

Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee 37402-2801

John A. Scalice  
Chief Nuclear Officer and Executive Vice President, TVA Nuclear

January 22, 2001

Mr. Richard W. Borchardt, Director  
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U. S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2739

|                            |   |                    |        |
|----------------------------|---|--------------------|--------|
| In the Matter of           | ) | Docket Nos. 50-390 | 50-259 |
| Tennessee Valley Authority | ) | 50-327             | 50-260 |
|                            |   | 50-328             | 50-296 |

**REPLY TO A NOTICE OF VIOLATION - ANSWER TO A NOTICE OF VIOLATION (PROPOSED IMPOSITION OF CIVIL PENALTY) - NUCLEAR REGULATORY COMMISSION'S OFFICE OF INVESTIGATIONS (OI) REPORT NO. 2-98-013 - ENFORCEMENT ACTION 99-234**

This letter responds to Luis A. Reyes' letter to J. A. Scalice dated February 7, 2000, that transmitted the subject Notice of Violation (NOV) and Proposed Imposition of Civil Penalty. The NOV describes NRC's determination that a violation occurred involving employment discrimination in contravention of 10 CFR § 50.7, Employee Protection, involving a former TVA employee, Gary L. Fiser. The NOV classified this as a Severity Level II violation and proposed a civil penalty of \$110,000.

TVA met with the NRC in a predecisional enforcement conference in NRC's Region II Office on December 10, 1999. TVA representatives also attended and participated in the individual enforcement conferences of two TVA managers on November 22, 1999. During those conferences, TVA presented its reasons for disagreement with the subject OI Report's conclusion that discrimination was a factor in the nonselection of Mr. Fiser for a position in 1996. TVA addressed, in detail, the legitimate, nondiscriminatory processes and decisions which led to Mr. Fiser's nonselection. TVA also discussed, notwithstanding its disagreement with the OI Report, its actions to ensure that an effective environment exists for employees to raise safety concerns.

Mr. Richard W. Borchardt

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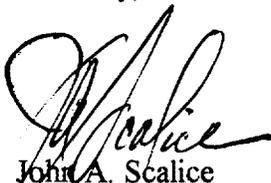
January 22, 2001

Upon receipt of Mr. Reyes' February 7, 2000, letter transmitting the NOV, TVA wrote to Loren R. Plisco, Region II, on February 8, 2000, requesting a copy of the OI Report and all of its related transcripts. TVA also requested transcripts of the above-mentioned enforcement conference, as well as the two individual enforcement conferences held in connection with OI's findings. TVA explained that it was essential to review this material in order to respond to the NOV. Mr. Plisco responded on February 18, 2000, stating that NRC was processing TVA's request for the indicated documents and that TVA would have 45 days from the date of the letter transmitting the documents in which to respond to the NOV. NRC transmitted the documents to TVA by letter dated December 7, 2000. Accordingly, this response is due January 22, 2001.

TVA has carefully reviewed the entire record of this enforcement action and continues to believe that no violation of 10 CFR § 50.7 occurred. We believe that the actions that were taken in regard to Mr. Fiser's nonselection were for nondiscriminatory, legitimate reasons in accordance with 10 CFR 50.7(d). As a result, TVA respectfully denies the alleged violation and protests the imposition of a civil penalty. Enclosure 1 contains TVA's "Reply to a Violation" which explains the bases for our denial in accordance with 10 CFR § 2.201. Enclosure 1 also contains TVA's "Answer to a Violation and Proposed Civil Penalty," in accordance with 10 CFR § 2.205 and is the corresponding protest of the proposed civil penalty based on the reasons set forth in TVA's Reply.

If you have any questions regarding this submittal, please call me at (423) 751-8682.

Sincerely,



John A. Scalice

Enclosure

cc (Enclosure):

Mr. Luis A. Reyes  
Regional Administrator  
U. S. Nuclear Regulatory Commission  
Region II  
61 Forsyth Street, SW, Suite 23T85  
Atlanta, GA 30303-8931

**Reply to Notice of Violation**  
**&**  
**Answer to Proposed Civil Penalty**

**I. Introduction**

**A. Restatement of Violation**

On February 7, 2000, the Nuclear Regulatory Commission (NRC) informed the Tennessee Valley Authority (TVA) that, based on an investigation conducted by the Office of Investigations (OI), the NRC had identified an apparent violation involving discrimination by TVA against a former employee for engaging in protected activity. The NRC issued a Notice of Violation (NOV) and proposed imposition of a civil penalty of \$110,000. The NOV stated the violation as follows:

10 CFR 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and privileges of employment. The activities which are protected include, but are not limited to, providing a Commission licensee with information about nuclear safety at an NRC licensed facility or testifying at any Federal proceeding regarding any provision related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

Contrary to the above, the Tennessee Valley Authority (TVA) discriminated against Mr. Gary L. Fiser, a former corporate employee, for engaging in protected activities. Specifically, in July 1996, TVA eliminated Mr. Fiser's position of Chemistry and Environmental Protection Program Manager, Operations Support, as part of a reorganization, and took subsequent actions to ensure that he was not selected for one of two new positions within Operations Support. TVA took these actions, at least in part, in retaliation for Mr. Fiser's involvement in protected activities. Mr. Fiser's protected activities included the identification of chemistry related nuclear safety concerns in 1991 - 1993, and the subsequent filing of a Department of Labor (DOL) complaint in September 1993 based, in part, on these chemistry related nuclear safety concerns.

**B. Summary of TVA Position**

Pursuant to 10 CFR § 2.201, TVA denies the alleged violation for the reasons stated below. Also, pursuant to 10 CFR § 2.205, TVA contests imposition of the proposed civil penalty.

TVA maintains that management did not discriminate against Gary Fiser (Fiser) for engaging in protected activities. The decisions made, and cited by the NRC, in connection with the

reorganization of TVA Nuclear (TVAN) in July 1996, the elimination of Fiser's position of Chemistry and Environmental Protection Program Manager, Operations Support, and the selection of individuals to fill new positions were made solely for legitimate business reasons. Notwithstanding the NRC's perceptions of inferences otherwise, these actions were not in any part taken as retaliation for Fiser engaging in protected activity.

## **II. Issue/Summary of Facts**

As described in the NRC's letter of February 7, 2000, NRC suggests that TVA retaliated against Fiser because of protected activity based on six key findings:

- Thomas McGrath (McGrath) and Wilson McArthur (McArthur) “were knowledgeable and critical of Fiser’s 1991-93 protected activity involving chemistry related safety concerns and their actions in this regard were part of the information developed associated with the 1993 DOL case”;
- Shortly after McGrath and McArthur were named to new positions, a reorganization was implemented at McGrath’s direction that ultimately resulted in the elimination of Fiser’s previous position and his nonselection for a newly created position;
- The temporal proximity between McGrath’s and McArthur’s appointment as Fiser’s supervisors and his nonselection for a newly created position was a reason for the NRC to conclude that the reasons articulated by TVA for Fiser’s nonselection were pretextual;
- Fiser was treated disparately in that the Chemistry Program Manager position was posted for competition while the Radcon Chemistry Manager position was filled without competition, leading the NRC to conclude that the reasons articulated by TVA for Fiser’s nonselection were pretextual;
- The NRC considered it likely that an individual was pre-selected to one of the Chemistry Program Manager positions;
- The NRC questioned the impartiality of the selection process.

