

1 JUDGE YOUNG: But Mr. Dambly, you have
2 questioned how the RIF reorganization process was used
3 in --

4 MR. DAMBLY: In the Operations Support
5 organization.

6 JUDGE YOUNG: Hold on a second. You have
7 questioned how the reorganization/reduction in force
8 process was used with regard to Mr. Fiser and alleged
9 that he was discriminated against. You're saying
10 within a certain part of the organization. But the
11 party here is TVA. So I'm not sure that your wanting
12 to draw the line at a particular place and say
13 everything on this side of the line is relevant and
14 everything on the other side of the line is not
15 relevant, at least it doesn't make a whole lot of
16 sense to me from a logical standpoint.

17 MR. DAMBLY: Well, let me put it this way.
18 If we had made an allegation that Mr. Grover was
19 discriminated against because he was an African-
20 American and he was discriminated against by Mr.
21 McGrath because he was an African-American, I trust
22 that you would not think that they could bring in
23 evidence about how an African-American was treated at
24 Watts Bar under a different supervisor because it
25 would have no relevance whatsoever in that case

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1 anymore than this when we're talking about did Mr.
2 McGrath discriminating have anything to with how other
3 people were treated anywhere else.

4 MR. MARQUAND: It really does make a
5 difference when you're talking about whether the
6 policy and practice or whether it's just an
7 individual. Our defense is that we have used a policy
8 and practice consistently throughout. This particular
9 document is almost a perfect example of the situation
10 we have in the case of chemistry. That is Counsel has
11 argued that there's really no difference between
12 chemistry and environmental and the chemistry jobs.
13 But all this document shows --

14 JUDGE YOUNG: Just hold on one second.
15 You can finish if you need to after I say what I have
16 to say. I really think that we're starting to go
17 around in circles here. Mr. Dambly, you withdrew your
18 individual complaint against Mr. McGrath. The
19 complaint in this case is --

20 MR. DAMBLY: No we did not.

21 JUDGE YOUNG: Pardon?

22 MR. DAMBLY: That's a different case.

23 JUDGE YOUNG: Okay. A different case. In
24 any event, this case involves TVA. So the party
25 against whom the discrimination is alleged is TVA. I

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1 for one don't buy your argument that you can separate
2 out parts of TVA and say that what happens in TVA as
3 a whole is irrelevant to your allegation of
4 discrimination one part of TVA. Now, if we need to
5 confer further on this, maybe we need to do that. But
6 we're going around in circles. The same issue keeps
7 coming up. That is the basic relevance of all this.

8 MR. DAMBLY: And again, I would disagree
9 with your recent statement. If we brought an EEO
10 action against TVA because of discrimination against
11 Mr. Grover being African-American, they could not
12 bring in as relevant how somebody was treated at Watts
13 Bar just because it's a big corporation any more than
14 if you sue Denny's at a given site, they can come in
15 with somebody in Seattle and say the Denny's in
16 Seattle didn't discriminate so we win. That's not
17 relevant.

18 JUDGE YOUNG: I think you're
19 oversimplifying it a bit.

20 CHAIRMAN BECHHOEFER: Well, let me state
21 a somewhat contrary view to what we've just heard. I
22 believe that without a demonstration that any of the
23 RIFs or reductions or surplusings, whatever you wish to
24 call it, that were carried out at these other reactors
25 were done properly. How were these registers

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1 prepared? Were the right people on them or not on
2 them?

3 I don't think I could accept any of these
4 documents into evidence without a full demonstration
5 of the propriety of the particular documents. In
6 addition, I don't think a showing that each document
7 was prepared properly which it may well have been is
8 relevant to this proceeding. I think it's surplus
9 change at best. Maybe that's using the term derived
10 from the conversations here. I don't see how I could
11 give any of them any weight.

12 I could give weight to a statement by the
13 witness that similar procedures were used at such-and-
14 such. He could even name the occasions. But that's
15 this witness whom we could question if we thought
16 necessary. I don't think that we have any basis for
17 determining the propriety of any of the documents
18 relating to other RIFs in any event.

19 Therefore, I don't think I would accept
20 into evidence any of the proffered exhibits. If they
21 were denied, they could travel with the record. So
22 that wouldn't help the paperwork problems. But I
23 think they would travel with the record under the
24 rules. I would be disinclined to accept any of them
25 into evidence.

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1 MR. MARQUAND: With all due respect, Your
2 Honor, I think you are missing the appropriate
3 standard. The standard is not whether they did it
4 right somewhere else. They may have indeed done it
5 wrong somewhere else. They may have indeed done it
6 wrong across the board. But you also --

7 CHAIRMAN BECHHOEFER: Is that an excuse
8 for doing it wrong?

9 MR. MARQUAND: No. That's not the issue
10 in this case. The issue in this case was whether
11 Fiser was discriminated against. If the mistake was
12 made somewhere else, assume that they made a mistake
13 in interpreting the OPM regulations and putting it
14 into the TVA personnel instructions and that those
15 instructions are wrong. But if they applied the same
16 mistake to everybody, it's not discrimination.

17 CHAIRMAN BECHHOEFER: No. But can't we
18 take testimony to that effect from the witness?

19 MR. MARQUAND: We're not suggesting that
20 these other ones are right or that they're wrong. All
21 we're simply showing is that HR makes these
22 determinations. They make very fine distinctions in
23 looking at these things. And they apply exactly the
24 same process at Watts Bar and Sequoyah and Browns
25 Ferry and Chattanooga and under Mr. McGrath's

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1 organization. Whether these others are wrong is
2 irrelevant.

3 The question is what process was applied.
4 We think these documents show that precisely the same
5 process was applied by HR with very fine distinctions
6 distinguishing between HVAC and qualification
7 specialists and heating and component qualification.
8 They make those very fine calls both in civil
9 engineering and between chemistry and environmental or
10 chemistry or RadWaste or whatever. That same process
11 is applied everywhere.

12 JUDGE COLE: Then why wouldn't it be
13 sufficient for this witness to say that?

14 MR. MARQUAND: That's all that I'm trying
15 to get to and all I had asked him to do. I want to
16 move on. The only thing I intend to ask him about
17 this document is when we look at civil engineers do
18 they make this fine distinction and break it down
19 between civil engineers and put these people on
20 different retention registers. That's the only
21 question I have.

22 JUDGE COLE: He has already testified to
23 that, sir.

24 MR. MARQUAND: He hasn't gotten there yet.
25 We had an objection we've been arguing.

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1 MR. DAMBLY: And I would further object
2 that if the intent is to show somehow they're making
3 fine distinctions, giving me a piece of paper with
4 lines through it doesn't show fine distinction. The
5 only way you could even remotely get there is if they
6 brought in the before and after PDs. For all I know
7 they are gross distinctions between the HVAC civil
8 engineer and a concrete specialist. I don't see how
9 fine that it.

10 CHAIRMAN BECHHOEFER: Well, I might say I
11 view distinctions between technical positions and
12 managerial positions somewhat differently even though
13 technically the same procedures may apply. I think
14 evaluating managerial positions is much more
15 discretionary. Discretion may be abused. It's much
16 more discretionary than technical distinctions between
17 types of engineers who may call for differing
18 background, differing qualifications. I view a
19 difference anyway. I may be the only one here. I see
20 a difference.

21 JUDGE YOUNG: I think there are two issues
22 that we're being called upon to decide here. First
23 primarily is the issue of relevance. Second is the
24 issue of the amount of documents and some issue as to
25 what those documents say and mean. I think it might

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1 be a good idea at this point to take a short break and
2 for us to confer and then come back and help the
3 process move along by giving you a ruling on at least
4 relevance. Does that sound like a good idea?

5 (Judges confer.)

6 JUDGE YOUNG: So let's take five minutes.
7 Off the record.

8 (Whereupon, the foregoing matter went off
9 the record at 2:08 p.m. and went back on
10 the record at 2:13 p.m.)

11 CHAIRMAN BECHHOEFER: Back on the record.

12 JUDGE YOUNG: All right. Although none of
13 these documents have actually been formally tendered
14 into evidence, the same objection as to relevance is
15 obviously going to continue to arise. And so we have
16 conferred on this.

17 Two of us find that the documents would be
18 relevant in showing what the overall approach of TVA
19 was. And although there might be differences as to
20 the weight, we do find that it is relevant.

21 Judge Bechhoefer is going to state a
22 differing view on that. And then we would like to
23 hear your arguments on why it is or is not cumulative
24 to go through all of these fairly thick documents or
25 sets of documents relating to the retention lists and

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1 the RIFs and -- what was the other category of
2 documents?

3 MR. MARQUAND: Surpluses.

4 JUDGE YOUNG: Surpluses.

5 MR. MARQUAND: That we don't intend to go
6 through other than to say, "Here is the document."

7 JUDGE YOUNG: Hold on. Hold on. We're
8 not there yet. Okay?

9 So we have made our ruling on relevance.
10 And Judge Bechhoefer wants to make a separate
11 statement on that.

12 CHAIRMAN BECHHOEFER: I believe it
13 relevant that the same RIF procedure or framework is
14 followed throughout all the TVA reactors. What I do
15 not believe is to be relevant are examples of RIFs
16 that do not involve cases of alleged whistle-blowing
17 because what we have to determine, among other things,
18 is whether the RIF in question here was motivated by
19 getting rid of an alleged whistle-blower.

