Department of Energy
Washington, DC 20585

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By Electronic Mail

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Re: Busselman NDAA-ECP Complaint

Dear Mr. Bartlett and Mr. Sheridan:

This letter concerns a July 5, 2018, report issued by the Department of Energy's Office of Inspector General (OIG) concerning a whistleblower complaint filed against Battelle Memorial Institute (Battelle), by Ms. Aleta Busselman. This complaint (Complaint) was filed pursuant to the National Defense Authorization Act's Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information Act (NDAA-ECP), 41 U.S.C. § 4712.

On July 9, 2018, we invited both parties to provide briefs addressing whether the Office of Hearings and Appeals (OHA) had jurisdiction to issue any order on the merits regarding Ms. Busselman's Complaint, given that she had already filed another complaint with the U.S. District Court pursuant to the NDAA-ECP.

We have considered the briefs submitted by both Battelle's counsel and Ms. Busselman's counsel. As explained below, the claims in this matter are now pending within the jurisdiction of the United States District Court for the Eastern District of Washington. As such, we decline to exercise jurisdiction under 41 U.S.C. § 4712 to issue an order regarding the merits of Ms. Busselman's Complaint.

I. Background

Subsection (b) of the NDAA-ECP requires the OIG to complete its investigation of a complaint and submit a report of findings within one hundred eighty (180) days, unless a complainant agrees to an extension for the OIG's investigation. If the complainant agrees to an extension, the

OIG must complete the investigation and submit the report of findings within the time frame agreed upon between OIG and the complainant. 41 U.S.C. § 4712(b)(2)(A)–(B). Subsection (c) of the NDAA-ECP requires that, within thirty (30) days of receiving a report from the OIG pursuant to subsection (b), the head of the agency shall issue an order granting or denying relief to the complainant. 41 U.S.C. § 4712(c)(1).[1] A complainant may file a *de novo* action in the appropriate U.S. district court based upon exhaustion of administrative remedies if the agency denies relief to the complainant. The complainant may also file a *de novo* action in U.S. district court if the agency does not issue an order within two hundred ten (210) days after the complaint was submitted, or, in the case of an extension of time for the OIG to conduct its review, within thirty (30) days after the expiration of the extension of time. 41 U.S.C. § 4712(c)(2).

Ms. Busselman agreed to extend the time period for the OIG's review of her Complaint to March 27, 2018. Because DOE did not issue an order on Ms. Busselman's Complaint within thirty (30) days of March 27, 2018, Ms. Busselman was eligible to file a *de novo* action in U.S. district court at any time after April 26, 2018 (30 days after March 27, 2018). On July 2, 2018, Ms. Busselman filed a *de novo* action in the U.S. District Court for the Eastern District of Washington.[2] The OIG ultimately submitted its report on July 5, 2018, after Ms. Busselman had filed her claim with the U.S. District Court for the Eastern District of Washington.

Pursuant to the NDAA-ECP, once a complainant files a *de novo* action in U.S. district court, the "district court of the United States [] shall have jurisdiction over such an action without regard to the amount in controversy." 41 U.S.C. § 4712(c)(2).

II. Analysis

The NDAA-ECP requires OHA to issue a determination concerning a complaint under NDAA-ECP "[n]ot later than 30 days after receiving an Inspector General report *pursuant to subsection (b)* . . . ." 41 U.S.C. § 4712(c)(1) [emphasis added]. An act is "pursuant to" a thing if it is "in compliance with; in accordance with." Black's Law Dictionary 1272 (8th ed. 2004). Under subsection (b), the OIG is required to either "submit a report . . . within 180 days after receiving the complaint" or, if the complainant agrees to an extension of time, "within such additional period of time . . . as shall be agreed upon between the Inspector General and the person submitting the complaint." 41 U.S.C. § 4712(b)(2)(A)–(B). The OIG did not submit its report concerning the Complaint pursuant to subsection (b) because the OIG did not act in accordance with subsection (b)'s requirement to issue a report by the extended deadline agreed to by Ms. Busselman and the OIG. In light of this statutory language, OHA concludes that it is not compelled to issue a final order on Ms. Busselman's Complaint and, in this case, declines the invitation to issue a decision on a matter that is now pending in federal district court.