It is TVA’s position that the first, third, fourth, fifth, and sixth findings are not valid. The second finding, while factually correct, can in no way be linked to any animus or retaliatory intent by TVA, McGrath, or McArthur. Moreover, a preponderance of the evidence demonstrates that each and every decision affecting Fiser was motivated by legitimate and nondiscriminatory considerations.

TVA provided reasoned explanations for each of the developments that led to Fiser’s nonselection for a new position. In three separate enforcement conferences, TVA provided direct testimony of key individuals involved in each step of the reorganization and restaffing process that led to

Fiser's nonselection. Testimony was provided by Nuclear Human Resources and Office of the General Counsel staffs who had advised McArthur and McGrath during the selection process, all of whom were aware that Fiser was filing a DOL complaint alleging retaliation because he was being required to compete for a new position. In short, all of those involved made their best, good-faith effort to ensure that the selection process was fair, objective, and resulted in the best person being selected for the available positions.

Before discussing the facts and challenging the conclusions reached by NRC, it is important to examine the legal and evidentiary standards, and the problems therein, which led NRC to its erroneous conclusions.

### **III. Legal and Evidentiary Standards**

#### **A. Elements of a Violation**

An analytical framework for assessing potential enforcement cases under 10 CFR § 50.7 was discussed in the report of the Millstone Independent Review Team (MIRT) issued to the Commission in March 1999.<sup>1</sup> The MIRT Report identified (at pages 3-4) four elements of "critical importance in assessing a finding of retaliation":

1. Did the employee engage in protected activity?
2. Was the employer aware of protected activity?
3. Was an adverse action taken against the employee?
4. Was the adverse action taken because of protected activity?

Although the Commission has not formally adopted the MIRT Report, these elements of a retaliation case are not unusual. Indeed, the first three have been adopted intact by the NRC Staff in Enforcement Guidance Memorandum (EGM) 99-007 (September 20, 1999). However, in the EGM the NRC Staff articulated the fourth element--the causal nexus test--as follows (emphasis added):

- Was the adverse action taken, at least in part, because of protected activities?

The fourth element is of critical importance in the present case. The causal nexus test derives from 10 CFR § 50.7 (d), which states (emphasis added):

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<sup>1</sup> Report of Review, "Millstone Units 1, 2, and 3: Allegations of Discrimination in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned" (March 12, 1999) ("MIRT Report").

Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activity. An employee's engagement in protected activities does not automatically render him or her immune from . . . adverse action dictated by non-prohibited considerations.

Notwithstanding the element as articulated in EGM 99-007, the regulatory standard of Section 50.7(d) is quite clear: for a violation to exist, there must be a showing that an action was taken "because of" protected activity. The burden of proof is on the government (*see* 10 CFR § 2.732) and the ultimate evidentiary standard for the necessary showing of causation is presumably one of (at least) *preponderance of the evidence*. *See* MIRT Report, at pages 5-7.<sup>2</sup> The MIRT Report, EGM 99-007, and the NRC's enforcement action in this case all focus on the possibility of "mixed motives"--that employment decisions could be made in part because of protected activity (or conversely, they were not made solely for nonprohibited reasons). It is imperative, however, that in assessing evidence in a given case, the NRC not confuse conflicting *evidence* (or conflicting *inferences*) with conflicting or *mixed motives*. Discrete evidentiary inferences may be inappropriate, wrong, or outweighed by other evidence or inferences. Under the regulation, all of the evidence must be assessed together and a conclusion reached as to whether, based on *a preponderance of evidence*, an action was taken "because of" protected activities on the one hand or based on "non-prohibited considerations" on the other.

The MIRT's reasoning recognizes that a finding of retaliation requires some measure of intent, or bad faith. Protected activity, according to the MIRT Report, would need to be a "contributing factor" to the adverse action. The MIRT described an evidentiary standard as follows:

. . . knowledge that an employee has engaged in protected activity by the company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." Instead, there would need to be an adequate evidentiary basis, *i.e.*, a preponderance of the evidence, for a reasonable inference that the company official had some motivation or impetus relating to the protected activity that, in some meaningful way, was an ingredient in the decision to take adverse action.

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<sup>2</sup> *See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681, 720 (1985); *cf. Piping Specialists, Inc., et al. (Kansas City, Missouri)*, CLI-92-16, 36 NRC 351, 353 (1992). In *Director, Office of Workers' Compensation Programs, Dep't. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994), the Supreme Court specifically observed that the burden on the government under Section 553(d) of the Administrative Procedure Act refers to the ultimate burden of persuasion, and not simply the burden of production.

TVA is not challenging, and does not need to challenge, the causal nexus element of a retaliation case as articulated in EGM 99-007 standing alone. Likewise, TVA does not necessarily challenge the quoted analysis of the MIRT. TVA, however, *does* challenge the factual conclusion reached in the present case that there was, at least in part, a retaliatory motive. TVA *also* challenges the legitimacy of any combination of causal nexus standard (*e.g.*, the "in part" test of the EGM) and evidentiary threshold (*e.g.*, the "reasonable inference" of the MIRT) that would lead to a conclusion of a violation of Section 50.7 based on the slim inferences cited in the present action.

The MIRT Report, for example, as cited above, blends the "in part" language of a causal nexus test with an evidentiary standard that can only be described as weak. While the NRC did not specifically rely on the MIRT standard in this enforcement action, TVA believes that the standard articulated by the MIRT for proceeding to enforcement--"a preponderance of the evidence, for a reasonable inference that the company official had some motivation or impetus relating to the protected activity . . ."--is a grossly inadequate standard for *an ultimate finding of a violation*. As stated above, under the regulations, the standard must be a preponderance of the evidence supporting a conclusion that adverse action was taken because of protected activity.

The NRC's enforcement action in the present case is based entirely on inferences of a retaliatory motive. The enforcement action cites the following as the bases for inferences of a retaliatory motive:

- The individuals allegedly responsible for the retaliation were "knowledgeable and critical" of Fiser's 1991-1993 protected activity.
- The NRC considers it "more likely than not" that one of the managers was aware that Fiser filed a 1993 complaint before 1996.
- There was "temporal proximity" between the appointment of the two individuals alleged to be responsible and Fiser's nonselection in July 1996.
- There was "disparate treatment" of Fiser with respect to the new Chemistry Manager position.

A finding of retaliation should not be made under Section 50.7 simply because an inference of a retaliatory motive can be made. The discussion below will demonstrate that the inferences cited in the enforcement action are either inappropriate as a matter of fact or outweighed in the totality of circumstances. In the present case, there was no intent to discriminate against the individual involved--and hence no retaliation, in any part. A preponderance of the evidence clearly supports a conclusion below that *this is not a "mixed motive" case*. A preponderance of the evidence demonstrates legitimate considerations behind each and every decision affecting the individual. The record overwhelms any inferences that can be drawn (*e.g.*, based on knowledge of protected activity, "temporal proximity," or "disparate treatment") that there was even a modicum of retaliatory animus.

