U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 February 2005

CASE NO.: 2004-SOX-00075

In the Matter of:

KAREN CANTWELL,
Complainant,

v.

NORTHROP GRUMMAN CORPORATION and
NORTHROP GRUMMAN INFORMATION TECHNOLOGY,
Respondents.

PROTECTIVE ORDER AND
ORDER COMPELLING DISCOVERY

The matter before me is Respondents' Motion for a Protective Order filed on January 14, 2005, to which Complainant timely replied on January 18, 2005. For the reasons set forth below, the Motion for Protective Order is granted in part and denied in part. Respondents shall respond to all outstanding discovery requests within ten days.

Factual and Procedural Background

The above captioned matter arises from a claim brought under the whistleblower protection of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 ("CCFA"), Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A *et seq*. (hereafter "the Act") enacted on July 30, 2002. On August 9, 2004, OSHA issued a finding that the Complainant failed to establish a prima facie case of discrimination under CCFA, and Complainant filed objections and requested a hearing before the Office of Administrative Law Judges on September 14, 2004 along with an amended complaint.

On November 9, 2004, a Scheduling Order was issued setting forth the discovery deadlines and defining the parameters of Phase I discovery, which was limited to the preliminary issue of whether there is jurisdiction under the employee protection (whistleblower) provisions of the Sarbanes Oxley Act of 2002, 18 U.S.C. §1514A. On December 14, 2004 Complainant filed a Motion to Compel, to which Respondents timely replied on December 23, 2004. In addition, a Joint Motion to Extend Discovery was also filed on December 23, 2004. On January 5, 2005, I issued an Order Granting Motion to Compel in Part and Extending Discovery

Deadline, which ordered Respondents to respond to most of the Interrogatory and Production requests.

Compliance with Previous Order

Before discussing the merits of the Motion for Protective Order, I must address Respondents' failure to comply with my January 5, 2005 Order. Some of the Complainant's discovery requests could have been addressed by the Respondents without a Confidentiality Agreement and/or Protective Order, because the information is outside the scope of the subject matter that Respondents sought to protect through their Motion. For example, Interrogatory No. 6 asked for a description of the training given to NGIT management and human resource employees on the Sarbanes-Oxley Act of 2002. This interrogatory does not include information relating to any compensation plans, salary structures and/or performance reviews, and thus the information could have been provided. Interrogatory No. 8 serves as another example of Respondents' failure to respond, because the information requested was a list of Account Managers, their date of hire, date of termination, date of transfer, accounts assigned, and the period of assignment. Such list could have been provided without disclosing information relating to performance reviews or compensation plans. Although the proposed confidentiality order covers a broader category of information and documents, Respondents' motion does not make a showing of the need for a broader protection.[1] Therefore, these responses could have been provided to the Complainant in a timely manner as directed in my January 5, 2005 Order.

I do recognize that some of the discovery requests related to matters that could fall within the purview of the proposed confidentiality agreement or protective order. Specifically, Interrogatory Nos. 11 and 13 clearly seek information sought to be protected by the Respondents' Motion and Interrogatory No. 9, concerning Performance Crediting or Incentive Compensation complaints, may have been difficult to address without providing such information. In regards to production requests, Request No. 6 (for incentive compensation payments), Request No. 7 (performance reviews), and Request No. 9 (objectives, goals and standards for performance reviews and incentive compensation) were also covered by the proposed Motion. However, this does not negate the fact that Respondents are in direct violation of my January 5, 2005 Order relating to the remaining discovery requests, which granted Complainant's motion to compel and ordered Respondents to provide the requested documents and information by January 14, 2005.[2] Respondents are therefore being required to produce the requested responses and documents within ten days of the date of this Order. Respondents are cautioned that continued failure to comply with the outstanding Orders of this tribunal may result in sanctions being imposed upon counsel, Respondents, or both.

[1] Even if the motion had addressed the broader category of information and documents, Interrogatory Nos. 6 and 8 would not be covered. These interrogatories do not seek confidential commercial information and the personnel information involved does not materially involve privacy interests of individuals.

[2] To the extent that Respondents considered the information to be privileged, they were directed to provide a privilege log; however, they failed to do so with respect to the information and documents they have sought to protect under a confidentiality agreement or protective order.