20 And unless we have some demonstration that
21 any or all of those other RIFs involved -- and
22 managerial type employees in addition but
23 whistle-blowing managerial employees. Unless that
24 were demonstrated for the particular positions for
25 which RIFs were carried out, I do not believe that

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1 they would be relevant to this proceeding.

2 And I join any objection as to quantity as
3 well, but I don't think the material -- I would take
4 the statement of the witness that similar procedures
5 are used throughout TVA reactors for conducting
6 reductions in force.

7 And we do have the guidelines or rules I
8 think already in the record if my recollection is
9 correct and those rules are the ones that TVA attempts
10 to follow.

11 MR. MARQUAND: I'm not sure --

12 CHAIRMAN BECHHOEFER: That much I would
13 accept certainly.

14 MR. MARQUAND: I'm not sure I understood
15 what you're saying, Judge. We're not trying to show
16 we treated Fiser the same as other whistle-blowers.
17 We're trying to show we treated him the same as
18 non-whistle-blowers; that is, that we didn't
19 discriminate against him because he was whistling,
20 trying to show he was treated the same as everybody
21 else in a different classification. That is,
22 regardless of whether he is a whistle-blower, he's
23 treated the same.

24 JUDGE YOUNG: We're finding it relevant.
25 And now we want to hear your arguments on --

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1 CHAIRMAN BECHHOEFER: But with my
2 objection to that ruling.

3 MR. MARQUAND: Your Honor, my (inaudible)
4 I want him to identify these and say these are the RIF
5 documents, the surplus documents of Sequoyah or Watts
6 Bar or Browns Ferry. And I don't intend to ask him
7 other questions except about the specific documents
8 from operations support.

9 JUDGE YOUNG: And do you want to make any
10 argument on whether these documents are cumulative or
11 repetitive?

12 MR. DAMBLY: Well, they're certainly
13 cumulative. And, quite frankly, I'll just again note,
14 as far as I can see, absent even for the purpose that
15 you want them in for relevance, unless you have the
16 position descriptions before and after and you have
17 the organization charts before and after and the
18 whatever documents were considered in reaching these
19 retention registers, they don't show you anything
20 except we have a pile of documents that say they were
21 retention registers.

22 They don't show you a thing about whether
23 Mr. Fiser was treated differently than anybody else.
24 For all we know, there were gross disparities in the
25 PDs.

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1 JUDGE YOUNG: I think you are getting back
2 on relevance. And you may be right that there would
3 need to be some explanation of the documents, but I
4 understand you to be saying that assuming they're
5 relevant, you object to their being cumulative and
6 repetitive.

7 MR. DAMBLY: If you think they are
8 relative and you all want to lug these around, fine.

9 JUDGE YOUNG: I think those are two
10 separate issues. Mr. Marquand, I think we all are
11 wondering why bring in all of these thick, thick
12 documents, which, I think Mr. Dambly has a point, are
13 not necessarily self-explanatory on their face and
14 which appear to be cumulative and to show the same
15 thing for very many employees at TVA?

16 We're having a hard time understanding
17 what this provides to us over and above the witness'
18 statement that the same procedures were followed
19 TVA-wide during the 1996 reorganization.

20 JUDGE COLE: Even though these are weighty
21 documents, I would put more weight on the testimony of
22 the witness.

23 MR. MARQUAND: Your Honor, let me address
24 that. This case has been going on since 1996. And we
25 have tried over and over to explain to the staff that

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1 we did apply the same procedures throughout. And
2 apparently they don't listen to individual. I don't
3 know any other way to convince them.

4 We do consider this to be a --

5 JUDGE YOUNG: Well, at this point you are
6 here to convince us, not them.

7 MR. MARQUAND: I understand. We do
8 consider this case to be important. We place a lot of
9 weight on this case. We obviously have invested a lot
10 of time in it, a lot of money and resources in
11 bringing people to Washington, going to Chattanooga
12 for some I guess 27-28 days

13 The '96 reorganization was important. '96
14 reorganization was big. And to the extent that these
15 documents --

16 JUDGE YOUNG: Was important and was what?

17 MR. MARQUAND: Big.

18 JUDGE YOUNG: Big.

19 MR. MARQUAND: It was very big. And
20 unfortunately --

21 JUDGE YOUNG: You might need to pull that
22 microphone closer because she is having a hard time
23 getting you.

24 MR. MARQUAND: That is the first time in
25 this hearing anybody has accused me of that, isn't it?

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1 Anyway, we view this with some importance.
2 And these RIFs were important to a lot of people,
3 including the people involved. And it's our view that
4 we treated Mr. Fiser the same way. Other than
5 presenting you the documents that show that we treated
6 thousands of employees exactly the same way we did
7 with Mr. Fiser, I don't know how else to convey to you
8 the weight of the importance of Mr. Fogleman's
9 testimony.

10 We have been here for 27 days. And we
11 have been hearing the staff argue about how TVA
12 treated Mr. Fiser differently simply because Dr.
13 McArthur was the exception to the rule.

14 This is the rule. There are thousands and
15 thousands of people who were surplused or RIFed or put
16 at risk. And these documents go to show that. And I
17 think --

18 JUDGE YOUNG: But, Mr. Marquand, Mr.
19 Fogleman can say that.

20 MR. MARQUAND: Right.

21 JUDGE YOUNG: The documents on their own
22 just based on what we have seen so far demand some
23 explanation. And if you go through having Mr.
24 Fogleman explain each set of documents, we are going
25 to be here a lot longer than today.

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1 So I guess that is the question I am
2 asking you. What use would you want us to make of
3 these documents absent further explanation by Mr.
4 Fogleman?

5 MR. MARQUAND: I believe his explanation
6 simply has to be that this collection of documents or
7 retention registers or surplus notices from Watts Bar,
8 this particular exhibit are the retention registers
9 and RIF notices for CTS employees, this exhibit, and
10 just go through them one exhibit at a time.

11 I think that is all it requires to have in
12 the record the documents that show you can look,
13 everybody can look, at a retention register and see
14 how many employees are on that retention register.

15 And they can look behind it and find the
16 RIF notices. And they can look behind it and find the
17 surplus notices. And I don't think there's any
18 question that those documents speak volumes about the
19 number of --

20 JUDGE YOUNG: On their own without any
21 explanation?

22 MR. MARQUAND: I think we have identified
23 the types of documents that are in here. I think when
24 you go through these documents, these exhibits now,
25 you see assignment to TVA services letter. It is a

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1 form letter. You see a retention register. It is a
2 form. And every one of them, all of those are going
3 to be essentially the same.

4 The RIF notices, the assignment to
5 services, the at-risk notices are all essentially the
6 same. And they speak volumes about the number of
7 employees that were affected, the number of employees
8 that went through the identical process and got the
9 same form letter that were treated, put on the same
10 source of retention registers. It all went through
11 the same process.

12 CHAIRMAN BECHHOEFER: Does it reflect
13 employees who perhaps should have been listed on the
14 retention register but were not?

15 MR. MARQUAND: I don't know that, Your
16 Honor. I don't know how one would make that judgment.

17 MR. DAMBLY: That's going to get to my --
18 I have never disagreed with the board that his
19 testimony to the extent he wants to say we followed
20 the same procedures for everybody was relevant.

21 My objection to these documents is they
22 don't show a thing about how people were treated. All
23 they show is there were a bunch of -- we will
24 stipulate a lot of people ended up on the street as a
25 result of what happened in 1996.

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1 These don't show the people who didn't end
2 up on retention registers because their jobs were
3 termed "interchangeable," which would give you some
4 basis to see that they applied the same
5 interchangeability.

6 All this shows is a list of people they
7 put together. These are the ones that end up going
8 out the door. That doesn't show anything. There are
9 no PDs. There is no way to tell one way or another
10 how this shows anything about how they treated Mr.
11 Fiser or any other employee.

12 MR. MARQUAND: Counsel has had ample
13 opportunity for discovery. I am assuming that if they
14 had come up with any other situation where there were
15 PDs that people were rolled over when he thinks that
16 they shouldn't have been, that he would have presented
17 those.

18 These are the ones that we determined
19 didn't have rights to new jobs and weren't rolled
20 over; weren't transferred to new jobs; and, in fact,
21 treated just like Mr. Fiser, they got surplus notices
22 because they were determined not to be on the same
23 competitive level as the new jobs.

24 I cannot believe that if he didn't have
25 that sort of information -- he had access to these; he

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1 requested whatever he wanted in discovery -- if he had
2 come up with those situations, that we wouldn't see
3 those.

4 JUDGE YOUNG: Any other argument?

5 MR. DAMBLY: It is certainly not my
6 responsibility to request the non-retention registers
7 for Watts Bar for a period of time that was after
8 whatever went on.