## B. Comparison to Section 211

The NRC's legal and evidentiary standard for a finding of retaliation has not always been an in part/reasonable inference test as apparently applied in the present case. First, the standard adopted in 10 CFR § 50.7 provides no inkling of such an articulation of the standard. Moreover, the NRC Staff, in previously interpreting Section 50.7, took the position that the same burden of proof that would apply in DOL proceedings under Section 211 of the Energy Reorganization Act (ERA) applies to NRC actions. See "Reassessment of NRC's Program for Protecting Allegers Against Retaliation," Appendix B, at B-5 (January 7, 1994).

Indeed, Section 50.7 was first proposed as a rule by the NRC in March 1980 after Pub. L. No. 95-601, enacted in November 1978, amended the ERA to add a new Section 210 (now Section 211) on employee protection. The NRC's final rule of July 1982 (47 Fed. Reg. 30452) stated that, among other things, the rule would implement Section 210 of the ERA.

As now amended, Section 211 of the ERA places the burden on the complainant to "demonstrate" that he was discriminated against because of his protected activity. To meet this burden, the complainant must first prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action taken against him. *Dysert v. Florida Power Corp.*, Case No. 93-ERA-21 (Sec'y, Final Dec. and Order, Aug. 7, 1995), *aff'd*, 105 F.3d 907 (11th Cir. 1997); 42 U.S.C. § 5851(b)(3)(C). The "contributing factor" requirement is analogous to the NRC EGM 99-007 "in part" standard; however, the ERA goes on to develop a more rigorous scheme for burdens of proof that allows legitimate business considerations to offset any inference of a contributing factor, and indeed any "dual motives" as well.

Under Section 211, a complainant can demonstrate that protected activity contributed to an unfavorable personnel action using the burden of proof model adopted in other employment discrimination law contexts. If the complainant lacks direct evidence of discrimination, the employee must initially establish a prima facie case of discrimination, the elements of which might vary depending on the claim involved. Typically, the complainant must show that: (1) he engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer took adverse action against him; and (4) the evidence is sufficient to permit an inference that the protected activity was the likely reason for the adverse action. *Macktal v. United States Dep't of Labor*, 171 F.3d 323 (5th Cir. 1999). Temporal proximity between the adverse action and the protected activity, for example, can be sufficient to support such an inference. The complainant need not prove a prima facie case by a preponderance of the evidence, but rather is only required to present evidence sufficient to raise an inference of discriminatory motive. *Adornetto v. Perry Nuclear Power Plant*, Case No. 97-ERA-16 (ARB, Dec. and Order, Mar. 31, 1999). It appears that NRC's enforcement analysis now stops here; however, a Section 211 analysis continues on.

Where the complainant establishes a prima facie case, the employer then must articulate a legitimate business reason for the unfavorable personnel action. *Bechtel Construction Co. v. United States Dep't of Labor*, 50 F.3d 926 (11th Cir. 1995). If the employer does so, the complainant (and, by analogy, the NRC in a Section 50.7 case) then bears the burden to prove by

a preponderance of evidence that the employer's reason is a pretext for discrimination, by showing either that the employer's reason is false or that protected activity more likely than not motivated the unfavorable personnel action. The burden is greater than a prima facie case and, in the face of conflicting evidence, *requires more than inferences based on knowledge or temporal proximity*.<sup>3</sup>

In an NRC enforcement case such as this one, under Section 553(d) of the Administrative Procedure Act (APA) (and under 10 CFR § 2.732), the burden of proof is on the Government regulator. An assignment of the burden of proof has been held to be a rule of substantive law.<sup>4</sup> A fundamental change in interpretation of the regulation establishing the burden is therefore subject to the APA. *See Alaska Professional Hunters Assoc. v. Federal Aviation Administration*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).<sup>5</sup> Section 553 of the APA requires that administrative agencies publish a notice of a proposed rulemaking in the *Federal Register* and give interested persons an opportunity to comment on the rulemaking. The NRC cannot effectively promulgate a new regulation without complying with these notice and comment requirements. Stated another way, an agency must follow its own rules; a failure to do so may be challenged as a violation of Section 102(c) of the APA.<sup>6</sup>

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3 If a complainant can make this showing, this will support a finding that the employer violated Section 211. 42 U.S.C. § 5851(b)(3)(C). However, even this is not the end of the matter. If the employer has established a legitimate reason for taking the unfavorable personnel action, the case becomes a "dual motives" case. If DOL finds that a violation occurred based on the complainant's meeting his burden of proof, "relief" (remedies) still "may not be ordered" if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. Note that the clear and convincing standard has been held by the DOL to apply only in "dual motives" cases. *Adjiri v. Emory University*, Case No. 97-ERA-36 (ARB, Final Dec. and Order, July 14, 1998). *Cf. Trimmer v. United States Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1999) (if complainant proves by a preponderance of the evidence that protected activity was a contributing factor in an unfavorable personnel action, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the action in the absence of the protected activity).

4 *Director, Office of Workers' Compensation Programs*, 512 U.S. at 271, *citing American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994).

5 *See also Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586-88 (D.C. Cir. 1997); *cf. Hudson v. FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999), *reh'g en banc denied* (Dec. 8, 1999).

6 *See Webster v. Doe*, 486 U.S. 592, 601 n.7 (1988); *Service v. Dulles*, 354 U.S. 363 (1957); *Ellison v. Connor*, 153 F.3d 247 (5th Cir. 1998); *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642 (10th Cir. 1990); *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986). While the NRC may interpret its rules through guidance documents and enforcement actions, the NRC remains obligated to interpret its regulations consistent with the language of the rules. In addition, when an agency departs significantly from its own precedent, it must confront the issue (...continued) squarely and explain why the departure is reasonable. "This is not to say that agencies must forever adhere to their precedents; agencies may refine, reformulate and even

Expressly or implicitly, the NRC has now adopted an "in part" causal nexus test and coupled it with a "reasonable inference" evidentiary standard for deciding whether to take enforcement action in retaliation cases. The NRC, through the EGM, the MIRT Report, and in this enforcement action, or some unarticulated combination of the three, is altering its prior practice of utilizing the disciplined shifting burdens of Section 211 of the ERA and fundamentally altering the balance struck by Section 50.7(d). The NRC is also effectively changing the burden of proof required from the agency enforcement staff under 10 CFR § 2.732. This change has not been supported as either a matter of law or good policy.

### C. Policy Considerations

Section 50.7(d) specifically provides that protected individuals are not immune from employment decisions dictated by nonprohibited considerations. That regulation serves important public policy interests. Section 50.7(d) assures that employers will be able to make employment decisions on the basis of performance, including job selections, discipline, or termination of poor performers who may actually detract from public health and safety, despite any protected activity in which individuals may have engaged.