Protective Order

There is a general presumption that pretrial discovery is "accorded broad and liberal treatment." *See Hickman v. Taylor,* 329 U.S. 495, 507 (1947). Specifically, the Administrative Review Board has recognized the broad scope of discovery to be afforded in whistleblower cases before administrative law judges (ALJs). *Khandelwal v. Southern California Edison,* ARB No. 98-159, ALJ No. 1997-ERA-0006 (Nov. 30, 2000). The scope of discovery under the Federal Rules of Civil Procedure and the regulations governing administrative hearings before ALJs is broad. *U.S. Dept. of Labor v. HCA Medical Center Hospital,* ARB No. 97-131, ALJ No. 1994-ARN-0001 (June 30, 1999); *citing* Fed. R. Civ. P. 26-37; 29 C.F.R. §§18.13-18.23. [3] However, a court or administrative tribunal, within in its discretion, is authorized to fashion a set of limitations that allows as much relevant material to be discovered as possible while preventing unnecessary intrusions into the legitimate interests, including privacy and other confidentiality interests, that might be harmed by the release of the material sought. *In Re: Sealed Case (Medical Records)*, 381 F.3d 1205, 1216 (D.C. Cir. 2004) *citing Pearson v. Miller,* 211 F.3d 57, 64 (3d Cir. 2000).

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide the following:

> Upon motion by a party or the person from whom discovery is sought, and for *good cause* shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:
> ...(6) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way.

29 C.F.R. §18.15 (emphasis added); *see also* Fed. R. Civ. P. 56(c). Protective orders may restrict the use that a party can make of information obtained in discovery. *HCA Medical Center Hospital, supra, citing Adolph Coors Co. v. American Ins. Co.,* 164 F.R.D. 507, 513-514 (D. Colo. 1993). However, the moving party must first show good cause for the issuance of the protective order.

The burden of establishing good cause for a protective order rests with the movant. *See, e.g., Pearson v. Miller*, 211 F. 3d at 72. Such an order is only appropriate, however, where the party seeking the order shows good cause by demonstrating a particular need for protection "with specificity." *Id.* In *U.S. Dept. of Labor v. HCA Medical Center Hospital,* ARB No. 97-131, ALJ No. 1994-ARN-0001 (June 30, 1999), the Administrative Review Board found that the hospital's nonspecific claim of "unwarranted and unnecessary intrusion" fell well short of the requisite demonstration (to show "that disclosure of the requested information will cause a clearly defined and serious injury") and the Board determined that the administrative law judge abused his discretion in protecting the hospital from further investigation or discovery. The moving party must make a particular request and a specific demonstration of facts in support of the request as

[3] Title 29 C.F.R. §18.1(a) provides that the "Rules of Civil Procedure for District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation."

opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one. *Brittain v. Stroh Brewery Co.,* 136 F.R.D. 408, 412 (M.D.N.C. 1991). This requirement furthers the goal that a tribunal only grant as narrow a protective order as is necessary under the facts. *Id.*

Administrative Law Judge Clement J. Kennington, when addressing the need for a protective order in an environmental whistleblower case, pointed to several factors to be considered when "weighing whether good cause exists to issue a protective order, and in balancing interests of the parties":

1. whether disclosure will violate any privacy interests;
2. whether the information is being sought for a legitimate purpose or for an improper purpose;
3. whether disclosure of the information will cause a party embarrassment;
4. whether confidentiality is being sought over information important to public health and safety;
5. whether the sharing of information among litigants will promote fairness and efficiency;
6. whether a party benefiting from the order of confidentiality is a public entity or official; and
7. whether the case involves issues important to the public.

Jackson v. Northrop Grumman Corp., 2002-CAA-15 (ALJ, June 24, 2002), *citing Pansey v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3rd Cir. 1994). Applying these factors, and noting that the information was sought for a legitimate purpose, it would not likely cause any party embarrassment, and it was important to public health and safety, Judge Kennington denied the motion for protective order. Here, as the whistleblower provision in the Sarbanes-Oxley Act is involved, there are no public health and safety considerations. Instead, I must take into consideration that the Act, which was adopted in the wake of the Enron debacle, was intended to protect investors, employees, and members of the public by improving the accuracy and reliability of financial disclosures by publicly traded corporations. *See generally* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002).[4]

In the instant case, Respondents seek to protect the confidentiality of their "compensation and incentive compensation plans for business development, sales and marketing personnel, compensation policies and procedures, salary and incentive structure, and information related to performance reviews for employees, including performance management information." *Respondents' Motion* at 4. Moreover, the proposed Confidentiality Order[5] also seeks protection of a much broader area beyond the scope of compensation plans, personnel information, and performance reviews.[6] Under paragraph six of the proposed agreement, Respondents sought to

[4] The Act was designed to prevent corporate deceit, to protect investors, and to restore full confidence in the capital markets. S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002). "Accountability and transparency help our markets work as they should, in ways that benefit investors, employees, consumers, and our national economy." *Id.*

[5] The proposed Confidentiality Order is attached as Respondents' Exhibit No. 1 to the motion.

