

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2)	
Browns Ferry Nuclear Plant, Units 1,2 &3))	
)	ASLBP No. 01-791-01-CivP
)	
)	EA 99-234

NRC STAFF MOTION IN LIMINE TO EXCLUDE CERTAIN
DOCUMENTS RELATED TO RONALD GROVER

This proceeding involves a violation of 10 C.F.R. § 50.7 by the Tennessee Valley Authority (TVA) for retaliating against Gary Fiser for engaging in protected activities. Pursuant to the Atomic Safety and Licensing Board’s (Board) Fourth Prehearing Conference Order of February 13, 2002, the Staff hereby files this motion in limine to exclude certain documents and testimony related to witness Ronald Grover identified by TVA as exhibits and witnesses in its March 29, 2002 “Tennessee Valley Authority’s Exhibit List” and “Tennessee Valley Authority’s Witness List.” The Staff requests that the Board exclude these documents and testimony from evidence in this proceeding.

BACKGROUND

Both the Staff of the Nuclear Regulatory Commission (NRC) and TVA have identified Ronald Grover, a former TVA employee, as a witness in this proceeding. Prior to the 1996 reorganization, Grover was the Corporate Chemistry and Environmental Manager and Gary Fiser’s immediate supervisor. Grover’s position was eliminated in the 1996 reorganization, and Grover informed Thomas McGrath, his supervisor, that he would like to compete for the Radiological Control and Chemistry Manager position. If Grover had been selected for that position, he would

have been the selecting official for the Chemistry Program Manager position for which Fiser competed. Grover has stated that if he had been the selecting manager for the Chemistry position, he would have selected Fiser. Additionally, Grover has provided testimony regarding negative statements about Fiser made by both Wilson McArthur and Thomas McGrath. Grover testified as to these matters both in Fiser's Department of Labor (DOL) complaint and the subsequent NRC investigation of that complaint.

As a result of the 1996 reorganization, Grover was left without a position. Grover negotiated with individuals from Human Resources to receive a PG-SR developmental position and a swap agreement with the Institute for Nuclear Power Operations (INPO). Upon return from his rotation at INPO, TVA was supposed to provide developmental positions for Grover in various TVA organizations. TVA failed to provide Grover with assistance in development, and the TVA Office of Inspector General (OIG) initiated an investigation of Grover for misconduct after his return from INPO soon after Grover provided testimony in the Fiser case. Grover was terminated from TVA based on a finding of alleged misconduct by the TVA OIG. TVA's failure to assist Grover, the subsequent TVA OIG investigation of alleged misconduct, and Grover's eventual termination from TVA were the subject of DOL and EEO complaints by Grover. TVA and Grover have recently reached a settlement of Grover's complaints. The allegations raised by Grover and TVA in those complaints were not litigated before DOL and no decision on those allegations has ever been issued.

As a result of Grover's DOL complaint, the NRC Office of Investigations (OI) conducted an investigation of whether TVA's failure to assist Grover, the TVA OIG investigation of Grover, and his subsequent termination from TVA violated 10 C.F.R. § 50.7. Although NRC OI has completed its investigation, the Staff has not yet made a decision on any potential enforcement action against TVA in the Grover case.

TVA has identified a number of documents in its exhibit list which relate to Grover's DOL complaint. These documents include an August 5, 1998, memorandum from O.J. Zeringue to Grover regarding his loan assignment to INPO; the TVA OIG Report of Administrative Inquiry regarding Grover; an October 6, 2000 memorandum from Jack Bailey to Grover; Grover's termination letter; and Grover's DOL and EEO complaints.¹ Additionally, TVA has listed Beth Thomas, the lead agent in the TVA OIG investigation of Grover, and two other individuals from TVA OIG as witnesses.

DISCUSSION

The Staff requests that the Board exclude any documents and testimony related to alleged misconduct by Grover from this proceeding on four grounds. First, Rule 608 of the Federal Rules of Evidence expressly prohibits the use of extrinsic evidence such as these documents and testimony for the purpose of attacking a witness's credibility. Second, the documents and testimony are not relevant to the matter at issue in this proceeding, which is whether TVA violated 10 C.F.R. § 50.7 by retaliating against Fiser for engaging in protected activity. Third, even if the documents and testimony are deemed to be relevant, they should be excluded pursuant to Rule 403 of the Federal Rules of Evidence because introduction of evidence related to Grover's DOL complaint would cause undue delay and waste of the Board's time. Finally, litigation of the matters involved in Grover's DOL complaint would impede the Staff's investigation of TVA's actions and its determination as to whether TVA retaliated against Grover in violation of 10 C.F.R. § 50.7.