The NRC must be cautious of applying a standard--as it appears to have done here--that requires a licensee to prove a negative: *not only that there was no retaliatory animus contributing to the decision, but that there was no conceivable inference of some retaliatory animus*. It would not be possible to prove that an action is based "solely" on nonprohibited considerations if the NRC were to find that the slimmest of inferences would be sufficient to satisfy the causal nexus element of a retaliation case.

A consequence of an approach such as the one reflected in the NOV could make management reluctant to make decisions regarding their organization, to take adverse employment actions, or to set standards and assure accountability, even where those decisions are warranted or would further enhance safe operations. There inevitably would be fear among managers and supervisors that protected activity may later be discerned by the NRC to have played "a part" in these decisions. Such a regulatory approach has the clear potential to *diminish*, rather than protect, public health and safety.

By the nature of their jobs, most--if not all--nuclear employees are required to identify, report, and resolve plant safety and performance issues. All employees, therefore, could at some point be considered to be "protected." The universe of management decisions implicated by Section 50.7 is therefore vast. For example, in this case, all three candidates were involved day-to-day in identifying and resolving issues in the area of nuclear chemistry. In fact, one of the two individuals who was ultimately selected for the new position over Fiser (Sam L. Harvey) had also objected that he felt that Fiser was being given preferential treatment because of his opportunity

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reverse their precedents in the light of new insights and changed circumstances. An agency changing its course must, however, supply a reasoned analysis for the change." *See Citizens Awareness Network v. United States Nuclear Regulatory Commission*, 59 F.3d 284, 290 (1st Cir. 1995) (citations omitted).

to draft the position description to favor himself (Nov. 19, 1999, decl. of Harvey). Thus, NRC's standard as applied in this case would place TVA in an untenable position of being subject to a violation regardless of who was chosen.

Under the NRC's apparent approach, whereby an inference of some motivation relating to protected activity could be drawn based on knowledge of protected activity, and this inference is enough to satisfy the "in part" causal nexus test, *knowledge of protected activity* would become something for managers to avoid. Knowledge would become a basis for concluding that any subsequent decisions (at least where there is "temporal proximity") regarding the protected employee were motivated at least "in part" by the protected activity. This would discourage informing more senior managers of safety issues or other protected activity for fear of spreading the "knowledge." This result would run counter to sound policy that would encourage all managers to become involved in these issues to resolve safety concerns and to assure no retaliation.

Licenses must have the ability to structure their nuclear organizations and to evaluate employees. By applying an unduly low standard for determining a "causal nexus," or an unduly low evidentiary threshold, the NRC contributes to a culture whereby a "protected employee" is essentially immune from adverse decisions. It does not serve the NRC's regulatory purpose to create a regulatory regime by which an individual, once he or she has proclaimed "protected" status, must always get good performance reviews, must always get the same or biggest merit bonus, and must always get the job they apply for. Management would be unduly restricted and nuclear safety potentially degraded.<sup>7</sup>

#### **IV. Factual Discussion**

##### **A. Introduction**

The NRC's February 7, 2000, NOV concluded that TVA discriminated against Fiser for filing a 1993 DOL complaint based on six key findings:

1. McGrath and McArthur "were knowledgeable and critical of Mr. Fiser's 1991-93 protected activity involving chemistry related safety concerns and their actions in this regard were part of the information developed associated with the 1993 DOL case" (at 3);
2. Shortly after McGrath and McArthur were named to new positions, a reorganization was implemented at McGrath's direction that ultimately resulted in the elimination of Fiser's previous position and his nonselection for a newly created position;

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<sup>7</sup> Ironically, with this regulatory approach, the inevitable result may be that employers will be forced to consider an employee's protected activity: managers will effectively be required to make employment decisions based not on business needs or performance/safety considerations, but to ensure that employees who engaged in protected activity are not adversely affected--ever.

3. The temporal proximity between McGrath's and McArthur's appointment as Fiser's supervisors and his nonselection for a newly created position was a reason for the NRC to conclude that the reasons articulated by TVA for Fiser's nonselection were pretextual;
4. Fiser was treated disparately in that the Chemistry Program Manager position was posted for competition while the Radcon Chemistry Manager position was filled without competition, leading the NRC to conclude that the reasons articulated by TVA for Fiser's nonselection were pretextual;
5. The NRC considered it likely that an individual was pre-selected to one of the Chemistry Program Manager positions;
6. The NRC questioned the impartiality of the selection process.

It is TVA's position that the first, third, fourth, fifth, and sixth findings are not valid. The second finding, while factually correct, can in no way be linked to any animus or retaliatory intent by TVA, McGrath, or McArthur. Moreover, a preponderance of the evidence demonstrates that each and every decision affecting Fiser was motivated by legitimate and nondiscriminatory considerations. The record overwhelms any inference that could be drawn (e.g., based on knowledge of protected activity, "temporal proximity," or "disparate treatment") that there was even a modicum of retaliatory animus on TVA's behalf. In sum, the facts demonstrate that TVA did not discriminate or retaliate against Fiser for having engaged in protected activity.

## B. Facts

### Fiser's 1993 DOL complaint.

From 1988 until 1992, Fiser served as Chemistry Manager, grade PG-9, at Sequoyah Nuclear Plant (Sequoyah).<sup>8</sup> In 1992 he was rotated to the Corporate Chemistry Manager position in Chattanooga. Fiser was later removed from the position of Corporate Chemistry Manager and reassigned to work as a Chemistry Program Manager in the Corporate Chemistry organization.

Although Fiser had moved out of the Sequoyah Chemistry Manager position and the Corporate Chemistry Manager position, TVA's Nuclear Human Resources organization had not caught up with his reassignments and had not issued official paperwork reflecting his new position in Corporate Chemistry. Thus, when Sequoyah Chemistry was reorganized in 1993, Fiser was

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**8** During the time relevant to Fiser's complaint, lower- and mid-level managers and specialists at TVA were classified to the PG schedule, which extended from grade PG-1 to grade PG-11. Above that schedule were senior managers and officers who served at the pleasure of the TVA Board of Directors. In conducting reductions in force, TVA is subject to the Office of Personnel Management (OPM) regulations found in Title 5 of the Code of Federal Regulations. TVA has more latitude in dealing with managers above the PG schedule.

reduced in force (RIF) because on paper he still occupied the Sequoyah Chemistry Manager position.<sup>9</sup>

On September 23, 1993, he filed an ERA complaint with DOL alleging discrimination in his removal from the Sequoyah Chemistry Manager position. When TVA management realized that Fiser had been RIFed from a position which he did not actually occupy, TVA canceled Fiser's RIF notice and settled all of Fiser's claims against TVA, including his DOL complaint. TVA's motivation in settling was based on the fact that it had doubts about the validity of Fiser's RIF and not any assumed liability under the ERA. The settlement involved placing him in the Chemistry Program Manager position, PG-8, in the Corporate Chemistry organization, to which he had already been assigned.

1. McGrath had no prior knowledge of Fiser's 1993 DOL complaint, and McArthur was not critical of Fiser's chemistry related safety concerns.