[6] In the proposed Confidentiality Order, Respondents defined Confidential Information as "any (a) proprietary, trade secret or confidential business information or any extracts or summaries thereof; (b) any personnel or personal information including, but not limited to, personnel files, performance evaluations, salary and compensation

include "non-public proprietary, strategic or commercial information, data or research of NGC and/or NGIT or one or more of their affiliated entities" under the definition of Confidential Information.[7] *Respondents' Exhibit No. 1*. Inasmuch as the motion does not address the additional categories of information specified in the proposed Confidentiality Order, the sweeping boilerplate of the proposed Order need not be addressed. Instead, I will evaluate each category of information outlined in Respondents' Motion and determine if a specific showing of good cause has been made to support non-disclosure to the public of each category of information.

The first category of information that Respondents seek to protect is the compensation and incentive compensation plans for business development, sales and marketing personnel. Respondents stated that most if not all individual compensation and incentive compensation plans are treated as confidential, and if the information were to become public it would result in negative ramifications on Respondents' ability to compete, as well as their relationships with employees, potential employees, and customers. *Respondents' Motion* at 4. Respondents specifically stated that their recruitment efforts and retention of high performance employees would be threatened by competitors or headhunters recruiting them away to other companies. *Id.* Moreover, Respondents stated that disclosure could affect their ability to win business, because disclosure of the hourly rates could allow a competitor to under-price them in the future by ascertaining their general and administrative expense. *Respondents' Motion* at 5. Additionally, Respondents stated that such information would interfere with Respondents' relationships with individual government customers, who often make significantly less money. *Id.* A declaration by Beth Hardison, Vice-President of Business Development and Marketing, was attached as Exhibit 3 to the motion in support of these assertions.

Most of the examples provided by Respondents and addressed in Ms. Hardison's declaration demonstrate potential harm to their business by the disclosure of specific information relating to compensation and incentive compensation plans. For example, Respondents have raised a legitimate concern in keeping specific information about compensation plans confidential, in order to remain competitive in attracting and retaining employees as well as maintaining a high level of employee morale. In addition, concern as to the potential harm from competitors' using compensation information in order to gain bidding advantages is also legitimate. However, Ms. Hardison's assertion that disclosure could interfere with relationships with government customers, who often make significantly less money, is unpersuasive. This argument assumes that government customers are not already informed of the salary disparities between private versus public sector employers. Additionally, it assumes that government clients would base their business decisions on such information. Respondents provided no facts

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information, home addresses and telephone numbers, or any extracts or summaries thereof; (c) any document or information designated as confidential in accordance with paragraph 6 of this Order; and (d) any aggregation of Confidential Information, so long as the party who seeks confidentiality has a good faith belief that the information is entitled to confidentiality under the terms of this Order." *Respondents' Exhibit No. 1*. The referenced paragraph 6 relates to information the producing party "in good faith believes to be confidential", including personnel or personal information and "trade secrets or other non-public proprietary, strategic or commercial information." *Id.* Moreover, paragraphs 2 and 17 of the proposed order provide that any nonparty may likewise designate documents or material as "Confidential Information." *Id.*

[7] Moreover, the proposed order sought to grant Respondents blanket protection for all documents that they believed in "good faith" to be confidential based upon the vague definition outlined in paragraphs 2 and 6 of the Order.

to support this claim, and I find that advancing such an argument based strictly upon assumptions is without merit.[8]

Nonetheless, Respondents have demonstrated the potential harm to their business through disclosure of specifics relating to individual compensation plans. However, their arguments focused on one factor -- their need for privacy. I must consider other factors, such as those listed above, in balancing whether a protective order is necessary in this instance. While acknowledging the privacy interests of individual employees, Complainant asserts that Respondents, as large, publicly traded corporations, are entitled to only a limited level of privacy. *Complainant's Opp.* at 3. Although I agree that Respondents' entitlement to privacy is compromised by their status as large, publicly held entities, in view of the purposes behind the Sarbanes-Oxley Act, there is still a valid need to protect their ability to compete and retain employees. While Respondents are charged with the responsibility of reporting certain information under Securities and Exchange Commission ("SEC") rules, there has been no showing that they are required to disclose salary information relating to middle level to lower level employees. Therefore, I find that the specific salary amounts for individual employees under their compensation and incentive compensation plans should be protected during the discovery and prehearing phase of this litigation for all of the reasons stated above.