¹ The Staff has named those documents and witnesses on TVA's exhibit and witness lists which it was able to identify as relating to Grover's DOL complaint. However, because of the brief description of the documents and witnesses, as well as the fact that TVA has not yet provided the Staff with all of the documents on its exhibit list, the Staff was unable to determine whether other documents or witnesses on the lists pertained to Grover's complaint. Therefore, the Staff requests that the Board order that all documents and testimony related to this matter be excluded from evidence, regardless of whether the Staff has identified those documents or witnesses in this motion in limine.

A. Rule 608 prohibits the use of extrinsic evidence to attack a witness's credibility

By identifying exhibits and witnesses related to the TVA OIG investigation and subsequent termination of Grover, TVA is proposing to use extrinsic evidence of alleged wrongdoing in order to challenge Grover's credibility. The Federal Rules of Evidence explicitly prohibit the use of extrinsic evidence to attack the credibility of a witness. Rule 608 states that:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which the character the witness being cross-examined has testified.

Under this rule, TVA would be prohibited from introducing extrinsic evidence of alleged wrongdoing by Grover in order to impeach his character for truthfulness.

In *United States v. Herzberg*, 558 F.2d 1219 (5th Cir. 1977), the Court of Appeals addressed the exclusion of extrinsic evidence as to a matter on which there has been no criminal conviction. In that case, the court concluded that, although the rule permits cross-examination of the witness as to prior acts of misconduct, "[t]he cross-examining attorney must take the witness' answer. This result is consistent with the long-standing doctrine that a witness may not be impeached with extrinsic evidence as to a collateral matter. Prior wrongful acts not resulting in a criminal conviction ordinarily are "collateral matters." *Id.* at 1223. The court then held that Rule 608(b) prohibited the government from impeaching a witness using extrinsic evidence of civil fraud. *See also United States v. Simpson*, 709 F.2d 903, 907 (5th Cir. 1983). Therefore, TVA is limited to asking Grover whether he engaged in the alleged misconduct. Once Grover denies that he engaged in the misconduct, TVA must accept his answer and cannot further question him about the alleged misconduct.

The Tenth Circuit has defined a collateral matter as one that could not have been introduced into evidence for any purpose other than impeachment. *United States v. Walker*, 930 F.2d 789, 791 (10th Cir. 1991). Any alleged misconduct in which Grover engaged after Fiser's employment at TVA ended could not be introduced into evidence in this proceeding for any purpose other than to impeach Grover. The evidence has no relevance to any of the matters at issue in determining whether TVA retaliated against Fiser for engaging in protected activity.

The Sixth Circuit has also held that extrinsic evidence used to impeach a witness on a collateral matter is inadmissible. *United States v. Quinn*, 230 F.3d 862 (6th Cir. 2000). In that case, the court excluded testimony by a fingerprinting expert which would have impeached the fingerprint testimony of the police officer who conducted the fingerprinting. The court upheld the district court's decision to exclude the testimony because Rule 608(b) prohibited the use of such extrinsic evidence for impeachment.

The prohibition against the use of extrinsic evidence applies only if the witness denies his prior misconduct. *United States v. Archer*, 733 F.2d 354, 361 (5th Cir. 1984) and *United States v. Simpson*, 709 F.2d 903, 908 (5th Cir. 1983). In *Archer*, the court held that Rule 608(b) may not have been violated by admitting testimony of a check kiting scheme by the defendant because she admitted to the misconduct. 733 F.2d at 361. In *Simpson*, the court found no error in admitting an SEC injunction into evidence because the defendant admitted his involvement in the matter. Grover has repeatedly denied engaging in the misconduct for which TVA allegedly terminated him. Unless Grover admits to such behavior on cross-examination during the hearing, Rule 608(b) prohibits TVA from introducing any evidence of its TVA OIG investigation of Grover's behavior.

