



Issue Date: 26 August 2005

CASE NUMBERS: 2005-SDW-004
2005-SDW-005
2005-SDW-006

In the Matter of:

**GREGORY A. DANN,
LON A. FULLER, and
THOMAS J. KOSCIK,**
Complainants,

v.

**BECHTEL SAIC COMPANY, LLC, and
BECHTEL NEVADA**
Respondents.

**ORDER DENYING BECHTEL NEVADA'S REQUESTS TO RE-OPEN DISCOVERY,
TO COMPEL THE COMPLAINANTS TO TAKE PRE-TRIAL DEPOSITIONS, AND TO
BE FURNISHED A SUBPOENA COMPELLING THE TESTIMONY OF NICK FIORE**

In letters dated August 11 and 18, 2005, Patrick R. Scully, the counsel for Respondent Bechtel Nevada requested: (1) that the period previously allowed for pre-trial discovery be re-opened so that he can take additional deposition testimony from the Complainants and obtain deposition testimony from a former Bechtel employee named Ronald Dollens, (2) that the Complainants be required to take deposition testimony from two Bechtel Nevada employees, Clay "Wes" Young and Gayla Seymon, and (3) that Bechtel Nevada be furnished a subpoena compelling the trial testimony of its former employee, Nick Fiore.

For the following reasons, all three of these requests are hereby denied.

1. Re-opening discovery

As documented in some of the earliest submissions of the Complainants, their allegations of violations of federal whistleblower statutes are based in part on assertions that Bechtel SAIC and Bechtel Nevada retaliated against them for refusing to sign affidavits that the Respondents wished to provide to officials who were evaluating a whistleblower complaint that Mr. Dollens had submitted to the Department of Labor. In a Revised Notice of Trial and Revised Pre-Trial Order issued on May 11, 2005 all parties, including Bechtel Nevada, were directed to submit any

discovery requests to opposing parties no later than May 24, 2005. Thereafter, the attorneys representing each of the Respondents took the deposition testimony of each of the three Complainants, but did not seek to take any deposition testimony from Mr. Dollens. During a deposition held on June 16, 2005, Complainant Koscik was asked about his refusal to sign an affidavit concerning Mr. Dollens' whistleblower complaint, which is now being considered in a separate proceeding before the Office of Administrative Law Judges. During his response, Complainant Koscik denied that there were any conflicts between his own interests and the interests of Mr. Dollens, but acknowledged that changes in his "opinion" concerning Mr. Dollens could have occurred around the time that he began to receive representation from the same attorney who is representing Mr. Dollens.

Bechtel Nevada's recent request to take deposition testimony from Mr. Dollens and to re-open the deposition testimony of the Complainants is based on the assertion that during his deposition testimony Mr. Koscik admitted that he "altered his factual account regarding Dollens after he was in contact with Mr. Dollens' counsel." In addition, Bechtel Nevada also notes that the Complainants recently submitted an affidavit signed by Mr. Dollens, which indicates that Mr. Dollens "has information relevant to this case." Neither of these considerations warrants re-opening discovery. There are three reasons for this conclusion. First, Bechtel Nevada was given clear notice in early May of 2005 that any discovery requests would have to be submitted by May 25, 2005. Hence, its recent request is woefully late. Second, although it is generally permissible to re-open discovery if a party shows that relevant issues have arisen that could not have been reasonably anticipated, no such showing has been made in this case. Indeed, the deposition testimony of Mr. Koscik has plainly been mischaracterized by Bechtel Nevada and even if the testimony were as alleged by Bechtel Nevada, there has been no showing that any follow-up questions could not have been asked as soon as Mr. Koscik supposedly admitted that he "altered his factual account." Third, Bechtel Nevada has long been aware of Mr. Dollens and the topics about which he might have relevant information. Accordingly, if Bechtel Nevada truly wanted to secure information from Mr. Dollens, it should have asked for his deposition by the May 25, 2005 deadline.