McGrath has unequivocally stated that he had no prior knowledge of the 1993 DOL complaint and that he was not motivated in any way by Fiser's alleged chemistry related concerns. Similarly, there is no evidence that McArthur was critical of chemistry related concerns in 1991-1993, that he attributed those concerns to Fiser, or that he was motivated in any way to retaliate against Fiser for raising those concerns. On the other hand, the record shows that OI failed to critically evaluate the evidence or even gather all of the pertinent evidence.<sup>10</sup> The summary of OI's Report

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9 When an employee's employment is terminated in a RIF, TVA is required to follow OPM's regulations in 5 CFR part 351. In order to identify which employees may be affected by a RIF, TVA must establish the employees' retention standing by determining their competitive level. OPM's standard to determine which positions should be included in a competitive level is found at 5 CFR § 351.403. It requires that positions be mutually interchangeable and be "based on each employee's official position, not the employee's personal qualifications" (5 CFR § 351.403(a)(1) and (2)). See *Estrin v. Soc. Sec. Admin.*, 24 M.S.P.R. 303, 307 (1984) ("[A]ppellant's ability to perform the duties of a specific position does not establish that the position is interchangeable, since it is the qualifications set forth in the official position description, not the qualifications of an employee, which determine the composition of the competitive level."). Accordingly, TVA uses the last position description of record in determining an employee's competitive level. In *Townsel v. TVA*, 36 M.S.P.R. 356, 360 (1988), the employee, who had been RIFed as an M-3, General Foreman, argued that he was actually "performing the duties of a Planner, M-3, a position not affected by the RIF, and that his competitive level should have been determined by his actual duties rather than his official position description." The MSPB upheld his RIF, stating:

The Board has long held that it is the official position occupied by an individual which determines the competitive level in which he is properly placed [36 M.S.P.R. at 360].

10 Because NRC did not provide TVA with all of the evidence in the record, we have assumed that certain of the documents mentioned on the list of exhibits in the OI Report at pages 21-22 correspond to the documents available to TVA.

states that Fiser's protected activity was the "filing of a discrimination complaint" in 1993 (NRC's Sept. 20, 1999, letter, enclosure 2). Apparently OI did not review that complaint, since it is not referenced among the exhibits to OI's report listed on pages 21-22.<sup>11</sup> Instead, OI seems to have accepted the DOL investigator's characterization of Fiser's 1993 DOL complaint. The DOL investigator's report states that Fiser's 1993 "complaint named Tom McGrath, NSRB Chairman."<sup>12</sup> Based on our review of DOL's investigative file, it appears that the DOL investigator did not review or even obtain a copy of Fiser's 1993 DOL complaint either.

The failure to include Fiser's 1993 DOL complaint as part of OI's investigation is particularly egregious since Fiser's 1996 DOL complaint inaccurately recharacterizes his 1993 DOL complaint. In the 1993 complaint, Fiser identified a number of persons by name, none of whom were McGrath, and he named McArthur, not as a culpable party, but as an ally. Based on the compounded failures by the DOL and OI investigators to review the 1993 DOL complaint, the summary of the OI Report provided by NRC concluded that McGrath and McArthur "were named as culpable parties in [Fiser's] 1993 DOL complaint" (NRC's Sept. 20, 1999, letter, enclosure 2 at 1). Only after we provided a copy of the 1993 DOL complaint did the NRC acknowledge that error (NRC's Feb. 7, 2000, letter at 3).

OI's failure to review Fiser's 1993 DOL complaint also led it to conclude that the matter giving rise to Fiser's 1993 DOL complaint was that "McGrath recommended to the Sequoyah plant management that FISER should be terminated because of his refusal to implement new Chemistry procedures" (OI Report at 17).<sup>13</sup> To the contrary, Fiser's 1993 DOL complaint did not involve new Chemistry procedures or trending plots; instead, it alleged he was unfairly being held accountable for three problems in Sequoyah Chemistry: (1) radiation monitor setpoints that did not account for vacuum and or negative pressure; (2) a containment radiation monitor that was improperly aligned; and (3) the ability of Sequoyah chemistry personnel to properly conduct post-accident sampling analyses.<sup>14</sup> Since OI apparently did not review Fiser's 1993 DOL complaint,

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11 The only analysis of that complaint by OI is a reference in exhibit 1 to the OI Report which states only that a 1993 complaint filed by Fiser "was unsubstantiated due to lack of protected activity" (emphasis added).

12 OI Report, ex. 4, 3-27-98 investigative report at 1.

13 Likewise, the DOL investigator mistakenly concluded that the 1993 DOL complaint involved "issues surrounding the generation of trend plots at SQNP" (OI Report, ex 4, 3-27-98 investigation report at 1).

14 Fiser's 1993 DOL complaint did not show that he had engaged in any protected activity. Indeed, OI's status report shows that his 1993 complaint was "unsubstantiated due to lack of protected activity" (OI Report, ex. 1). He did not allege that he had identified or documented any of the problems in these areas. To the contrary, he complained that he was being unfairly blamed for the existence of these problems which were identified and documented by others. As to the first two, he claimed that "even though I was not directly responsible for either of the underlying conditions leading to those situations, I was charged with them" (Sept. 23, 1993, compl. at 3). Thus, with respect to radiation monitor setpoints, he claimed that he was not responsible since the

they could not have known that in 1996 Fiser had misstated the protected activity he had claimed as the basis for his 1993 complaint and identified different managers who were allegedly responsible.<sup>15</sup>

We agree that the act of filing a DOL complaint in 1993 is protected activity. However, when a claim of retaliation based upon the filing of an earlier DOL complaint is made, it is important to look at the motives of the managers who are alleged to have retaliated. It is clear that different inferences can be drawn depending on whether the managers who are alleged to have engaged in retaliation were identified as responsible for the previous discrimination and whether those managers were identified as being adversely affected by the protected activity identified in the first complaint. While it is undisputed that Fiser filed a 1993 DOL complaint, NRC made an erroneous finding that implies that McGrath and McArthur had an additional motive to retaliate against Fiser—the finding that “these individuals *were knowledgeable and critical of Mr. Fiser’s 1991-93 protected activity* involving chemistry related safety concerns and *their actions in this regard were part of the information developed associated with the 1993 DOL case*” (NRC’s Feb. 7, 2000, letter at 3; emphasis added).” The NRC further reasons that “given his position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews, the NRC also considers it more likely than not that [McGrath] was aware that Mr. Fiser filed a 1993 DOL complaint prior to 1996” (*id.*). We believe the NRC’s conclusions are in error.