9 JUDGE YOUNG: Without us getting into your
10 responsibility, is there any other argument on whether
11 these documents would be cumulative or repetitive?

12 MR. DAMBLY: I will object to any page
13 that is not referred to in this record going into the
14 record, same as I did with the file cabinet.

15 JUDGE YOUNG: Let's take one moment.

16 (Whereupon, the foregoing matter went off
17 the record at 2:33 p.m. and went back on
18 the record at 2:35 p.m., during which
19 time the panel conferred.)

20 JUDGE YOUNG: We are going to sustain the
21 objection on the exhibits being cumulative and
22 repetitive. We find that in order for them to be
23 meaningful to us, you would need to go through each of
24 them and explain to us what happened with each of
25 them.

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1 However, if the witness wishes to provide
2 testimony that X number of people -- and tell us how
3 many people -- were treated in the same manner, then
4 we would find that relevant and would allow the
5 witness to testify to that.

6 And if you want the -- I think you have
7 had the documents marked for identification. So the
8 record would reflect that they would be rejected, not
9 because they're not relevant but because to make them
10 relevant would demand very cumulative and repetitive
11 testimony. That would not be the most efficient
12 manner to proceed at this point.

13 CHAIRMAN BECHHOEFER: And I might say if
14 they're rejected, they travel with the record. And
15 commissioners or OCCA individuals can sit, read
16 through them if they wish.

17 JUDGE YOUNG: But, again, Mr. Marquand,
18 you can ask Mr. Fogleman to give his testimony about
19 how many people are repeated in there or --

20 JUDGE COLE: Approximate numbers.

21 JUDGE YOUNG: Right, approximate numbers.

22 CHAIRMAN BECHHOEFER: Ballpark.

23 JUDGE YOUNG: And what general procedures
24 were used. We would find that to be relevant.

25 MR. MARQUAND: You may find that to be

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1 more lengthy than the testimony we had anticipated.
2 All right.

3 BY MR. MARQUAND:

4 Q Let's go back to TVA Exhibit 83. Mr.
5 Fogleman, that is a --

6 JUDGE YOUNG: Now, for what purpose are
7 you going back to it?

8 MR. MARQUAND: Well, I think we have to
9 identify the numbers of employees that are involved,
10 at least have an idea of the number of retention
11 registers that are in this thing.

12 JUDGE YOUNG: Okay. Then why don't we
13 take a break, get that information together? And then
14 you can testify to it. The intent of our ruling was
15 not to go through page by page of the document.

16 MR. MARQUAND: We are not going to go
17 through page by page. I am simply going to ask him
18 about approximately how many employees were covered by
19 that.

20 JUDGE YOUNG: Okay. Is that all right?
21 Would it be easier to take a break and then come back?

22 MR. MARQUAND: No, I don't believe it
23 would.

24 CHAIRMAN BECHHOEFER: Like 15 minutes?
25 You'll have some figures that you could --

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1 MR. MARQUAND: No. I don't believe that
2 we're going to go -- we're not going to attempt to go
3 through and count them up.

4 JUDGE YOUNG: Go ahead.

5 BY MR. MARQUAND:

6 Q Mr. Fogleman, TVA Exhibit 83, those are
7 the retention registers for Watts Bar TVA service
8 employees. And that document is paginated pages
9 beginning with the second page, EA-1, through Page
10 EA-326. Is that correct?

11 A That's correct.

12 Q And that's a collection of retention
13 registers and draft retention registers and surplus
14 notices and reduction-in-force notices. Is that also
15 correct?

16 A That's correct.

17 MR. MARQUAND: And, Your Honors, I know
18 you have already ruled, but I have never offered
19 these. So I am going to make a formal proffer of each
20 document as I finish so that we can have it in the
21 record as being formally proffered.

22 So at this point I am going to offer TVA
23 Exhibit 83 into the record, about which we have
24 already had considerable testimony explaining
25 retention registers and the notices that were in the

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1 --

2 JUDGE YOUNG: With the exception of I just
3 realized, Mr. Dambly, you had said something about the
4 pages that were discussed, you didn't have any
5 objection to the pages that were discussed coming in.

6 MR. DAMBLY: I said if you were going to
7 admit the documents, which is kind of what I thought
8 you had said. You said they were relevant. And if
9 you're going to admit them, I would object to
10 admitting any pages that he didn't go through and
11 explain how they were relevant to this particular
12 proceeding.

13 JUDGE YOUNG: That's what I thought you
14 said. So that means that you don't object to the ones
15 that he did discuss.

16 MR. DAMBLY: Well, I don't think this
17 discussion was relevant. I mean, we went through that
18 there is a piece of paper that has one guy's name on
19 it. I don't know what the relevance of that was other
20 than to show --

21 JUDGE YOUNG: I am just trying to clarify
22 what you meant by saying that assuming --

23 MR. DAMBLY: My objection or my statement
24 was if you decide you want to take in all the
25 document, the entire document, just like when he

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1 offered Mr. McGrath's file cabinet after discussing
2 three or four pages in it, then I would object to
3 taking in any parts if you already decided it was
4 relevant that weren't discussed.

5 JUDGE YOUNG: That's what I understood you
6 to say. Assuming relevance, you object to taking in
7 any parts that were not discussed.

8 MR. DAMBLY: And I object to the four
9 pages that were being discussed as being irrelevant.
10 Okay?

11 JUDGE YOUNG: All right. All right.
12 We're going to sustain the objection not on relevance.
13 We find them to be relevant, but we do find them to be
14 cumulative and repetitive in that we don't find that
15 they would be meaningful to us without explanatory
16 discussion about each one.

17 CHAIRMAN BECHHOEFER: I might say
18 two-thirds of us find them relevant.

19 JUDGE YOUNG: So without having to repeat
20 that specific ruling, I think everybody probably
21 understands what the ruling is at this point. You can
22 proffer them one by one. Go ahead.

23 BY MR. MARQUAND:

24 Q TVA Exhibit 84, Mr. Fogleman; that is,
25 retention registers for Watts Bar engineering and

1 technical support, that is 293 pages of retention
2 registers and RIF notices and surplus notices. Is
3 that correct?

4 A That's correct.

5 MR. MARQUAND: Your Honors, I tender TVA
6 Exhibit 84.

7 JUDGE YOUNG: Same ruling.

8 BY MR. MARQUAND:

9 Q TVA Exhibit 85, also Watts Bar nuclear
10 plant, retention registers for March 10, 1997. There
11 are 251 pages following that. Is that a list of
12 employees who received retention registers, assignment
13 to services, more retention registers from Watts Bar?

14 A Yes, it is.

15 MR. MARQUAND: Your Honors, I tender TVA
16 Exhibit 85.

17 JUDGE YOUNG: Same ruling.

18 BY MR. MARQUAND:

19 Q TVA 86 is more workforce planning
20 documents from Watts Bar. And they are numbered.
21 Beginning on Page 2, they are numbered from 1 through
22 286. Those again are more lists of employees who have
23 been surplusd, retention registers, assignment to
24 services letters. Is that also correct?

25 A That's correct.

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1 MR. MARQUAND: Your Honors, I tender TVA
2 Exhibit 86.

3 JUDGE YOUNG: Same ruling. Judge
4 Bechhoefer has raised an issue. And that is if you do
5 wish to give us numbers on how many employees were
6 affected, you are free to do that.

7 CHAIRMAN BECHHOEFER: In each of the
8 categories.

9 JUDGE YOUNG: You don't have to do that
10 right now. You can count them up in a break and give
11 testimony to that effect.

12 BY MR. MARQUAND:

13 Q For example, Mr. Fogleman, on TVA Exhibit
14 86, there are pages beginning with Page ED-1 through
15 ED-3 is a listing of employees who resigned, listing
16 of employees who exercised reassignment rights, were
17 transferred to services, et cetera. And that's a
18 total of 75 on those 3 pages alone, isn't it?

19 A That's correct.

20 Q TVA Exhibit 87 is more Watts Bar
21 employees. And that is CTS. What does CTS stand for?

22 A Credit Transition Services.

23 Q That beginning with Page 2 is numbered
24 Page EF-1 through Page 329. Are those more retention
25 registers, reduction-in-force notices?

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1 A Retention registers and reduction-in-force
2 notices.

3 MR. MARQUAND: Your Honors, we tender
4 Exhibit 87.

5 JUDGE YOUNG: Same ruling with the same
6 proviso, numbers, et cetera.

7 BY MR. MARQUAND:

8 Q TVA Exhibit 88, Browns Ferry nuclear
9 plant. That begins at Page EG-1 through Page EG-105.
10 Those are essentially all retention registers, aren't
11 they?