Since Rule 608(b) expressly prohibits the use of extrinsic evidence to attack the credibility of a witness, the Staff requests that the Board exclude all documents, testimony, and other extrinsic evidence which relates to alleged misconduct by Grover. Additionally, the Staff requests that the Board limit TVA on cross-examination to asking Grover if he engaged in the alleged misconduct.

Once Grover has denied the misconduct, TVA must accept his answer and cannot attempt to prove otherwise.

B. Any alleged misconduct by Grover happened subsequent to his testimony in the Fiser case and is therefore irrelevant to the matters at issue in this proceeding

The misconduct alleged by TVA is not relevant to Grover's testimony against TVA in this proceeding. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Evidence of alleged misconduct by Grover would not make any of the facts in dispute in this proceeding either more or less probable. The alleged misconduct occurred subsequent to Grover's early testimony in the Fiser proceeding. Grover provided statements which supported Fiser to TVA OIG on July 11, 1996, to the Department of Labor on September 27, 1996, and provided deposition testimony in Fiser's DOL case on January 29, 1998. The TVA OIG investigation of Grover for alleged misconduct was not initiated until July 24, 1998.

Use of Grover's alleged misconduct and subsequent termination for that alleged misconduct would only be relevant if they are probative of Grover's truthfulness or untruthfulness, as set forth by Rule 608. These allegations against Grover are not probative for two reasons. First, the alleged misconduct involves mere allegations against Grover by TVA and has never been litigated or proven by TVA in any independent forum. Second, the statements given by Grover in the Fiser case after the initiation of the TVA OIG investigation of the alleged misconduct are consistent with the statements Grover provided prior to the initiation of the investigation. In his subsequent statements, Grover has not exaggerated or embellished on the statements he made prior to the TVA OIG investigation. Instead, his statements have been consistent over the course of both the DOL and NRC proceedings in the Fiser case. Absent exaggeration or embellishment that occurred

after the initiation of the TVA OIG investigation, evidence of alleged misconduct that had no discernible effect on Grover's testimony in this proceeding is irrelevant.

C. Evidence of Grover's alleged misconduct should be excluded pursuant to Rule 403

Even if the Board determines that evidence of Grover's alleged misconduct is relevant to this proceeding, the evidence should be excluded pursuant to Federal Rule of Evidence 403. Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Permitting TVA to introduce evidence of the alleged misconduct by Grover would result in undue delay and cause a waste of the Board's time. Introduction of evidence of the alleged misconduct would result in a mini-trial on whether or not Grover engaged in such conduct, including additional discovery and depositions, an expansion of the Staff's witness list, and the application for subpoenas duces tecum on matters related to Grover's misconduct, since TVA has not proved in any forum that Grover has engaged in such misconduct.

The courts support the exclusion of evidence when it would result in an "undue delay" because of the necessity for a mini-trial on the evidence. In *Larch v. Mansfield Municipal Electric Dep't*, 272 F.3d 63 (1st Cir. 2001), the plaintiff filed a whistleblower claim against the Electric Department, claiming that he was fired from his position as Manager of the Department because he refused to hire a department commissioner's friend. The department attempted to introduce evidence of sexual harassment allegations against the department's Business Manager as a reason for not renewing plaintiff's contract. *Id.* at 73. The court did not let the Department inquire into the Business Manager's personal involvement in the incidents, because "we're not going to have mini trials on each one of those allegations." *Id.* The Court of Appeals concluded that "there

was no abuse of discretion in the court's decision not to conduct a 'mini-trial' on the issue of sexual harassment." *Id.*

In *Tennison v. Circus Circus Ent., Inc.*, 244 F.3d 684 (9th Cir. 2001), the plaintiffs filed a sexual harassment claim and attempted to offer the testimony of two co-workers that the same employee harassed them in 1988 and 1989 and that they had complained to management. *Id.* at 689. The district court excluded the testimony under a Rule 403 balancing test. *Id.* The Court of Appeals concluded that the exclusion was proper, noting that "admitting [the co-workers'] testimony might have resulted in a mini-trial, considering that much of their testimony was disputed by Defendants. The trial court could reasonably conclude that this would be an inefficient allocation of trial time." *Id.* at 690.

