Department of Energy
Washington, DC 20585

JAN - 9 2007

Mr. Gary S. Vander Boegh
7660 Old Hinkleville Road
West Paducah, KY 42086

Re: Case No. TBB-0049

Dear Mr. Vander Boegh:

This letter concerns the complaint of retaliation that you filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On September 6, 2006, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the August 3 jurisdictional appeal decision issued by the OHA Director. Under the Part 708 regulations, the Secretary will reverse or revise an appeal decision by the Director of OHA only in extraordinary circumstances. 10 C.F.R. § 708.19.

In this case, you alleged that several DOE contractor employers retaliated against you for participating in a protected proceeding and for making protected disclosures under Part 708. These retaliations included terminating you from your position. The Office of Civil Rights and Diversity of the DOE's Environmental Management Consolidated Business Center (EMCBC) dismissed your complaint of retaliation because you had filed a complaint regarding the same issues with the Department of Labor (DOL). Part 708 provides that it is appropriate to dismiss a complaint of retaliation 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." 10 C.F.R. § 708.17(c)(3).

You appealed that dismissal. After reviewing the facts in this matter, the Director of OHA upheld the dismissal. Specifically, he found that not only had you filed a complaint involving the same issues with both the DOE and the DOL, but also that the DOL had issued a substantive determination regarding your complaint. Specifically, the DOL found that there was clear and convincing evidence that with respect to the termination there was no retaliation by your contractor employer for your protected disclosure. The OHA Director further found that there was no merit to any of the other retaliations you raised in your complaint, but which were not specifically considered by the DOL.

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In the petition for Secretarial review, your key contention is that the complaint filed with the DOL involved a different set of facts from the complaint filed with the DOE. In this regard, you state that the disclosures you alleged in the DOL complaint involved different aspects of improper handling of leachate from those asserted in your DOE complaint. You therefore believe that Section 708.17(c)(3) is not applicable. These assertions do not rise to the level necessary to invoke Secretarial review under Part 708. As an initial matter, the DOE and DOL disclosures that you refer to are not meaningfully different. They all involve your perceptions of allegedly improper leachate handling by your contractor employer. Secondly, the key retaliation you assert is identical in the DOL proceeding and the DOE proceeding: you were terminated by your contractor employer. Your petition seeks merely to reargue the findings and conclusions set out in the EMCBC and appeal determinations. However, you do not set forth any reasoning as to what extraordinary circumstances exist that would justify a reconsideration here, and I do not see any issue of an extraordinary nature.

The Deputy Secretary of Energy has authorized me to send you this letter dismissing the petition for failure to demonstrate extraordinary circumstances.

Accordingly, the petition for review filed in Case No. TBB-0049 is hereby dismissed.

If you have any questions regarding this letter, please call Virginia Lipton at telephone number (202) 287-1436.

Sincerely,

Fred L. Brown
Acting Director
Office of Hearings and Appeals

cc: Mr. Bartley Fain
Assistant Director
Office of Civil Rights and Diversity
Environmental Management Consolidated Business Center
250 East 5th Street, Suite 500
Cincinnati, OH 45202