12 A The exhibit is just retention registers
13 from Browns Ferry.

14 MR. MARQUAND: Your Honors, we tender TVA
15 Exhibit 88.

16 JUDGE YOUNG: Same ruling.

17 BY MR. MARQUAND:

18 Q Eighty-nine is also from Browns Ferry, was
19 all retention registers as well.

20 A Retention registers and it looks like a
21 9880 personnel document.

22 Q That's 360 pages, isn't it?

23 A Three hundred and sixty-nine pages.

24 MR. MARQUAND: All right. Your Honors, we
25 tender TVA 89.

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1 JUDGE YOUNG: Same ruling.

2 BY MR. MARQUAND:

3 Q TVA 90 is lists of employees from Browns
4 Ferry RIF 1996 as well as RIF notices. It is --
5 begins on Page EG-371 and goes to Page EG-529. That
6 would be 158 pages. Is that correct, Mr. Fogleman?

7 A Yes, reduction-in-force notices.

8 Q And it shows, the list at the outset of
9 that document shows, some 67 employees who were RIFed
10 in September of '96 and another 15 or dozen or 20
11 employees who received RIF letters but found other
12 jobs in TVA. Is that also correct?

13 A That's correct.

14 MR. MARQUAND: Your Honors, I tender TVA
15 Exhibit 90.

16 JUDGE YOUNG: Same ruling. And for the
17 court reporter, just afterwards you will be indicating
18 rejected on all of them.

19 BY MR. MARQUAND:

20 Q TVA Exhibit 91 is retention registers and
21 assignment-to-services letters for Browns Ferry. It
22 begins on Page 530 and goes to Page 608. It's 78
23 pages. Is that also right, Mr. Fogleman?

24 A That's correct.

25 MR. MARQUAND: I tender TVA Exhibit 91.

1 JUDGE YOUNG: Same ruling.

2 BY MR. MARQUAND:

3 Q TVA Exhibit 92 is also Browns Ferry
4 documents. Those are all memos assigning people to
5 services beginning on Page 609 through Page 802. It's
6 about 198 pages of letters notifying employees that
7 their jobs were surplusd and assigning them to
8 services. Is that correct?

9 A That's correct.

10 MR. MARQUAND: I tender TVA Exhibit 92.

11 JUDGE YOUNG: Same ruling.

12 BY MR. MARQUAND:

13 Q TVA Exhibit 94.

14 JUDGE YOUNG: You're skipping 93.

15 MR. MARQUAND: Yes for the moment. I
16 think Your Honors will have a different ruling on
17 this.

18 MR. DAMBLY: And we have no objection to
19 93.

20 MR. MARQUAND: You shouldn't. You already
21 identified it.

22 BY MR. MARQUAND:

23 Q TVA Exhibit 94 we'll come back to it, too.
24 TVA 94 looks like letters assigning people to services
25 out of TVA corporate nuclear, correct?

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1 A That's correct.

2 Q And that is beginning at Page 166 through
3 324. That would be 158 pages.

4 JUDGE YOUNG: You're saying that's in a
5 separate category.

6 MR. MARQUAND: Well, I think these are a
7 separate category, too. Yes.

8 BY MR. MARQUAND:

9 Q Corporate nuclear would include operation
10 support, which is where Mr. Fiser was, wouldn't it,
11 Mr. Fogleman?

12 A That's correct.

13 Q Page 216, Bates Number EH-216, of TVA
14 Exhibit 94 is a memo to who?

15 A Gary L. Fiser.

16 Q Dated what?

17 A August the 30th, 1996 at the time of his
18 TVA services.

19 Q Is there any difference that you can tell
20 with respect to the memorandum to Mr. Fiser than there
21 are to the other employees in operation support or TVA
22 nuclear corporate?

23 A It's a form letter. It's the same letter
24 that was issued to other employees.

25 JUDGE YOUNG: Did your objection go to --

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1 MR. MARQUAND: Cumulative.

2 JUDGE YOUNG: -- this exhibit?

3 MR. DAMBLY: No. This is, I guess, the
4 letters that go with 93. It has to do with the
5 organization at issue. We don't object to 93 or 94.

6 CHAIRMAN BECHHOEFER: Oh. You don't
7 object to 93 or '4.

8 MR. DAMBLY: Or '4. He hasn't discussed
9 93 yet, I guess, though.

10 JUDGE YOUNG: In that event, if there is
11 no objection, both parties agree we will allow in --

12 (Whereupon, the aforementioned
13 document, having previously
14 been marked for identification
15 as TVA Exhibit Number 94, was
16 received in evidence.)

17 MR. MARQUAND: I will offer it. But 93
18 and 94 --

19 JUDGE YOUNG: We're now on 94.

20 MR. MARQUAND: Right now I'm offering TVA
21 94.

22 BY MR. MARQUAND:

23 Q TVA 95 says it's a services retention
24 register.

25 MR. MARQUAND: If there is no objection,

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1 is TVA 94 admitted, Your Honor?

2 JUDGE COLE: Yes.

3 JUDGE YOUNG: Pardon? I didn't hear what
4 you were saying.

5 MR. MARQUAND: I was asking if you had
6 made a ruling on TVA 94 for the record.

7 CHAIRMAN BECHHOEFER: Ninety-four, without
8 objection, we're going to allow it, admit it.

9 JUDGE YOUNG: We just need to make sure
10 that we get them marked later.

11 BY MR. MARQUAND:

12 Q TVA Exhibit 95 states that "services
13 retention register." Does that appear to be the
14 engineering technical services retention registers out
15 of corporate TVA nuclear for all of --

16 A It looks to me like it is all the
17 corporate retention registers and resources,
18 engineering, and technical services for Bellefonte,
19 which was part of the corporate organization.

20 JUDGE YOUNG: Did your objection extend to
21 --

22 MR. MARQUAND: We haven't gotten there
23 yet, Your Honor.

24 MR. DAMBLY: If they have got something
25 for operation support, we haven't found it in 95 yet.

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1 So if it's in there, we wouldn't have an objection.
2 If it's not, then we would.

3 THE WITNESS: This is engineering and
4 technical services, the Bellefonte side, and a TVAN
5 reemployment initiative.

6 JUDGE YOUNG: I'm sorry?

7 THE WITNESS: TVAN reemployment
8 initiative. That was an HR organization. There is
9 not enough support in that exhibit.

10 BY MR. MARQUAND:

11 Q That particular exhibit is 84 pages of
12 nothing but retention registers, is it?

13 A That's correct.

14 MR. MARQUAND: We tender TVA Exhibit 95.

15 JUDGE YOUNG: Ninety-five did not --

16 MR. MARQUAND: Right.

17 JUDGE YOUNG: Okay. So we would make the
18 same ruling as on the previous exhibits except for 94.

19 MR. MARQUAND: We'll get back to 94 in a
20 minute.

21 JUDGE YOUNG: We already allowed it.

22 MR. MARQUAND: We'll get back to 93. Can
23 I have TVA Exhibit 96?

24 BY MR. MARQUAND:

25 Q TVA Exhibit 96 are assignment notices of

1 surplus and assignment to services for Sequoyah
2 nuclear plant, 159 pages.

3 A That's correct.

4 MR. MARQUAND: We tender TVA 96.

5 JUDGE YOUNG: Same ruling as on 83 through
6 92 and 95.

7 BY MR. MARQUAND:

8 Q Now, each of those appears to me --
9 correct me if I'm wrong. Each of those memoranda
10 appears to be one page long.

11 A That's correct.

12 Q So if we're talking 159 pages, separate
13 pages, of notices of assignment to services, we're
14 talking 159 --

15 JUDGE YOUNG: In that, you're referring
16 back to 96?

17 MR. MARQUAND: Yes.

18 BY MR. MARQUAND:

19 Q TVA Exhibit 109, those are notices of
20 assignment to services for Sequoyah employees. And it
21 is 58 pages of notices, isn't it?

22 A That's correct.

23 MR. MARQUAND: I tender TVA Exhibit 109.

24 JUDGE YOUNG: Same ruling.

25 BY MR. MARQUAND:

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1 Q TVA Exhibit 110 again is Sequoyah nuclear
2 plant. And those are retention registers? It's 350
3 pages of retention registers?

4 A That's correct.

5 MR. MARQUAND: I tender TVA Exhibit 110.

6 JUDGE YOUNG: Same ruling.

7 BY MR. MARQUAND:

8 Q Now, let's focus on TVA Exhibit 93. What
9 is TVA Exhibit 93?

10 A It's nuclear corporate retention
11 registers.

12 Q There were assignment-to-service notices
13 in 94, and there were retention registers also for
14 corporate nuclear in 96. Ninety-three has corporate
15 retention registers. Does that include retention
16 registers for ops support?

17 A Yes, it does.

18 Q Let me direct your attention specifically
19 to Page EH-33. What is that?

20 A That is a retention register, competitive
21 area, nuclear operations, competitive-level program
22 manager, schedule and grade PG-8, that lists under I.B
23 Gary L. Fiser, E. S. Chandra, and S. L. Harvey.

24 Q And the proposed effective date of that
25 would be what?

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1 A 9-30-97.