2. Request to Compel Complainants to take deposition testimony from Clay "Wes" Young and Gayla Seymon

The counsel for the Complainants has chosen to forego the use of pre-trial depositions in this case and has instead elected to prepare her case by seeking responses to document requests, interrogatories, and requests to admit. Apparently the reasons for this choice of discovery techniques are both financial and tactical. Although the counsel for Bechtel Nevada has requested that the Complainants' counsel be required to take depositions from Mr. Young and Ms. Seymon, there is no factual or legal justification for granting this request. The Complainants' counsel is entitled to follow her own discovery strategy and is not required to follow alternative strategies preferred by her opponent. Indeed, Bechtel Nevada's continued refusal to make good faith efforts to respond to the Complainants' interrogatories and requests for admissions suggests that its request to compel the Complainants to take the depositions of Mr. Young and Ms. Seymon is based on something other than a desire to assist the Complainants or expedite the conclusion of this proceeding.

3. Request for a subpoena compelling the trial testimony of Nick Fiore

Bechtel Nevada has also requested that it be issued a subpoena requiring its former employee, Nick Fiore, to appear as a trial witness. The authority of Administrative Law Judges to issue subpoenas in whistleblower proceedings such as this one is currently unresolved. On one hand, the Administrative Review Board has held that such authority does exist. *See Childers v. Carolina Power & Light Co.*, ARB No.98-077, OALJ Case No. 1997-ERA-32 (ARB December 29, 2000). On the other hand, the Solicitor of Labor and at least one Federal district court have concluded that such subpoenas are unauthorized and unenforceable. *See Bobreski v. U.S. Environmental Protection Agency*, 284 F.Supp.3d 67 (D.D.C. 2003). In any event, however, it is clear that the rules of procedure governing hearings before the Office of Administrative Law Judges authorize Administrative Law Judges to direct corporations that are parties to whistleblower proceedings to require their current employees to appear as witnesses in whistleblower proceedings. See 29 C.F.R. §18. Hence, it is the common practice of this Administrative Law Judge to consider issuing subpoenas only in those cases where a potential witness is no longer an employee or otherwise under the control of a corporate party.

In this case, Complainant Koscik's Interrogatory Number 20 asks Bechtel Nevada to provide information concerning Mr. Fiore's "current relationship" with "any other Bechtel entity." It is obvious that, as used by the Complainants, the term "Bechtel entity" means any entity under the control of the international construction firm known as "Bechtel." Bechtel Nevada initially refused to answer this inquiry and various other inquiries in Interrogatory 20 on the grounds that it is "not authorized or required to respond" to any inquiries directed to Bechtel SAIC or any other Bechtel entity. Because of evidence showing that various Bechtel Nevada employees, including Mr. Fiore, worked simultaneously for both Bechtel Nevada and Bechtel SAIC, that objection was overruled in an August 9, 2005 Order granting the Complainants' motion to compel Bechtel Nevada to respond to various discovery requests, including Interrogatory 20. In particular, the order concluded that "Bechtel Nevada must provide answers to the extent that any of Bechtel Nevada's current or former employees (including employees of Bechtel Nevada's corporate parents and their subsidiaries) have information responsive to the requests." Although Bechtel Nevada's subsequent submissions failed to provide specific, responsive answers to many of the requests for admissions and interrogatories that the August 9 Order required Bechtel Nevada to answer, Bechtel Nevada did submit an affidavit from Mr. Fiore. Notably, this affidavit failed to identify Mr. Fiore's current employer and that omission leaves open the possibility that Mr. Fiore may in fact be currently employed by Bechtel Nevada's corporate parent or one of Bechtel Nevada's corporate siblings. Accordingly, no subpoena will be issued concerning Mr. Fiore until Bechtel Nevada provides a response to Interrogatory 20 concerning Mr. Fiore's current relationship with any Bechtel entities.

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Paul A. Mapes
Administrative Law Judge