

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 THE
TESTIMONY AND SUMMARY OF ANALYSES OF CAREY L. PETERS
AND REQUEST FOR PERMISSION TO FILE FURTHER MOTIONS IN LIMINE

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 the testimony of Carey L. Peters and the “Summary of Analyses: Likelihood of Negative Interview Bias Against Employee Involved in Protected Activity” report drafted by Peters in March 2002, as well as any other testimony or documents related to that report.

BACKGROUND

On March 29, 2002, TVA filed “Tennessee Valley Authority’s Witness List” and “Tennessee Valley Authority’s Document List.” TVA identified Carey L. Peters as a witness who “may testify about whether knowledge of Fiser’s purported protected activity affected the results of the selection review board.” TVA Witness List at 3. The witness list did not specify the nature of Peters’ knowledge and testimony. In its document list, TVA included a number of documents which it had not previously provided to the Nuclear Regulatory Commission (NRC) Staff during discovery.

Counsel for the Staff received copies of these documents at approximately 11:30 A.M on April 4, 2002, the date on which the Board required the parties to file motions in limine to exclude evidence. Included among these documents were the resume of Carey L. Peters and Peters' "Summary of Analyses: Likelihood of Negative Interview Bias Against Employee Involved in Protected Activity." The document list did not provide any explanation of the Summary of Analysis, nor did it provide the date of this document. Neither the witness list nor the document list identified Peters' position within TVA or what his personal knowledge of the Fiser matter was.

Peters' resume identifies him as a Program Manager in TVA Human Resources, with a Doctor of Philosophy in Industrial/Organizational Psychology. Peters drafted a report entitled, "Summary of Analyses: Likelihood of Negative Interview Bias Against Employee Involved in a Protected Activity." The report is dated March 2002. This report purports to conduct an analysis of variance that it claims demonstrates that the interview scores Gary Fiser received from the Selection Review Board were not lower because he had engaged in protected activity.

DISCUSSION

NRC regulations permit "[o]nly relevant, material, and reliable evidence which is not unduly repetitious" to be admitted into evidence. 10 C.F.R. § 2.743(c). The Board should exclude the testimony of Peters as well as his report because they are irrelevant to the matters at issue in this proceeding and they are unreliable evidence. First, Peters has no personal knowledge of the process used by the selection review board or of the subjective determinations made by each member of the review board. Additionally, Peters' analysis was conducted almost six years after the selection review board interviews were conducted and in no way reflects an accurate determination of the board's conclusions regarding the interviews in July 1996. Finally, Peters' analysis is flawed because it fails to take into account the subjective nature of the interviews,

including the substance of the technical questions asked and the attitude of each interviewer towards particular interviewees.

While the Federal Rules of Evidence are not directly applicable to NRC proceedings, NRC adjudicatory boards often look to those rules for guidance. *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, ALAB-717, 17 NRC 346, 365 n. 32 (1983). Federal Rule of Evidence 602 specifically requires a witness to have personal knowledge of the matter on which he is testifying. TVA has not asserted and the Staff is not aware that Peters has any personal knowledge of how the selection review board was conducted. His knowledge is limited to the information provided second or third hand from TVA counsel or other TVA representatives. Although there is generally no bar to the admission of hearsay evidence in NRC adjudicatory proceedings, it does not appear from his report that Peters' will be testifying as to hearsay matters. *See Id.* at 366.

Federal Rule of Evidence 703 permits an expert witness to testify despite his lack of personal knowledge of the underlying facts, but TVA has not identified Peters as an expert witness, and the Staff would question whether an internal TVA employee conducting a self-serving analysis qualifies as an expert witness. Peters' report was obviously drafted specifically for use as evidence in this proceeding, as demonstrated by the fact that it was not drafted until March 2002, one month before the hearing and almost six years after Fiser filed his complaint with the Department of Labor. An analysis based solely upon numerical data, conducted almost six years after the relevant events, is not an accurate reflection of the subjective machinations of the three individuals who scored the interviews. Under these circumstances, Peters' report at best constitutes unreliable evidence that the selection review board was not affected by Fiser's protected activity. *See* 10 C.F.R. § 2.743(c).