2 Q What does a proposed effective date mean,
3 retention register?

4 A That would be the proposed effective date
5 of the reduction in force.

6 Q First of all, do we know when this
7 retention register was prepared, what date it was
8 prepared as of?

9 A No. There's not an indication. It was
10 prepared prior to the services letters being issued.
11 And since all three individuals are on the retention
12 register, it was likely prepared before the selection
13 for the job, other chemistry jobs, were made.

14 Q Assuming the selections were made, I
15 believe, around the end of July, it was likely made
16 before the end of July of '96?

17 A This retention register was made prior to
18 the selections being made?

19 Q And why would it have a proposed effective
20 date of 9-30-97?

21 A That would have been the period of time
22 they would, the individuals would, have been eligible
23 to remain in TVA services.

24 Q Even if their jobs were ended in fiscal
25 year '96, September 30th, '96, they would have been

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1 entitled to those services for a full year?

2 A That's correct.

3 MR. MARQUAND: Your Honors, I tender TVA
4 Exhibit 93.

5 MR. DAMBLY: No objection.

6 CHAIRMAN BECHHOEFER: Without objection,
7 TVA 93 will be admitted.

8 (Whereupon, the aforementioned
9 document, having previously
10 been marked for identification
11 as TVA Exhibit Number 93, was
12 received in evidence.)

13 BY MR. MARQUAND:

14 Q So had all three of these individuals
15 remained in their positions, Mr. Fiser had the most
16 seniority and would have been the last one reached in
17 the reduction in force?

18 A That's correct.

19 Q And had the new position been deemed to be
20 in the same competitive level as the old positions,
21 Mr. Fiser would have had retention standing over Mr.
22 Chandra and Mr. Harvey with respect to the new job?

23 A Would you ask that --

24 Q If the new positions had been determined
25 to be the same competitive level as the old positions

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1 --

2 A Okay.

3 Q So assuming there weren't as many slots
4 available in the new position, two, as opposed to the
5 three existing --

6 A Mr. Fiser would have had seniority.

7 Q Okay. Mr. Fiser and Chandra would have
8 been the two individuals --

9 A They would have been retained, yes, sir.

10 Q So the question really comes down to
11 whether or not the new job should be in the same
12 competitive level as the old jobs and, therefore,
13 perceived by the retention standing or whether the new
14 job is in a different competitive level and,
15 therefore, perceived by selection process. Is that
16 correct?

17 A Yes, sir.

18 CHAIRMAN BECHHOEFER: Pardon me. Since
19 Mr. Chandra was obviously qualified or seemed to be
20 qualified for the BWR job and was actually I
21 understand selected for that job, would he not have
22 been withdrawn from the PWR job retention register?

23 JUDGE YOUNG: The question was whether if
24 they remained in the original jobs, I think. Wasn't
25 it?

1 MR. MARQUAND: Your Honor, the question is
2 if the new jobs are on the same competitive level, you
3 don't have a competition for the new jobs.

4 BY MR. MARQUAND:

5 Q Do you, Mr. Fogleman?

6 A No. That's right. You would just go by
7 the retention register.

8 Q So that Chandra doesn't compete for BWR.
9 Fiser and Harvey don't compete for BWR. They simply
10 go by retention standings if they're on the same
11 competitive level. Is that right?

12 A That's correct.

13 Q But if they're not on the same competitive
14 level, then everybody has to compete for the new jobs
15 or stay on the old competitive level and face a
16 possible surplus and reduction in force. Is that
17 right?

18 A That's correct.

19 CHAIRMAN BECHHOEFER: But would not the
20 BWR experience, as distinguished from PWR experience,
21 have separated the competitive levels?

22 JUDGE YOUNG: The question was if it were
23 determined that they were on the same competitive
24 level.

25 CHAIRMAN BECHHOEFER: Right.

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1 THE WITNESS: Would you care to ask that
2 question again?

3 CHAIRMAN BECHHOEFER: Well, was Mr.
4 Chandra considered a candidate for the PWR jobs? Did
5 he apply? Did he apply for both jobs?

6 MR. MARQUAND: Your Honor, all three --
7 Mr. Chandra and Mr. Harvey applied for both jobs. The
8 numbers which you have in the books show that Chandra
9 was arithmetically at the time thought to be the
10 highest ranked candidate for both jobs. Mr. Easley
11 made an arithmetic error, however.

12 Mr. Harvey, in actuality, was the highest
13 ranked candidate for the PWR job. At the time of the
14 selections, it was thought that Chandra was the
15 highest ranked candidate.

16 As you recall, Dr. McArthur had a
17 discussion with him. And Chandra expressed his
18 preference for the BWR job. And they thought that
19 would be the best way to go.

20 And so it was like incrementally one or
21 two points difference, even with the arithmetic error,
22 between Harvey and Chandra.

23 CHAIRMAN BECHHOEFER: Okay.

24 MR. MARQUAND: But when the IG looked at
25 it, they found the arithmetic error and said, "No.

1 Actually, Harvey was higher ranked slightly again,
2 within one or two points, than Mr. Chandra for the PWR
3 job."

4 CHAIRMAN BECHHOEFER: I see. Thank you.
5 Thank you. I hadn't recollected that.

6 BY MR. MARQUAND:

7 Q We've talked about and we've gone through
8 a whole lot of documents showing that a lot of
9 employees were subject to reductions in force and RIFs
10 and assignment to services in '96. With respect to
11 are you aware of any situations where new jobs were
12 created and those jobs were deemed to be -- first of
13 all, let's start over -- where new jobs are created
14 and they weren't on the same competitive level as
15 existing jobs, throughout TVA nuclear, what happened?

16 A When that occurs?

17 Q Yes.

18 A When we had jobs that were created that
19 were not on the same competitive level as the old
20 jobs, then jobs were posted.

21 Q All right. And if the old jobs weren't on
22 the same competitive level as the new jobs, it was
23 determined that those new jobs were no longer
24 necessary. What happened to the incumbents in the old
25 jobs if they didn't find a new job?

1 A They were assigned to services.

2 Q I want to show you TVA Exhibit 61. What
3 is TVA Exhibit 61?

4 A It is a report out of the vacancy posting
5 system of the number of jobs posted, it looks like,
6 throughout TVA during 1996. And that probably would
7 be calendar year 1996.

8 Q If you look at the bottom of the last
9 page, is there a count on the number of jobs that were
10 posted by VPA in 1996? I guess it's the next to last
11 page.

12 A The tally is 1,043 jobs.

13 Q So 1,043 jobs were posted as vacancies.
14 Some of those obviously were vacancies or may have
15 been vacancies created through attrition, others
16 through the reorganization. Is that correct?

17 A Some through attrition, some through
18 reorganization. Yes, it would probably be in those
19 two categories.

20 MR. MARQUAND: We tender TVA Exhibit 61,
21 Your Honor.

22 MR. DAMBLY: It's been previously tendered
23 and rejected.

24 MR. MARQUAND: But it was --

25 MR. DAMBLY: And I would object to it

1 again.

2 MR. MARQUAND: -- tendered for a different
3 purpose.

4 CHAIRMAN BECHHOEFER: Pardon?

5 MR. DAMBLY: And I would object to it
6 again. It doesn't show anything except there were a
7 lot of jobs posted, some of them part of a reorg., we
8 don't know what. Some weren't. And it's TVA-wide,
9 has nothing to do with what happened in operations
10 support.

11 JUDGE YOUNG: I thought earlier you had
12 stipulated that the same things happened TVA-wide.

13 MR. DAMBLY: This has to do with vacancy
14 announcements, doesn't have anything to do
15 specifically with the reorganization. This could be
16 just a job that somebody decided to post, could have
17 been somebody actually left and there was a vacancy
18 and they decided to post it. It's unrelated to a
19 reorg.

20 And, again, it has been tendered and
21 rejected.

22 MR. MARQUAND: It wasn't offered for this
23 purpose. The purpose I show now is to show that TVA
24 follows this process in posting vacant positions.

25 That's what happened in '96, that over

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1 1,000 jobs were posted. They were determined to be
2 vacant, either by attrition or by reorganization.
3 They were then posted pursuant to TVA's policies,
4 BP102, and the TVA corporate policies of posting jobs.

5 Again, counsel suggested TVA in the
6 processes -- this is simply what about a ten-page
7 document that's --

8 MR. DAMBLY: And I would --

9 CHAIRMAN BECHHOEFER: Does this document
10 reflect --

11 JUDGE YOUNG: When was this rejected? You
12 said it was rejected before?

13 MR. MARQUAND: It was offered with respect
14 --

15 MR. DAMBLY: June 18th.

16 MR. MARQUAND: -- to Mr. Kent's testimony
17 to simply show that there were no chemistry positions
18 advertised at Sequoyah in 1996, when the assertion was
19 made that Harvey should have been transferred there.

20 We're not offering it for that purpose.
21 We're offering it to show that vacant jobs were
22 posted, that they were posted in '96 throughout TVA.
23 Obviously there were over 1,000 of them posted. It is
24 not mere coincidence that the norm, not the exception.

25 CHAIRMAN BECHHOEFER: Well, does this

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1 table or list of jobs reflect what made the jobs
2 available for posting?