For the purposes of this Order, "compensation and incentive compensation plans" only covers the actual amount of the compensation and incentive plans, and such protection pertains to salaries and incentive pay for business development, sales and marketing personnel. Also, Respondents listed salary and incentive structures as a separate category in their Motion, and I find that such category of information is not distinguishable from compensation plans and shall be included in the definition of "compensation and incentive compensation plans."

The second category of information is compensation policies and procedures. Respondents stated that recruitment and retention of employees is one area in which the disclosure of policies and procedures would hurt Respondents. *Respondents' Motion* at 4. Relying upon Ms. Hardison's declaration, they stated that such information is very difficult to design and is often the competitive difference for candidates in choosing employers, and disclosure of such information would undermine the Respondents' ability to attract and retain key employees. *Id; Respondents' Exhibit 3.* Although I found Respondents' ability to attract and retain employees to be a valid concern, it is also important to consider whether the information to be kept secret is of importance to the public. As stated above, the Respondents' status as publicly held entities lessens their entitlement to secrecy and I find that the public interest regarding this information outweighs Respondents' stated interest of maintaining secrecy so as not to lose a competitive advantage as employers. At the heart of Complainant's whistleblower complaint is

[8] In paragraph 6 of her declaration, Ms. Hardison has stated: "Similarly, disclosure of the compensation of high-level employees could affect the Company's ability to win business. In NGIT, and specifically FES, the compensation of managers is embodied in the hourly rates charged for employees supporting individual customer contracts. Disclosure of such compensation information could allow a competitor to unfairly ascertain the G&A (general and administrative expense) load that these hourly rates support which could ultimately result in the Company being under-priced by competitors in future bidding efforts. This would seriously hamper the Company's ability to compete. Moreover, the disclosure of this salary structure could negatively impact the Company's relationships with its individual government customers, who often make significantly less money." *Respondents' Exhibit 3* ¶ 6.

the accusation that she was terminated for "raising legitimate process problems and inequities in the interpretation and administration of its sales performance crediting and incentive compensation procedures." Specifically, Complainant believes that Respondents are reporting more profits to shareholders than justified. As stated earlier, the purpose behind the Sarbanes-Oxley Act is to protect the public and shareholders from inaccuracies in reporting, and I find that public access to this category of information has important public interest concerns. Indeed, the information is integral to the complaint. Therefore, compensation policies and procedures will not be protected as confidential.

The next category of information is performance reviews. Respondents stated that disclosure of performance reviews would seriously damage their relationship with their own employees by eroding employee confidence. *Respondents' Motion* at 5. Complainant in this matter does not contest such protection and is agreeable to including such documents as confidential information. *Complainant's Opp.* at 3. In addition to Respondents' concerns, the disclosure of performance reviews raises serious issues regarding the public interest in individual privacy and embarrassment to employees. Courts have long recognized that interests in privacy may call for a measure of extra protection, even where the information sought is not privileged. *In Re: Sealed Case (Med. Records)* at 1215. There is a strong public policy against the public disclosure of personnel files. *Cason v. Builders FirstSource-Southeast Group, Inc.,* 159 F.Supp. 2d. 242, 247 (W.D.N.C. 2001). Although I find the potential harm to employee relationships to be a legitimate concern, I find that the public policy interest of individual privacy serves as a more compelling reason to protect the individual performance reviews. In order to protect the privacy of individual employees, performance reviews shall be protected.

In addition, Respondents sought broader protection by asking not only for the performance reviews to be protected but also for "information related to performance reviews…, including performance management information" to be included. It is unclear what specific information is covered by the term "performance management information", which Respondents have not defined. However, Respondents have requested that information related to targets, goals, quotas and/or strategies appearing in individual plans be protected by this Order based upon the argument that disclosure could result in a competitor gaining the information and using it to compete. *Respondents' Motion* at 4-5. Specifically, Ms. Hardison has stated that if this information were to become public, "a competitor could discern the Company's target revenues and/or existing revenues, as well as the Company's marketing and development plans and strategies." *Respondents' Exhibit 3* ¶ 5. Although protection of marketing and development plans and strategies is a valid consideration, there is no rationale for a publicly traded company maintaining secrecy concerning its existing revenues, which it must report.