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[1] The Office of Hearings and Appeals is the quasi-judicial arm of DOE that issues Departmental decisions with respect to any adjudicative proceeding which the Secretary may delegate, including whistleblower complaints filed with the agency. See DOE Delegation Order No. 00-002.16. Pursuant to the delegation of authority, OHA has been designated to act as the "head of the agency" for purposes of issuing any order pursuant to the NDAA-ECP.

[2] Ms. Busselman prematurely filed a complaint with the U.S. District Court for the Eastern District of Washington on April 24, 2018. Ms. Busselman subsequently refiled the complaint on July 2, 2018.

Our determination not to issue an order on the Complaint is further supported by judicial holdings regarding kick-out provisions in whistleblower statutes that are similar to that in the NDAA-ECP. The Sarbanes-Oxley Act of 2002 contains a whistleblower provision with language parallel to that of the NDAA-ECP. That provision allows complainants to file *de novo* claims in federal court based on exhaustion of administrative remedies if the U.S. Department of Labor (DOL) does not issue a final decision on the complaint within the statutory deadline. *Compare* 41 U.S.C. § 4712(c)(2) *with* 18 U.S.C. § 1514A(b)(1)(B); *see also Moore v. Univ. of Kan.*, 118 F.Supp.3d 1242, 1253 (D. Kan. 2015) (observing "[t]he relevant parallel language between § 4712 and whistleblower provision of Sarbanes–Oxley . . . ."). Once the statutory deadline for review of a complaint has elapsed, a complainant under Sarbanes-Oxley is not required to participate in further administrative appeals even if DOL makes them available. *Hanna v. WCI Cmtys.*, 348 F.Supp.2d 1322 (S.D. Fla. 2004).

DOL's Administrative Review Board has repeatedly dismissed complaints under Sarbanes-Oxley for lack of subject matter jurisdiction once the statutory deadline for agency action has run and a complainant files a *de novo* claim in U.S. district court on the basis of exhaustion of administrative remedies. *E.g.*, *Kelly v. Sonic Auto*, ARB No. 08-027, 2008 DOL. Ad. Rev. Bd. Lexis 160 (DOL Ad. Rev. Bd. 2008); *see also Candler v. URS Corp.*, ARB No. 13-045, 2013 DOL Ad. Rev. Bd. Lexis 61 (DOL Ad. Rev. Bd. 2013). Furthermore, even if DOL found subject matter jurisdiction and issued a decision, it would be "a nullity because it was entered after jurisdiction had vested in the district court." *Stone v. Duke Energy Corp.*, 432 F.3d 320, 322 (4th Cir. 2005). The parties have identified no compelling rationale for departing from the sound practice of DOL under Sarbanes-Oxley, and we decline to do so here.[3]

For these reasons, OHA declines to issue an order addressing the complainant's claims in these circumstances where the complainant has exhausted her administrative remedy under the involved statute, and is pursuing a *de novo* action involving the same claims in federal district court.

If you have any questions regarding this matter, please contact Neil Schuldenfrei, Deputy Director, Office of Hearings and Appeals, at (202) 287-1887, or by email at neil.schuldenfrei@hq.doe.gov.

Sincerely,

Poli A. Marmolejos
Director
Office of Hearings and Appeals

[3] Battelle argues in its brief that Congress' intent for OHA to issue a final order is demonstrated by a unique provision of the NDAA-ECP, which provides the complainant a right to introduce an order by OHA as evidence in the *de novo* action. Specifically, NDAA-ECP provides that "[a]n Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection." 41 U.S.C. § 4712(c)(3). We do not agree with Battelle's reading of this provision. This provision allows for the admissibility in federal district court of any order issued by the head of an agency; however, it does not compel the issuance of such an order.