3 MR. MARQUAND: Yes. It shows the opening
4 date that it was posted. It shows the closing date it
5 was --

6 CHAIRMAN BECHHOEFER: Not the dates. The
7 reason they're being posted, either through
8 retirement, attrition, or reorganization. Without
9 that, how can this be meaningful?

10 MR. MARQUAND: The only way we could do
11 that would be to go back and pull all of the history
12 on all of these things. And then, as the panel has
13 already indicated, it's lack of patience for these
14 sorts of cumulative and voluminous documents.

15 CHAIRMAN BECHHOEFER: Yes, but I'm trying
16 to figure out what relevance unless we know that some
17 of these jobs were reorganization jobs, reorganization
18 and TVA nuclear, actually. How do we know? Why are
19 they relevant? I mean, if this is done throughout
20 other parts of TVA, so what?

21 I mean, how do we even know that this
22 procedure was used in TVA nuclear? Are those jobs on
23 the list; through the reorganization, that is? I'm
24 not talking about retirements or -- unless we know
25 that the vacancies in TVA nuclear --

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1 MR. MARQUAND: Let me ask the witness that
2 question.

3 CHAIRMAN BECHHOEFER: Well, the witness'
4 testimony is sides apart from this list, but that is
5 fine.

6 MR. DAMBLY: I guess I would further
7 object to his statement that this shows they followed
8 their practices. It doesn't show they follow
9 anything. It shows they posted some jobs.

10 We don't know that they were in accordance
11 with their practice, with their regulations, or
12 whether there were a lot of others that should have
13 been posted that they didn't post or they posted some
14 that they shouldn't have.

15 I mean, it doesn't show you anything, just
16 that 1,043 times there were VPAs that went up
17 somewhere in TVA. I fail to see the relevance.

18 CHAIRMAN BECHHOEFER: Well, maybe we
19 should go and see first how many aircraft pilots
20 operational services needs, just taking the top of the
21 list.

22 MR. DAMBLY: There you go. Those are the
23 ones for the planes they told us they didn't have last
24 time.

25 CHAIRMAN BECHHOEFER: Okay.

1 JUDGE YOUNG: I'm trying to locate the
2 place where this was originally discussed.

3 MR. DAMBLY: It starts on I think 4030,
4 somewhere around there. It probably starts a lot
5 earlier. Probably there was another one of those
6 somewhat-less-than-quick discussion, 4,025. Start on
7 4,025, 6-18.

8 JUDGE YOUNG: That is one I seem to be
9 missing for some reason.

10 MR. MARQUAND: Your Honors, if it will
11 expedite the matter, I will withdraw the document.

12 JUDGE YOUNG: All right. Go ahead.

13 BY MR. MARQUAND:

14 Q Mr. Fogleman, are you aware of any new
15 positions created in the reorganization which were not
16 advertised? And when I say "new positions," that is
17 vacant positions created in the reorganization which
18 were not advertised.

19 A I'm not aware of any.

20 Q And can you tell us do you have any idea
21 approximately in 1996 about how many employees
22 received surplus notices in TVA nuclear?

23 A TVA nuclear? I'm going to estimate better
24 than 500 employees.

25 Q Turning to the Summer of 1996, are you now

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1 aware of a memorandum that Ron Grover wrote about Sam
2 Harvey concerning alleged harassment and intimidation?

3 A Yes, I am aware of that memo.

4 Q I will refer you to Staff Exhibit 67.
5 When did you become aware of that memorandum?

6 A In preparation for this case.

7 Q Do you have an opinion of whether it was
8 appropriate for Mr. Grover to send the memorandum to
9 --

10 MR. DAMBLY: I'm going to object to this.
11 He didn't know a thing about it. He had nothing to do
12 with it. And I don't know what his opinion has to do
13 with this case.

14 MR. MARQUAND: He's only the manager of
15 human resources for the chief operating officer's
16 organization in TVA nuclear.

17 MR. DAMBLY: He wasn't involved at the
18 time and had nothing to do with it. Boyles was. He
19 was here. You could have asked him about it. In
20 fact, you probably did. I don't recall.

21 But what he might think today being shown
22 this document in his position today is just
23 self-serving nonsense at this point.

24 JUDGE YOUNG: Why don't you establish
25 whatever foundation you have for Mr. Fogleman's

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1 testimony.

2 MR. MARQUAND: Okay.

3 BY MR. MARQUAND:

4 Q What do you know about this memorandum
5 today, Mr. Fogleman?

6 A Well, I understand that Ron Grover issued
7 this memorandum. It was sent to Ed, James E. Boyles,
8 Ed Boyles, in June of '96. And it came as a result of
9 a meeting that he and Mr. McArthur, Mr. Easley had
10 regarding an allegation of harassment and
11 intimidation.

12 JUDGE YOUNG: Excuse us.

13 (Whereupon, the foregoing matter went off
14 the record briefly.)

15 THE WITNESS: Ready? And that it was an
16 allegation that was copied to Mr. Easley, Mr. Harvey,
17 Ms. Landers, and Mr. McArthur and talks about the
18 incident and that Mr. Grover discussed the allegations
19 made by Mr. Landers with -- Ms. Landers with Mr.
20 Harvey.

21 BY MR. MARQUAND:

22 Q And did you have an understanding of
23 whether or not at that time there had been an
24 investigation of those allegations?

25 A It is my understanding the only

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1 investigation that had occurred was this meeting.

2 Q All right. Do you have any understanding
3 as to whether or not those allegations had been
4 determined to be true or not?

5 A I have no -- I don't know if those
6 allegations had been determined to be true or not.

7 Q What is the TVA nuclear? Was this an
8 employee what is called a warning letter?

9 A All the memorandum says is it serves to
10 document a meeting. And, at best, it might be
11 considered a counseling-type documentation of a
12 counseling session that would not in my opinion be
13 considered a warning letter.

14 Q In a situation where a manager documents
15 a counseling session but doesn't issue a warning
16 letter, is it appropriate to send such a memorandum to
17 an individual's personnel file?

18 A The personnel file typically has formal
19 disciplinary action in it. It would have warning
20 letters, suspension, discharges, RIF notices, things
21 like that. But, of course, we're only talking
22 disciplinary action. So it would be formal warnings
23 or informal warnings would not be contained in the
24 PHRs.

25 Q Would it be appropriate to send a

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1 memorandum documenting such a counseling session to an
2 allegor, complaining employee?

3 A That is Ms. Landers. It would not have
4 been appropriate to have sent the memorandum to Ms.
5 Landers.

6 Q Why?

7 A Well, first of all, we're talking about
8 Mr. Harvey and any actions that management may be
9 dealing with between he and management. And it would
10 not -- it would violate the privacy, Mr. Harvey's
11 rights, his ability to have his records, the privacy
12 of his records, maintained to send this information to
13 Ms. Landers.

14 Q Should the memorandum or its contents have
15 been revealed to Mr. Fiser?

16 A No other employee other than the
17 supervisory chain and HR should have been aware of
18 this memo.

19 Q Would it have been appropriate for the
20 selection review board to take this memorandum into
21 consideration in its deliberations in July of '96?

22 A Mr. McArthur -- well, the screener review
23 board or -- excuse me -- the selection review board
24 was there for to make a decision about the interview
25 process.

1 Mr. -- if this was going to be taken into
2 consideration, this should be taken into consideration
3 by Mr. McArthur as he was going through the process to
4 determine who -- the right candidates to review.

5 JUDGE YOUNG: Are you basing your
6 statements on general knowledge of how TVA operates or
7 on particular policies or what?

8 THE WITNESS: Well, I think I testified
9 earlier about the selection process. And the
10 selection review board is established for the
11 interview process. And the supervising manager should
12 be looking at the personnel records, the past
13 performance reviews prior to convening the selection
14 board.

15 JUDGE YOUNG: I recall your earlier
16 testimony. What about your testimony that it was
17 inappropriate to send copies to people or put things
18 in files. Are there policies? Are there policies on
19 that or are you just testifying from your knowledge of
20 the general practices at TVA?

21 THE WITNESS: My general knowledge.

22 CHAIRMAN BECHHOEFER: Could someone show
23 Mr. Fogleman TVA Exhibit 152?

24 MR. MARQUAND: Okay.

25 CHAIRMAN BECHHOEFER: Does the

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1 transformation of the draft memo into a formal memo
2 the way I understand it, which was written, change the
3 characterization of whether this was a warning or what
4 it was and what distribution it should receive? There
5 are some changes between the two documents.

6 In particular, Mr. Boyles was sent a copy,
7 which would seem to be fairly top-level.

8 THE WITNESS: I'm sorry. Would you ask
9 your question again?

10 CHAIRMAN BECHHOEFER: Well, your various
11 comments on who should or shouldn't be given access to
12 reports of allegations or incidents of this sort. The
13 chain of distribution, at least, was somewhat
14 broadened.