First, Fiser’s 1993 DOL complaint, which we provided to the NRC, did not accuse either McGrath or McArthur of any discriminatory act, and it did not claim that he had raised any issues for which they were responsible. Second, DOL’s investigation of the 1993 DOL case did not develop any information with respect to Fiser’s protected activity. As stated in the summary of OI’s Report (NRC’s Sept. 20, 1999, letter; enclosure 2), Fiser “settled his 1993 DOL action with TVA prior to completion of a DOL fact finding investigation.” Consequently, there was no decision in that case at any administrative level by DOL, and we are unaware that DOL’s investigation even proceeded to the point that any interviews were actually conducted. Since DOL did not investigate the 1993 complaint, the NRC is simply wrong when it concludes that McGrath’s or McArthur’s knowledge and criticism of Fiser’s protected activity “were part of the information developed associated with the 1993 DOL case” (Feb. 7, 2000, letter at 3). Given

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(...continued) evaluation which was not adequately performed occurred before he came to Sequoyah and that he was later assured that the readings were correct. With respect to the misaligned radiation monitor, he admitted that the problem was discovered and reported by others, but that at the time he was on another temporary assignment. With respect to the proficiency of chemistry technicians to perform post-accident sampling analysis, he blamed management for the lack of ongoing training and a lack of budget (Sept. 23, 1993, compl. at 3-4).

15 Under the Administrative Procedures Act, 5 U.S.C. § 706 (2) (1994), a reviewing court must set aside an administrative decision which is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] unsupported by substantial evidence.” We think a reviewing court would find that OI’s failure to obtain a copy of Fiser’s 1993 DOL complaint and NRC’s misreading of that complaint warrants setting aside the NRC’s NOV.

OI's apparent failure to review either DOL's or the Office of Inspector General's (OIG) file on the 1993 complaint, we do not understand how the NRC could arrive at such a conclusion. Third, given McGrath's position in the organization, he had no reason to learn of Fiser's 1993 DOL complaint. During the pendency of that complaint, McGrath was not in TVAN's Nuclear Operations, which included both Sequoyah and Corporate Chemistry. As a result, he was not informed and had no reason to learn of Fiser's 1993 DOL complaint.<sup>16</sup> Fourth, given the number of TVA employees who were actually interviewed by DOL and OIG, there was no reason for McGrath to learn of Fiser's 1993 DOL complaint. As stated above, we are not aware of a single interview by DOL in connection with the 1993 complaint. Furthermore, neither McGrath nor anyone in his chain of supervision above or below him was interviewed by the OIG in connection with its investigation of the allegations in that case.<sup>17</sup> Under those circumstances, there is every reason to credit McGrath's testimony that he had no prior knowledge of Fiser's 1993 DOL complaint and no reason to make an unsupported assumption to the contrary.<sup>18</sup>

OI found that in connection with Fiser's 1993 DOL complaint, "McGrath recommended to the Sequoyah plant management that FISER should be terminated" (OI Report at 17). That finding could only have been made by relying on Fiser's testimony (ex. 3 at 32-33) and disregarding McGrath's categorical denial (ex. 9 at 12). OI is required to explain why it chose to credit Fiser's version, which is clearly hearsay, over McGrath's unequivocal denial.<sup>19</sup> That error is doubly compounded. First, if OI had reviewed the 1993 DOL complaint, it would have had to make an adverse credibility finding against Fiser based on his mischaracterization of his 1993 claims. Not only is the claim against McGrath absent from Fiser's 1993 DOL complaint, but Fiser also failed to mention it when he was interviewed by OIG in connection with that complaint and had an opportunity to expound. Second, Fiser claimed he was informed of McGrath's recommendation by Rob Beecken (Beecken), the former plant manager at Sequoyah. There is nothing in OI's

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**16** It is not TVAN's practice to inform managers of pending DOL cases if they are in different organizations and have no involvement in the issues in the case.

**17** Since OI did not review DOL's file on Fiser's 1993 DOL complaint, it did not learn that there were no investigative interviews by DOL. Likewise, there is nothing in OI's Report to show that it reviewed the OIG's investigation of that complaint. If it had done so, it would have learned that nowhere in that file, including Fiser's interview, is McGrath even mentioned as being involved in the alleged discrimination.

**18** The United States Supreme Court rejected suspicion and surmise as a basis for an agency decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 484 (1951). Thus, in the context of a Section 211 case DOL may not simply assume that the responsible manager was told of the complainant's protected activity, there must be substantial evidence in the record to support a finding of such knowledge. *Bartlik v. TVA*, No. 88-ERA-15 (Sec'y Dec. 6, 1991, Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996).

**19** This type of "selective analysis"—disregarding evidence which conflicts with the agency conclusions—"is prohibited under the standard set forth in *Universal Camera [Corp. v. NLRB]*, 340 U.S. 474 (1951)" *NLRB v. Cutting, Inc.*, 701 F.2d 659, 665 (7th Cir. 1983).

record of investigation to show that OI made any attempt to interview Beecken to ask him to confirm or deny Fiser's version. Furthermore, there is no mention of McGrath's purported recommendation to Beecken in the OIG's 1993 interview of Beecken. However, OI failed to review the OIG's record of interview for either Fiser or Beecken.

The OI Report, citing an unidentified source, states that McGrath and McArthur made negative comments about Fiser (at 11). The NRC's failure to identify an alleged witness is prejudicial to TVA's opportunity to defend itself. That unnamed source does not state in fact what the comments related to, only an assumption. Assuming the unnamed source is Ronald Grover (Grover), OI failed to take into consideration that Grover did not work for TVA until well after Fiser had filed his 1993 DOL complaint. The OI Report also failed to account for the fact that Grover was disgruntled over the same reorganization and the elimination of his position. Further, the OI Report states (at 11 ¶ 1) that another unnamed source said that McArthur told him that Sequoyah management "wanted [an unnamed person] to fire Fiser," citing exhibit 15 at 14. The OI Report concluded that Sequoyah wanted to fire Fiser because he "refused to implement Chemistry procedures requested by MCGRATH." That conclusion is not supported by the testimony cited by the OI Report (ex. 15 at 14), and OI cites no other basis in the record for that conclusion.<sup>20</sup>

The NRC's finding that McArthur was "*critical of Mr. Fiser's 1991-93 protected activity*" and that his "*actions in this regard were part of the information developed associated with the 1993 DOL case*" is even more farfetched (OI Report at 3). Rather than criticize Fiser for his protected activity, McArthur was viewed by him as an ally. Thus, in his 1993 DOL complaint, Fiser states that McArthur was "very dismayed about the decision" to surplus him, expressed his "disagreement with this decision publicly," and "had me rated very high" (1993 compl. at 1, 4). As with McGrath, DOL did not develop any information regarding McArthur in connection with the 1993 DOL case. Similarly, there is nothing in the OIG's investigative file that suggests that McArthur was involved in the alleged discrimination. In contrast, McArthur maintains (and his OIG interview from 1994 is consistent) that NSRB had raised performance problems in the Sequoyah Chemistry program and that Fiser was looked upon as part of the problem, not that Fiser had raised safety concerns. NRC's conclusion that McArthur's criticism of Fiser's protected activity was "part of the information developed associated with the 1993 DOL case" is just wrong.

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<sup>20</sup> Findings of discrimination may not be based upon gossip and talk of discrimination in the workplace. *Chappell v. GTE Prods. Co.*, 803 F.2d 261, 268 n.2 (6th Cir. 1986); *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156-57 (6th Cir. 1988)..