The admission of evidence that Grover engaged in misconduct would also result in a mini-trial because there is a dispute as to whether or not he engaged in such misconduct. Although the TVA OIG has asserted that Grover has engaged in such misconduct, Grover has denied the alleged misconduct. If the Board permits TVA to introduce evidence of the alleged misconduct, the Staff will need to call other witnesses involved in the Grover case and conduct a mini-trial on whether or not Grover had actually engaged in the alleged misconduct.² Because the alleged misconduct in no way relates to any of the issues raised in this proceeding, and because Rule 608(b) permits TVA to cross-examine Grover on the alleged misconduct, the Board should exclude any extrinsic evidence of the alleged misconduct on the ground that it would cause an undue delay in the proceeding and that it would be a waste of the Board's time.

² The Staff notes that a mini-trial on the Grover matter would likely take longer than the hearing in the Fiser matter, as a number of issues would have to be litigated, including whether Grover engaged in the alleged misconduct, whether that alleged misconduct was sufficient to terminate Grover's employment, and whether TVA retaliated against Grover for engaging in protected activity by refusing to assist him upon his return from INPO, by initiating a TVA OIG investigation, and by terminating him. This mini-trial would likely double the length of the hearing in the Fiser matter.

D. Admission of evidence of Grover's alleged misconduct would impede the Staff's investigation of TVA's actions in that matter

Grover has asserted in a DOL complaint against TVA that the initiation and completion of the TVA OIG investigation into alleged misconduct, as well as his subsequent termination from TVA, constituted retaliation for protected activity. Grover and TVA recently settled Grover's DOL complaint prior to a hearing before a DOL Administrative Law Judge. Although the DOL case has concluded, the NRC is investigating whether the TVA OIG investigation of Grover and his subsequent termination based on the findings of that investigation constituted a violation of 10 C.F.R. § 50.7. The Staff has not yet completed its review of this case and has not made a determination as to whether a violation has occurred. In its review, the Staff will be specifically addressing the lack of independence and impartiality on the part of TVA OIG in conducting this investigation. It would be patently unfair to permit TVA to use a self-serving investigation of alleged misconduct by Grover to undermine his credibility as a witness in this proceeding. In light of this fact, evidence gathered by TVA OIG on the alleged misconduct should not be admitted into evidence.

This proceeding is not the appropriate forum for dealing with the dispute as to whether or not the investigation was undertaken in retaliation for protected activity. Conducting a mini-trial on the Grover case before the Board in this proceeding would preempt the Staff's authority to fully investigate this matter and determine whether a violation has occurred using its normal enforcement process. Therefore, the Board should decline to permit TVA to litigate Grover's alleged misconduct in this proceeding.

CONCLUSION

Any evidence related to alleged misconduct by Ronald Grover should be ruled inadmissible in this proceeding under the Federal Rules of Evidence. Rule 608(b) explicitly prohibits the introduction of such evidence in this proceeding in order to attack Grover's credibility. TVA should

be limited to asking Grover whether he engaged in the alleged misconduct on cross-examination and be required to accept his denial. Additionally, the evidence of Grover's alleged misconduct is not relevant to the matters at issue in this proceeding. Grover has not altered his story since the investigation of the alleged misconduct, nor does the misconduct make it more or less likely that statements given by Grover prior to the occurrence of the alleged misconduct were untruthful. Admission of this evidence would require a mini-trial as to whether or not Grover actually engaged in such misconduct, which would result in a delay of the Fiser proceeding and a waste of the Board's valuable hearing time. Finally, the Board should permit the NRC's normal enforcement process to determine the matters in dispute in the Grover case, rather than permitting TVA to litigate those matters in an unrelated proceeding. For these reasons, the Staff respectfully requests that the Board exclude any documents, testimony, or other extrinsic evidence related to alleged misconduct by Grover.

Respectfully submitted,

/RA/

Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of April, 2002

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NUCLEAR REGULATORY COMMISSION

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Sequoyah Nuclear Plant, Units 1 & 2) ASLBP No. 01-791-01-CivP
Browns Ferry Nuclear Plant, Units 1, 2, 3))
) EA 99-234

CERTIFICATE OF SERVICE

I hereby certify that copies of "MOTION IN LIMINE TO EXCLUDE CERTAIN DOCUMENTS RELATED TO RONALD GROVER" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 4th day of April, 2002.

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