15 Mr. Boyles was given a copy according to
16 TVA 152. Was that appropriate?

17 THE WITNESS: It would have been
18 appropriate for Mr. Boyles, Mr. Easley, Mr. McArthur,
19 and Mr. McGrath to have gotten a copy of this.

20 CHAIRMAN BECHHOEFER: I see. Your same
21 comments apply to Ms. Landers?

22 THE WITNESS: Yes, sir.

23 BY MR. MARQUAND:

24 Q Was TVA Exhibit 152, the July 1 memo, a
25 formal disciplinary memorandum?

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1 A In my opinion, it is not because, first of
2 all, it just -- usually when we're issuing a formal
3 discipline memorandum, this is -- this memorandum
4 would serve as a warning' is the way that those are
5 typically expressed. And all this memorandum is
6 doing, it says to serve to document a meeting between
7 you.

8 I would consider this a counseling session
9 or a documented counseling session.

10 CHAIRMAN BECHHOEFER: What about the
11 agreements at the bottom, agreements recorder? Does
12 that constitute anything binding?

13 THE WITNESS: What I would see is binding
14 in this situation, that Mr. Grover has told Mr.
15 Harvey, this meeting is to -- we've got an allegation.
16 And he acknowledged but was unaware of the impact of
17 his behavior toward Ms. Landers and said, "You need to
18 obviously exemplify better conduct in the workplace."
19 And apparently in the meeting, he agreed that he would
20 do a better job of that and take some sensitivity
21 training.

22 So it looks to me like that this is -- I
23 would describe this as a counseling session, Mr.
24 Harvey agreed he needed to do better and that if --
25 and that what this would serve as, if there was

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1 additional incidents, this would be shown as
2 progressive discipline for the next step. And the
3 next step could be either a warning letter or possibly
4 some sort of suspension.

5 CHAIRMAN BECHHOEFER: What I'm trying to
6 determine is if this document, which I guess TVA 152
7 is the finally issued form of it, constitutes
8 something comparable to what NRC calls a confirmatory
9 action letter, where licensee agrees to do something
10 and then if they don't do it, action can be taken
11 vis-a-vis their licenses.

12 THE WITNESS: Well, in this situation, I
13 would say that if Mr. Harvey did not follow through
14 with his end of the bargain that was struck during
15 this meeting, that further disciplinary action would
16 be appropriate.

17 CHAIRMAN BECHHOEFER: I see. Thank you.

18 JUDGE YOUNG: With all that said, I think
19 your objection would go to weight for my part.

20 CHAIRMAN BECHHOEFER: Well, this document
21 is already in.

22 JUDGE YOUNG: His objection was to the
23 testimony, which is pretty much already --

24 CHAIRMAN BECHHOEFER: Oh, I'm sorry,
25 because the document is already in the record.

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1 JUDGE YOUNG: And I had asked a foundation
2 question.

3 CHAIRMAN BECHHOEFER: Okay. I'm sorry.

4 JUDGE YOUNG: And so, as I was saying, I
5 think your objection, at least from my point of view,
6 would go to weight but not to the admissibility of the
7 testimony that has, nonetheless, already come in.

8 BY MR. MARQUAND:

9 Q Changing the subject, Mr. Fogleman, there
10 has been testimony in this proceeding that prior to
11 the selection review board actually conducting its
12 interviews and, in fact, before all of the members had
13 even arrived, that Charles Kent made a comment to
14 Wilson McArthur about Mr. Fiser having filed a
15 Department of Labor complaint. Did you become aware
16 of that comment sometime later?

17 A Yes, I did.

18 Q What is your assessment of the
19 appropriateness of the comment?

20 MR. DAMBLY: I'm going to object. I don't
21 see any relevance whatsoever at the end of this
22 hearing to bringing Mr. Fogleman in to give his
23 opinion on stuff that has been testified to by the
24 people who were here; for that matter, by Mr.
25 Reynolds, who is the HR VP, just to have him go

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1 through, "Well, gee, I think this is okay" or "That's
2 not okay" or whatever. He had nothing to do with it.
3 We're wasting time.

4 JUDGE YOUNG: I have taken Mr. Fogleman as
5 essentially being offered as an expert on human
6 resources issues. And given his testimony, I think
7 that is the -- well, let me ask you. Is that the
8 purpose? Are you offering him to give his opinion?

9 MR. MARQUAND: Yes, Your Honor.

10 JUDGE YOUNG: Objection overruled.

11 CHAIRMAN BECHHOEFER: From all of us.

12 BY MR. MARQUAND:

13 Q What is your assessment of the
14 appropriateness of Mr. Kent's comment? And, if I
15 could so that we have a common understanding, my
16 understanding was that the comment was something to
17 the effect to Wilson McArthur that, "You know, Gary's
18 filed a Department of Labor complaint. It might be
19 better if you did not participate in the board
20 proceedings."

21 A When I first heard it, I guess I viewed it
22 as that we had had some success in raising the level
23 of sensitivity of our supervisors on these type of
24 issues and that Kent's comment was advice to Mr.
25 McArthur that, you know, this has some potential to be

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1 a sensitive issue and you need to handle the matter
2 appropriately.

3 Q I'm sorry. I am going to have to
4 apologize. I was distracted. I didn't hear the last
5 part of your testimony there.

6 A Okay.

7 Q You said that you had had some success in
8 raising the sensitivity and? I didn't hear the last
9 part.

10 A Okay. And that Mr. Kent recognized the
11 sensitivity of the issue and was providing advice to
12 Mr. McArthur that, you know, he needed to -- as we
13 walked through the process, he needed to ensure that
14 he handled things appropriately.

15 Q In 1996, you became aware through Kathy
16 Welch that Gary Fiser threatened to file a Department
17 of Labor complaint before the selections were even
18 made. My question about that is, what was the
19 consequence of his threatening to file a complaint
20 and, in fact, filing a complaint before the selection
21 process had even taken place?

22 A I'm not -- when you say "what is the
23 consequence"?

24 Q Did anything happen? Did anybody turn the
25 evil eye towards Gary or what did happen?

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1 MR. DAMBLY: Well, I would object to any
2 basis for him knowing what anybody did to Gary. He
3 was not involved in the selection or the process.

4 MR. MARQUAND: He was involved. He
5 testified that he was informed by Kathy Welch, that
6 the two of them collaborated with OGC and took a look
7 at it.

8 I'm asking him what he knows about it and
9 what the consequence of --

10 MR. DAMBLY: Again, my objection goes to
11 his only involvement has been that he and Ms. Welch
12 looked at a prior DOL settlement and determined he had
13 no rights to the job.

14 He had no involvement whatsoever in the
15 ops support reduction, the determinations on what
16 should be posted, what shouldn't. For that matter,
17 the posting, the SRB, and any of it, was handled by a
18 whole different chain of people. He wasn't involved.

19 JUDGE YOUNG: What's the basis of your
20 knowledge about this, to the extent that you have
21 knowledge?

22 THE WITNESS: My knowledge of it is that
23 the complaint was filed prior to the selection. And,
24 you know, I think the question was something about the
25 consequences. And he filed a complaint before the

1 action -- there was any action taken or anything
2 occurred.

3 JUDGE YOUNG: Do you know anything about
4 whether there were any consequences?

5 THE WITNESS: The only consequences I'm
6 aware if consequences is the way to describe it would
7 be that he filed his complaint before the actual
8 selection occurred. That would be the extent of my
9 knowledge.

10 BY MR. MARQUAND:

11 Q Do you know whether or not anyone became
12 more sensitive to the handling of the selection as a
13 result?

14 A I don't know that they became more
15 sensitive to the selection process, but obviously if
16 they had a complaint that already existed, you know,
17 our management team and our human resource team that
18 would have been aware of it would have, you know,
19 obviously made sure that the process and procedures
20 were followed properly.

21 Q I have one last question. In 1994, there
22 was a selection process for chemistry and
23 environmental program manager jobs.

24 A Okay.

25 Q The issue has come up about why if Mr.

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1 Fiser had to go through the process in '94 and had
2 received a surplus letter or knew that he was at risk
3 of losing his job if he wasn't selected for that, the
4 question was why didn't he file a Department of Labor
5 complaint then. Why did he wait until '96?

6 Counsel has asserted that, well, he wasn't
7 in any danger of losing his employment in 1994 because
8 everybody knew that there were going to be enough jobs
9 to go around.

10 My question, first of all, have you had an
11 opportunity to examine human resource records of the
12 applicants on the position which Mr. Fiser was a
13 candidate for in 1994? Have you done so at my
14 request?

15 A Yes, I have.

16 (Whereupon, the aforementioned
17 document was marked for
18 identification as TVA Exhibit
19 Number 149.)

20 BY MR. MARQUAND:

21 Q I am going to hand you a document which we
22 have had marked as TVA Exhibit 149. Mr. Fogleman, I'm
23 handing -- I guess I haven't handed it.

24 A You haven't handed me anything.

25 Q I've handed you a document marked TVA

1 Exhibit 149. For everybody's benefit, the particular
2 job Mr. Fiser applied for in '94 was Vacancy Position
3 Announcement 66-21.