In support of their Motion, Respondents have, inter alia, relied upon *Duracell, Inc. v. SW Consultants, Inc.,* 126 F.R.D. 576, 578 (N.D. Ga. 1989). *Respondents' Motion at 7.* In the *Duracell* case, the plaintiff attempted to discover the defendant's marketing strategy, battery sales (present and projected), customer lists, and other information about the defendant's marketing approaches. *Id*. Noting that discovery rules are not intended to forfeit a party's ability to compete effectively in the market by opening up tangentially relevant financial and marketing information to competitors, the district court found that such information was not discoverable. *Id.* at 579. Here, Respondents have stated that disclosure of performance information could

result in competitors gaining and using this information; however, Complainant's request in this case in no way compares to the invasive and intrusive request of such commercially sensitive information as requested in the *Duracell* case. Complainant requested the performance reviews for specifically named individuals that happen to contain some targets and goals for those individuals. Such request is not tantamount to a request for the company's overall marketing strategy, sales goals, and customer lists.

Respondents' request to protect commercially sensitive information further raised an issue of whether the information was being sought for a legitimate purpose. Respondents stated "upon information and belief" that Complainant is currently working for an industry competitor, and she could conceivably use Respondents' confidential information to compete against them. *Respondents' Motion* at 5-6. Complainant denied such accusation. *Complainant's Opp.* at 4. There are no facts in this case that support the inference that Complainant brought this action for purposes of commercial gain or that she has abused the discovery process. Respondents have produced no evidence to support this serious accusation.

In considering this issue, the important consideration of fairness and efficiency also arises. In the instant case, Complainant and her counsel have not exhibited any behavior that compromises their ethical duty under the rules of discovery. On the other hand, Respondents' behavior in this case has caused serious delays in the discovery process. First, Respondents objected to every discovery request in this case based upon frivolous grounds for the most part.[9] Furthermore, Respondents have yet to comply with my January 5, 2005 Order with respect to information and documents for which a claim of privilege or confidentiality cannot be asserted. Thus, it would be neither fair nor efficient to accept Respondents' unfounded assertions and cause further delay in the discovery process.

The confidential protection provided by this Order to the compensation and incentive compensation plans and the performance reviews is limited in scope. Respondents requested the protective order to prevent the disclosure of Respondents' confidential commercial information to individuals other than Complainant and her counsel and to prevent the use of such information other than in the instant proceeding. However, the protection afforded by this Order does not apply to the entire proceeding and only applies to the discovery and prehearing phase of this litigation. Further, this Order in no way shall prohibit the Complainant from using such information in litigating this claim, although Respondents may request that the confidentiality of commercial information or records be maintained when such evidence is offered; the names of individuals and associated financial and performance information may be omitted or redacted when feasible. Additionally, the confidential information may become public record through the issuance of a decision, pretrial order, and trial testimony, but Respondents may request predisclosure notification. *See* 29 C.F.R. §70.26.

This Order may be amended at any time, by application of the parties or sua sponte, according to the discretion of the undersigned administrative law judge. Nothing in this Order

[9] For example, Respondents have objected to common terms such as "training", "management", and "human resources employees" as "vague and ambiguous." Additionally, Respondents sought to limit their responses in a manner inconsistent with the Scheduling Order.

shall prevent the parties from agreeing to protect additional categories of documents or information from being disclosed outside of this litigation.

Conclusion

For the reasons set forth above, Respondents' motion for protective order is granted in part and denied in part. In summary, the actual amount of the individual salaries under the compensation and incentive compensation plans for business development, sales and marketing personnel will be protected from public disclosure during the discovery and prehearing phase of this litigation. Further, the performance reviews shall be protected for the sake of protecting the privacy of the employees. However, the request for compensation policies and procedures to be treated as confidential is denied, and the request that information related to performance reviews, including performance management information, be treated as confidential is also denied. All information that is considered confidential shall not be disclosed to any persons outside of the course of this proceeding.

ORDER

IT IS HEREBY ORDERED, that Respondents' Motion for Protective Order is **GRANTED IN PART** and **DENIED IN PART,** as set forth above and

IT IS FURTHER ORDERED that information or documents provided during the course of discovery relating to (1) the actual amount of the individual salaries and other compensation under Respondents' compensation and incentive compensation plans for business development, sales and marketing personnel and (2) performance reviews of Respondents' employees shall not be disclosed to any persons or entities outside of the course of this proceeding; and

IT IS FURTHER ORDERED that Respondents shall respond fully to all outstanding discovery within ten (10) days of the date of this Order.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.