**2. The reorganization of Operations Support, which was part of the overall reorganization of corporate TVAN and which resulted in the elimination of Fiser's previous position, was accomplished for legitimate nondiscriminatory reasons.**

Over the years, TVA has changed from a construction and modifications organization to a much smaller operations organization. In addition, TVA is competing with other electric utilities by attempting to hold down electric rates by improving productivity and reducing costs. As a result of these efforts, TVAN has reorganized and reduced the size of its workforce, while maintaining its focus on the safety of its workforce and the public. These changes have not occurred all at once; rather, the reductions have been implemented in a deliberate step-wise fashion year by year. Thus, during 1994-1997, large numbers of TVAN employees lost their old positions. While some employees were successful in being selected for new positions created as a result of the reorganizations, many employees involuntarily lost their TVA employment.

As part of a five-year workforce and budget planning process, corporate TVAN underwent a reorganization and reduction in the summer and fall of 1996. The five-year goal was for the overall corporate organization budget to be reduced by about 40 percent. In the short term, the budget for the corporate organization was to be reduced by at least 17 percent. These proposed reductions were for the overall corporate organization; some of the constituent organizations might be more, while some might be less.

Although managers of each organization were asked to propose budget and staffing plans, the decisions on their budget and staffing were made by their superiors. McGrath, the acting General Manager of Operations Support, which included the Radiological Control and Chemistry Services organizations, requested his subordinates to propose an organization supporting the five-year goal, including specific functional activities, and a budget and organization for the first year which was a logical step in achieving the five-year goals. McGrath also requested that the Radiological Control and Chemistry Services organizations be combined under the existing, but then vacant, RadChem Manager position, thereby eliminating one level of management. Thus, Grover, Manager of Corporate Chemistry and Environment, and McArthur, Manager of Corporate Radiological Control, made a proposal as to how their two staffs could be combined under one manager. The organizational structure which McGrath ultimately approved included Grover's proposal to create two chemistry program manager specialist positions, in place of the three existing generalist chemistry and environmental protection positions. Those positions were separate Boiling Water Reactor (BWR) and Pressurized Water Reactor (PWR) Program Manager Chemistry positions which would enable the corporate organization to provide TVAN's nuclear plant sites with in-depth expertise.<sup>21</sup>

There is no evidence in the record from which a reasonable person could infer that discrimination was a motivating factor for the reorganization of Operations Support or the elimination of the chemistry and environmental specialist positions, or the creation of new Chemistry Program

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**21** The idea was to have a BWR chemistry specialist for Browns Ferry and a PWR chemistry specialist for Watts Bar and Sequoyah.

Manager positions. An inference otherwise, based on alleged knowledge of past protected activity or on any other factor, is simply unsupported and unupportable.

**3. The temporal proximity between McGrath's and McArthur's appointment as Fiser's supervisors and his nonselection for a newly created position is an insufficient basis for the NRC to conclude that the reasons articulated by TVA for Fiser's nonselection were pretextual.**

The OI Report notes that more than two years passed from the settlement of Fiser's 1993 DOL complaint in 1994 and the reorganization that ultimately resulted in Fiser's nonselection for the position of Chemistry Program Manager (PWR) in 1996. OI further states that McGrath and McArthur were not in his supervisory chain and did not have control over him until late 1995/early 1996. OI concludes that shortly after McGrath was made the General Manager of Operations Support, the reorganization which eliminated Fiser's job was announced. Thus, the NRC stated that the "temporal proximity between" McGrath's and McArthur's appointment as Fiser's supervisors and his nonselection was one of the reasons that "led the NRC to conclude" that TVA's articulated reasons for Fiser's nonselection "were pretextual" (NRC's Feb. 7, 2000, letter at 3).

The NRC's inferences based on "temporal proximity" between protected activity and adverse action are unwarranted as a matter of fact and law. In comparison to other employment law cases, the NRC's inferences based on "temporal proximity" are wrong in four key respects. First, where the claimed protected activity is the filing of a DOL complaint, the law requires the time to be measured from the date of filing the complaint, not the date of the settlement. *TVA v. Frady and U.S. Department of Labor*, No. 96-3831 (6th Cir. Jan. 12, 1988) at 5 n. 1. In Fiser's case, three years (or more) passed between the alleged protected activity and the alleged retaliation. Second, the NRC focuses on the "temporal proximity" between Fiser being returned to McGrath's chain of command and the reorganization/nonselection. However, we are unaware of any employment law cases that approve an inference based upon "temporal proximity" by, in effect, allowing the suspension of the measurement of time while an alleged discriminating official is not in the chain of command. Third, McGrath was officially designated as the Acting General Manager on October 10, 1995, more than nine months before Fiser's nonselection. We are not aware of any case approving an inference of retaliatory motive based on "temporal proximity" where there was more than nine months between an alleged discriminating official assuming management control and the alleged adverse action.<sup>22</sup> It strains credulity to believe that McGrath was so strong, yet so patient, in his alleged retaliatory animus. Fourth, even where there is a "temporal proximity" between protected activity and adverse action it is evidence of a cause and effect relationship; it is not evidence that management's articulated reason is pretextual. The

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<sup>22</sup> In *Frady* DOL had found TVA guilty of discrimination under the ERA based, among other things, on "an inference of retaliatory motive based on temporal proximity" (at 5). The Sixth Circuit reversed the finding of discrimination because it was "unsupported by substantial evidence" (at 10). With respect to the issue of temporal proximity, the Court held that the "inference is a weak one" (at 5) where "seven or eight months elapsed" between the filing of the earlier DOL complaint and the adverse action.

NRC has not established by any reasonable preponderance of evidence that TVA's stated reasons for the employment decisions are pretext.

**4. Fiser was not subject to disparate treatment in the posting of the Chemistry Program Manager position for competition.**

The NRC also stated that "the disparate treatment" of Fiser was the other reason that "led the NRC to conclude" that TVA's articulated reasons for Fiser's nonselection "were pretextual" (NRC's Feb. 7, 2000, letter at 3). NRC states that TVA's posting of the Chemistry Program Manager position for competition while filling the Radcon Chemistry Manager position without posting "were inconsistent" since both "individuals had previously performed the functions of the new positions they were seeking" (*id.*).

As stated above, in order to determine if a position description should be posted, TVA is required to perform a determination of competitive level. That determination must be made by comparing an employee's position description of record with the new position description. In this case, there was no question that the Chemistry Program Manager position description was not sufficiently interchangeable with the position description of the incumbents of the Chemistry and Environmental Program Manager positions so as to give them a right to the new job (ex. 20 at 13). That decision was made by Nuclear Human Resources, and neither McGrath nor McArthur was responsible for making that decision.