In his report, Peters asserts that the results of his analyses “clearly and strongly indicate that the ratings Fiser received were most likely *not* lower because Corey and Kent knew he was involved in a protected activity.” Summary at 2 (emphasis in original). Peters conducted simple statistical analyses that failed to take all relevant factors into account. The main (and only) factor Peters considered was whether the interviewer’s knowledge of an individual’s protected activity negatively biased their ratings against the candidate. Peters based his conclusion that Fiser’s protected activity did not result in a lower score almost exclusively on the fact that the raters who had knowledge of Fiser’s protected activity (Kent and Corey) rated him higher than the rater who did not have such knowledge (Rogers).

Peters’ analysis fails because it is an attempt to perform a quantitative analysis of a qualitative process. Each of the selection review board members testified during depositions that there were no grading criteria or standards, so the rater was free to assign any numerical value he personally determined should be assigned. Therefore, the ratings were a completely subjective determination, based in part on the candidates’ demeanor, perceived self-confidence, and interview performance relative to the other candidates, rather than their technical abilities. Peters focuses his analysis on the absolute scores given to each of the candidates. However, given that the selection review board was not given any standards by which to rate the candidates, the absolute scores are not relevant. Under these circumstances, it would be difficult to impossible to quantitatively conclude that one factor, knowledge of Fiser’s protected activity, played no role in the scores he received from the selection review board.

In addition, this statistical analysis is meager evidence that Fiser’s protected activity had no effect on his scores from the selection review board. The analysis is overly simple and fails to account for relevant factors in the scoring process. The most important of these factors is evidence that the questions drafted by Wilson McArthur and Kent for this Chemistry position were slanted

toward an individual with a strong secondary chemistry background. Fiser's main area of strength was primary chemistry, while the main area of strength of Sam Harvey, the individual who was ultimately selected for the position, was secondary chemistry. Peters' analysis fails to account for the bias inherent in the questions. An additional key factor that Peters ignored in his analysis is a positive bias that Kent and Corey had in favor of the candidates who worked closely at the site. Peters also fails to address that the individual who may have favored Fiser, Jack Cox, was not included as a member of the selection review board.

The analysis and report by Peters are unnecessary to support TVA's allegation that the selection review board was not influenced by Fiser's protected activity. If TVA desires to demonstrate that Fiser's protected activity did not influence Corey or Kent in their ratings, it can ask Corey and Kent those questions during their testimony at the hearing, as both have personal knowledge of what factors they considered in rating the candidates. This would be the best evidence to support TVA's allegation that Kent and Corey's knowledge of Fiser's protected activity had no impact on their ratings of Fiser. Questioning Corey and Kent during the hearing would also permit the Staff to cross-examine the witnesses as to their statements on this matter, as opposed to cross-examining a witness who conducted a bare statistical analysis of which he had no personal knowledge.

CONCLUSION

The Staff respectfully requests that the Board exclude the testimony and "Summary of Analyses" report of Carey Peters from evidence in this proceeding. The analysis is not relevant to any of the matters at issue in this proceeding and is unreliable evidence of the motivations of the selection review board. To the extent the Board concludes that the report and testimony are relevant, the analysis is inadequate and fails to address all of the relevant factors related to the candidate ratings by the selection review board.

Additionally, due to the Staff's late receipt of these documents, the Staff requests the Board permit the Staff to file any additional motions in limine after it has had an adequate opportunity to review the voluminous documents provided by TVA to the Staff on April 4, 2002. The Staff also requests the Board permit it to file any necessary motions in limine on those documents identified in "Tennessee Valley Authority's Supplemental Exhibit List" and "Tennessee Valley Authority's Second Supplemental Exhibit List" which TVA has yet to provide to the Staff.

Respectfully submitted,

/RA/

Jennifer M. Euchner
Counsel for NRC Staff

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of "MOTION IN LIMINE TO EXCLUDE THE TESTIMONY AND SUMMARY OF ANALYSES OF CAREY L. PETERS " 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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