February 23, 2006, the Complainant filed an amendment and supplement to the complaint and on April 23, he filed an additional supplement. For simplicity, the three filings will be referred to as "the complaint."

2003, a DOE Office of Hearings and Appeals (OHA) hearing officer found that the disclosures were protected, and that Weskem had taken several adverse personnel actions against Vander Boegh which constituted retaliation. The OHA hearing officer determined that the complainant should receive relief for those retaliations. *Gary Vander Boegh*, 29 DOE ¶ 87,040 (2003).²

The instant appeal concerns a different, although related, matter: a February 2006 complaint filed under Part 708 by Vander Boegh with the EMCBC. In that filing, the complainant contended that he had been subjected to ongoing retaliations for participating in the protected proceeding described above, and for making additional disclosures regarding landfill issues. He claimed that BJC, PRS, Weskem and Duratek, were all involved in a series of retaliations against him, culminating in his April 23, 2006 termination.

In its June 29, 2006 dismissal letter, the EMCBC determined that the complaint should be dismissed pursuant to Section 708.17(c), which in relevant part provides that:

Dismissal for lack of jurisdiction or other good cause is appropriate if:

. . .

(3) You filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation;

. . .

EMCBC found that Vander Boegh had filed a recent Complaint [with the Department of Labor (DOL)] under Section 211 of the Energy Reorganization Act, and determined that the DOL Complaint involved the same set of facts alleged in the complaint presented to the EMCBC. Accordingly, the EMCBC dismissed the Vander Boegh complaint under 10 C.F.R. § 708.17(c)(3).³

2/ That determination is currently under appeal both by the complainant and Weskem. OHA Case No. TBA-0007.

3/ There were several other bases on which the EMCBC rejected the Vander Boegh complaint. However, these are irrelevant, given our finding that the complaint was properly dismissed pursuant
(continued...)

Pursuant to 10 C.F.R. § 708.18(a), Vander Boegh filed the instant appeal with the Office of Hearings and Appeals.

II. Analysis

As noted above, Section 708.17(c) provides that a complaint of retaliation may be dismissed for lack of jurisdiction if the complainant "filed a complaint under State or other applicable law with respect to the same facts as alleged in a complaint under this regulation." Section 708.15(c) states that "you [i.e. the complainant] are considered to have filed a complaint under State or other applicable law if you file a complaint, or other pleading, with respect to the same facts . . . whether you file such complaint before, concurrently with, or after you file a complaint under this regulation." Finally, Section 708.15(a)(1) allows a complaint who has filed a complaint under State or other applicable law as described above to file a Part 708 complaint if the ". . . complaint under State or other applicable law is dismissed for lack of jurisdiction."

The EMCBC found that Vander Boegh filed a complaint with the DOL based on the same facts alleged before the DOE. Therefore, the EMCBC correctly dismissed the Vander Boegh complaint pursuant to 10 C.F.R. §708.17(c)(3).

However, the EMCBC dismissal was issued on June 29. The DOL had therefore not yet issued a determination regarding Vander Boegh's complaint. The DOL determination was issued on July 13. I must therefore consider whether under 10 C.F.R. § 708.15(a)(1), Vander Boegh is nevertheless entitled to a consideration of his complaint under Part 708. As I indicated above, that provision allows a complainant whose complaint has been dismissed under "other applicable law" to have his complaint considered under Part 708 if the dismissal was for "lack of jurisdiction."

We obtained a copy of the DOL determination, which was issued by the Atlanta Regional Administrator of the DOL's Occupational Safety and Health Administration (OSHA). In that determination, the OSHA Regional Administrator considered Vander Boegh's complaint that Duratek, Weskem, BJC and DOE retaliated against him (for voicing concerns regarding possible landfill pollution) by blocking his grandfathered rights to continue his employment as landfill manager

3/ (...continued)
to Section 708.17(c)(3).

under the new contract with PRS/Duratek. The Regional Administrator took note of Vander Boegh's termination, and found "clear and convincing evidence" there was no retaliation. Specifically, the Regional Administrator determined that from the time that they first formulated their bid for the contract in 2005, until the selection by PRS/Duratek of a new landfill manager, PRS/Duratek always intended to bring in their own landfill manager. I find that this determination does not constitute a dismissal of Vander Boegh's complaint for "lack of jurisdiction." The Regional Administrator fully considers the merits of the complaint and renders a substantive determination regarding the key retaliation raised by Vander Boegh. Accordingly, since he has received a consideration of the merits of his case from DOL, Vander Boegh no longer has the option of having his complaint of retaliation considered pursuant to Section 708.15(a)(1).

Vander Boegh raises other alleged retaliations that were not explicitly considered by DOL. These other retaliations, such as spreading false rumors about him, appear to me to be subsumed into the DOL determination. In any event, I can see no reason to provide any relief for this claim of purported retaliation, which is unsupported and not the type of retaliation against which protection is needed under Part 708.

However, one remaining retaliation raised by Vander Boegh does merit comment: his claim that he was forced to sell his Lockheed Martin stock, and that this was a retaliation for his protected activity. Vander Boegh offers no support for such a contention. He does assert that BJC breached a provision of its contract requiring it to confirm that all participants in the M&I 401(k) plan that held Lockheed Martin stock were required to sell their stock by April 30, 2003, before an automatic liquidation would occur. Vander Boegh claims that BJC withheld information that not all workers were required to sell their stock. I fail to see how this claim, which bears no meaningful direct relationship to an adverse personnel action against Vander Boegh, constitutes a retaliation under Part 708. Therefore I will deny this aspect of his appeal.

Accordingly, the Vander Boegh complaint was properly dismissed under Section 708.17(c)(3), and he is not entitled to any further review under Section 708.15(a)(1). His appeal should therefore be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Gary S. Vander Boegh (Case No. TBU-0049) 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. 10 C.F.R. § 708.19.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 3, 2006