Department of Energy
Washington, DC 20585

DEC - 8 2008

Mr. Donald E. Searle
1308 Barcelona Drive
Knoxville, TN 37923

Re: Case No. TBB-0079

Dear Mr. Searle:

This letter concerns your complaint of retaliation filed with the Department of Energy (DOE) under 10 C.F.R. Part 708. On September 8, 2008, the Office of Hearings and Appeals (OHA) received your petition for Secretarial review of the July 25, 2008, Appeal Decision issued by the Director of OHA.

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. As discussed below, your submission does not meet this standard.

In your petition, you argue that in the July 25 decision, we, in essence, established an arbitrary 12-month liability "time limit" between a protected disclosure or activity and the subsequent retaliation, for purposes of having a whistleblower complaint considered. This contention essentially attempts to reargue and rebut our legal conclusion as to whether the facts alleged in your complaint, assuming they are true, could demonstrate that the filing of your first whistleblower complaint in January 2007 was a contributing factor to your allegedly inadequate pay raise in January 2008. We believe, based on the record in this proceeding, that a 12-month period between the protected activity (the filing of your January 2007 complaint) and the alleged retaliation (your January 2008 pay raise), was too long to permit the inference that the protected activity was a contributory factor to the retaliation. During the pendency of this appeal, you have not presented any additional evidence to suggest that our conclusion is in error. Your disagreement with our legal determination on this issue does not establish the existence of extraordinary circumstances.

You also argue in your petition that in assessing whether your April 7, 2008, complaint was without merit, OHA incorrectly applied the burdens of proof as set forth in 10 C.F.R. § 708.29. You believe that this section applies to only whistleblower hearings. This is incorrect. Section 708.29 sets forth the basic elements that comprise a valid whistleblower complaint and is applicable to Part 708 proceedings as a whole. In the present case, OHA assumed that the facts alleged in your complaint were true and examined these facts to determine if all of the required elements contained in Section 708.29 were present in the complaint. Thus, it is appropriate for OHA to use those legal standards in evaluating the sufficiency of your complaint of retaliation. Your arguments regarding the applicability of Section 708.29 do not rise to the level of extraordinary circumstances meriting Secretarial intervention.

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Finally, you argue that OHA improperly considered the fact that UT-Battelle rehired you as evidence of your employer's lack of retaliatory intent. You allege that when UT-Battelle rehired you in May 2006 it did not yet know you were a whistleblower. This is obviously incorrect, since you made protected disclosures to your supervisor regarding beryllium handling in the summer of 2005. For the purpose of our analysis of UT-Battelle's lack of retaliatory intent, the focus is on the date you complained to your employer about beryllium handling (summer of 2005), and not the date when you actually filed your first complaint of retaliation (January 2007). It was as of the earlier date that UT-Battelle was fully aware of the disclosure. Given these facts, we reasonably concluded that the 2006 rehiring constituted important evidence that UT-Battelle had no retaliatory intent. Your argument regarding our analysis of the evidence in this case does not demonstrate extraordinary circumstances.

The Acting 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-0079 is hereby dismissed.

If you have any questions regarding this letter, please call Richard A. Cronin, Jr., Attorney-Examiner, Office of Hearings and Appeals, at telephone number (202) 287-1589.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

cc: Rufus Smith
EC-Manager
Oak Ridge Office

Nicole Porter, Esq.
General Counsel
UT-Battelle