In addition, TVA's presentation at its enforcement conference showed that both TVA's Office of General Counsel and Nuclear Human Resources were consulted with respect to whether TVAN should proceed with posting the position. None of these facts were mentioned or in any way dealt with by NRC in its finding of a violation in this case.<sup>23</sup> Furthermore, there was positive and un rebutted testimony that no one in management prevailed on Nuclear Human Resources to write the position description so that posting and competition would be required (ex. 20 at 40-41). The fact that Fiser had *once* held a position similar to the new position is irrelevant since during the intervening years he was selected for and issued a position description for the noninterchangeable job.<sup>24</sup>

As explained during TVA's enforcement conference, McArthur was placed in the Radcon Chemistry Manager position consistent with TVA's understanding of applicable OPM regulations. The NRC recognized that McArthur "had previously performed the functions of the new position[]" (NRC's Feb. 7, 2000, letter at 3). At the NRC's request, TVA provided records which showed that McArthur's last official position description of record was in fact a position interchangeable with the Radcon Chemistry Manager position description.<sup>25</sup> McGrath testified

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**23** As discussed above, a reviewing court will set aside an agency determination based upon this type of "selective analysis." *NLRB v. Cutting, Inc.*, 701 F.2d 659, 665 (7th Cir. 1983).

**24** Fiser could hardly complain about the job description since he helped draft the job description for the new PWR Chemistry Program Manager position.

**25** Just as with Fiser's 1993 RIF (see footnote 9 and accompanying text), TVA was

without contradiction that he was told by Nuclear Human Resources that McArthur should be placed in the position (ex. 9 at 29). James Boyles, the Nuclear Human Resources Manager, also testified that he made the decision to place McArthur in that position (ex. 24 at 21).

**5. An individual was not preselected to one of the Chemistry Program Manager positions.**

The NRC states that it was “likely that an individual was pre-selected” for the Chemistry Program Manager (PWR) position (NRC’s Feb. 7, 2000, letter at 3). However, that conclusion runs contrary to the selection process that was actually employed (as discussed below) and to the weight of the complete evidence of record.

Based on a conversation between Harvey and David Voeller, the substance of which is generally undisputed, OI inferred that Harvey had been preselected (OI Report at 11, 17). Both gentlemen’s testimony is consistent with Harvey’s denial that he had been promised the job and with Harvey’s explanation that he assumed that he was a better candidate and would be selected. OI’s failure to interview Harvey and the NRC’s failure to offer a reasoned explanation why it rejected Harvey’s un rebutted explanation is error. With respect to the decision not to transfer Harvey to Sequoyah, NRC’s finding, based on OI’s Report, is inconsistent with the testimony of the pertinent decision-makers. In a further exercise of “selective analysis”, the NRC’s finding ignores Boyles testimony that he advised McGrath that Harvey’s function could not be transferred to Sequoyah and that there was not a vacancy in Sequoyah Chemistry (Nov. 22, 1999, 10:05 a.m. conference, transcript at 27). OI also found (OI Report at 12, ¶ 4) that McGrath did not want Harvey to transfer to Sequoyah because he wanted to keep him in Corporate, again relying upon an unidentified source. OI’s finding is contrary to the testimony of Ben Easley that the Sequoyah Chemistry organization did not proceed to fill a vacancy after he had advised as to the appropriate manner to fill that vacancy (ex. 20 at 63-64).

OI also disregarded McGrath’s testimony that he did not recall saying that he wanted to keep Harvey’s expertise in Corporate Chemistry (ex. 9 at 17). OI also disregarded McGrath’s testimony that TVA “could not take a Corporate position and just move a Corporate position to Sequoyah.” McGrath also testified that he was concerned about transferring Harvey to Sequoyah because “it would have been a violation of personnel rules” and “would have really constituted pre-selection to protect one individual from possible impact of the reorganization” (ex. 9 at 14). Once again, NRC errs by failing to explain why it disregarded the testimony supporting TVA’s explanation.

**6. Fiser’s nonselection by the Selection Review Board (SRB) was impartial.**

The NRC expressed concern that two of the three individuals on the SRB and the selecting official had knowledge of Fiser’s 1993 DOL complaint and that the existence of his protected activity was discussed just prior to conducting interviews. OI reported that McGrath indicated that “the intent of the SRB process was to have a fair selection process, in which no one had past

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(... continued) compelled to determine McArthur’s competitive level by reference to his most recent official position description of record.

knowledge or involvement with FISER's DOL complaints" (OI Report at 17). That is a misstatement of McGrath's testimony which was that he did not want anyone on the SRB who was "intimately involved" with Fiser's complaint (ex. 9 at 24). Given the broad definition of protected activity, it would be impossible to constitute a selection board with managers knowledgeable of the subject matter but with no knowledge that any of the candidates had ever had any involvement with a nuclear safety-related concern.

In this case, John Corey (Corey) and Charles Kent (Kent) were the two SRB members who had some knowledge of Fiser's 1993 DOL complaint. However, Corey, Kent, and McArthur were not "intimately involved" or named as "culpable parties" with respect to Fiser's 1993 DOL complaint. Both McArthur and Kent were identified in that complaint as individuals who were trying to assist Fiser. While Corey said he had only a passing knowledge of the complaint, he said that it was a matter that should not be considered in the selection process. Just prior to the interviews, Kent commented to Corey and McArthur that the SRB needed to be particularly sensitive and impartial because of Fiser's DOL complaint. A cautionary remark to be fair is certainly not a basis to infer a retaliatory motive.

OI also attempted to infer retaliation based on Jack Cox's (Cox) unavailability to serve on the SRB and claimed that his "failure to recall why he was unable to participate on the date of the SRB" was questionable (OI Report. at 17). Cox, who was questioned more than two years after the SRB met, was unable to recall the specific reason he was unable to participate, but did state that "it was going to last into the evening hours . . . and I also have a farm and have obligations to take care of every evening" (ex. 19 at 12). OI was also critical that Cox was not replaced with someone who had knowledge of the chemistry needs of Watts Bar or of the qualifications of the applicants. However, Heyward Rogers (Rogers) was familiar with Fiser, having interfaced with Sequoyah Chemistry when Rogers worked there. Similarly, Rogers, with a mechanical engineering degree, had received training in nuclear chemistry as part of his training as a Shift Technical Advisor. To the extent the OI Report is critical of the SRB for failing to locate a third member with a nuclear chemistry background who would be supportive of Fiser, it is unfair. First, the SRB was considering a number of selections over the course of an entire day, only two of which were in the Corporate Chemistry organization. Second, the evidence in the record shows that both Corey and Kent had a background in radiological control and had not worked in their respective plant Chemistry organizations. Third, an SRB is supposed to make impartial selections; it is not intended to mediate the preferences of each site for individual candidates.

Finally, both OI and the NRC staff were provided the results of the SRB interviews for the position of Chemistry Program Manager (PWR). All of the candidates were asked the same questions and scored by each SRB member independently of the other members. Fiser was scored significantly lower than the other two candidates by all three of the SRB members. Given that Rogers had no prior knowledge of Fiser's 1993 DOL complaint, as OI acknowledges, and scored Fiser lower relatively than did the other two SRB members, we do not think that anyone could rationally conclude that the selection process was not impartial. Moreover, this matter was never addressed by NRC in its finding of a violation in this case.

**V. Conclusion**

TVA believes that NRC's finding of discrimination is in error, both as a matter of fact and of law. We respectfully request that NRC reconsider the violation and civil penalty.

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