4 Are the first several pages of this
5 document a listing of the qualifications of the
6 various applications for that VPA?

7 A The first couple of pages is the
8 educational background of the applicants. There are
9 several applicants listed. The third page over would
10 be the license and certificate information about the
11 applicants. The final few pages would be their work
12 history of the computer-generated type pages.

13 Q I believe the testimony was that in 1994,
14 they were seeking to select four individuals for this
15 particular job. Were there more than four applicants?

16 A Yes.

17 Q Now, if you'll look on beyond the computer
18 printouts, you'll see some other pages. Are those
19 at-risk and surplus letters as well as documentation
20 of individuals who were sent to services or who were
21 eventually reduced in force, roughly this same time
22 frame?

23 JUDGE YOUNG: Excuse me. My copy, Page
24 1492 and the next documents you're looking at didn't
25 come out on about a third of the page.

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1 MR. MARQUAND: On which page?

2 JUDGE YOUNG: 1492.

3 MR. MARQUAND: There is one document that
4 the original is bad. And I will represent to you that
5 is Dr. Charles Hodge.

6 JUDGE YOUNG: Is that 1492?

7 MR. MARQUAND: Yes.

8 JUDGE YOUNG: So they're all bad, in other
9 words?

10 MR. MARQUAND: Well, 1492 is the only one
11 that I am aware of that is bad. The others are not
12 bad.

13 JUDGE YOUNG: I mean, all of the copies of
14 it.

15 MR. MARQUAND: 1492, yes. I apologize,
16 but that's apparently the way the original was.

17 CHAIRMAN BECHHOEFER: And who does it
18 relate to?

19 MR. MARQUAND: Dr. Charles Hodge. He's a
20 chemical engineer.

21 BY MR. MARQUAND:

22 Q My only question I guess I have with
23 respect to this, Mr. Fogleman, is do the HR records
24 reflect that on Pages 1490 through 1503 a number of
25 employees were at risk of losing their jobs or were

1 surplused or, in fact, were RIFed who applied on this
2 particular vacant position announcement?

3 A Yeah. The letters from I guess 1490
4 through 1503 are mostly letters that reflect potential
5 at-risk status assignment to services warning there is
6 an at-risk status and transfer to services.

7 Q So would it be fair to say that in 1994,
8 when Mr. Fiser applied for this job, that all of the
9 applicants knew that they were not in danger of losing
10 their TVA employment because there was enough jobs to
11 go around? Is that what you're saying?

12 A Well, it would be fair to say that I'm not
13 sure what he knew, but it would be fair to say that
14 there was more people competing for this job than just
15 Mr. Fiser and the other people in the chemistry
16 organization that thought they might have had a chance
17 at that job and that there was a lot of other people
18 who were also interested in this position.

19 Q A lot of other people with chemistry
20 backgrounds, too, weren't there?

21 A Several of them have chemistry, chemical
22 engineering. It looks like chemical engineering
23 backgrounds.

24 Q For instance, the individual Judge Young
25 mentioned to us had a Ph.D. in chemical engineering.

1 Joseph Pleva had a B.S. in chemical engineering.
2 Nayan Vora had an M.S. in civil engineering. Walter
3 Skiba had a B.S. in chemical engineering. A number of
4 them had chemistry backgrounds.

5 A That's correct.

6 MR. MARQUAND: Your Honors, I tender TVA
7 Exhibit 149.

8 MR. DAMBLY: Could I have voir dire?

9 CHAIRMAN BECHHOEFER: Yes.

10 VOIR DIRE

11 BY MR. DAMBLY:

12 Q Mr. Fogleman, did you prepare this
13 document?

14 A No, I did not.

15 Q Do you know who prepared it?

16 A No, I don't.

17 Q Do you know for a fact where it came from?

18 A It's -- I don't know for a fact, but it
19 looks -- it's the same type of package that we prepare
20 for all of our selections.

21 Q Have you verified that this is accurate in
22 any way?

23 A No, I have not.

24 Q Do you know if everything that would be in
25 this file is included in this document?

1 A No, I don't know that.

2 Q So you don't know who decided which pages
3 they wanted to show us today? You've never seen it
4 before. Is that correct?

5 A I've seen this before.

6 Q When?

7 A Yesterday.

8 Q In preparation for this hearing?

9 A In preparation for this hearing.

10 Q Did you do anything to verify its
11 accuracy?

12 A No, I didn't.

13 MR. DAMBLY: I guess I would object to no
14 foundation for what this is.

15 MR. MARQUAND: He's testified that these
16 appear to be documents to the HRIS system. And I will
17 represent to the board that this was prepared by
18 Debbie Layne. And I believe Mr. Fogleman can identify
19 who Debbie Layne is.

20 MR. DAMBLY: It's certainly not going to
21 help me any that Mr. Marquand is willing to tell us
22 that he thinks it is good. I mean, that was my
23 objection to start with.

24 JUDGE YOUNG: The rules of evidence don't
25 apply, as you have said before, Mr. Dambly. So I

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1 guess I would ask you. Do you have any real reason to
2 question the accuracy of this or of Mr. Marquand's
3 representation as an officer of the court?

4 MR. DAMBLY: This was prepared for
5 litigation. And it is supposedly to demonstrate a
6 fact that it may not even demonstrate. There were a
7 lot of jobs. And I believe the testimony is it was
8 not a reduction in force back in '94. Mr. Fiser's
9 testimony was he also wasn't competing with Dr.
10 McArthur making a selection. It was Mr. Grover.
11 There were a lot of things.

12 This doesn't show. This just shows more
13 people applied for chemistry positions, but some of
14 those people were also applying for all of the other.
15 They might have thrown their hats in for everything.

16 But there was no reduction in force. This
17 goes to show that there was some lack of jobs.

18 JUDGE YOUNG: When was this provided to
19 you?

20 MR. DAMBLY: Two days ago.

21 MR. MARQUAND: That's not entirely true.

22 MR. DAMBLY: Wednesday?

23 MR. MARQUAND: The first part of it had
24 been provided months and months and months ago.

25 JUDGE YOUNG: The first?

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1 MR. MARQUAND: The first part of it,
2 HH-151 through 157, was provided in discovery as part
3 of the selection package. The last part of it is
4 simply looking in the individual's records to
5 determine whether or not they were at risk or had
6 received surplus notices.

7 JUDGE YOUNG: Mr. Dambly, on the first
8 page of this document, it says, "Position VPA 66-21."
9 Do you have any reason to doubt that all of these
10 people were applying for the same vacant position,
11 which had the number 66-21?

12 MR. DAMBLY: I don't know who applied and
13 who didn't.

14 JUDGE YOUNG: But do you dispute what mr.
15 Marquand just said about your having had that
16 information for several months, the first few pages?

17 MR. DAMBLY: It may well be that we had
18 it. I don't know. I see it's got a Bates stamp.
19 There were boxcars full of stuff that came in, not a
20 lot of which we thought necessarily had anything to do
21 with this. But this may well be one of them.

22 It doesn't establish anything as far as
23 I'm concerned. I mean, it still in terms of --

24 JUDGE YOUNG: If you had it and you had
25 doubts about its accuracy, have you done anything to

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1 determine whether those doubts were well-founded?

2 MR. DAMBLY: I have doubts as to its
3 relevance.

4 JUDGE YOUNG: I believe it's being offered
5 to rebut some suggestion that you made in your case
6 that at this point, there were no other people
7 competing for the job and that there were no jobs --

8 MR. DAMBLY: Mr. Fiser testified that he
9 didn't have a problem. He didn't file in '94 because:
10 one, there wasn't the reduction in force; and, two, it
11 wasn't the same people he thought had done him in
12 earlier making the selection and he felt confident in
13 his abilities. He reasonably thought he was the right
14 person.

15 We never made this an issue. This was an
16 issue that TVA raised that somehow Mr. Fiser should
17 have filed a complaint in 1994, instead of 1996, when
18 they did away with the job that was promised to him.

19 CHAIRMAN BECHHOEFER: Actually, Mr.
20 Marquand, could this be considered part of the
21 business records of TVA?

22 MR. MARQUAND: Yes. Well, of course, it's
23 all a business record. It's all from human resources.
24 TVA Exhibit 24 is the VPA package that was produced to
25 counsel.

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1 It's in the record. And the first part of
2 this document that shows a list of applicants is part
3 of that entire -- it's not part of this document, but
4 maybe it may be. I don't know.

5 It was part of that entire package that
6 was produced to counsel. It's got the same Bates IDs
7 on it with the HH numbers that was produced to counsel
8 in discovery.

9 JUDGE YOUNG: I would overrule the
10 objection. I don't think that there is any reason to
11 be hypertechnical about the rules of evidence with
12 regard to this exhibit, as opposed to all the other
13 exhibits. Objection overruled.

14 MR. DAMBLY: That's fine because
15 apparently the whole thing is in in 24 anyway or part
16 of it. It's cumulative, but that's okay.

17 CHAIRMAN BECHHOEFER: Well, are these
18 pages in?

19 MR. MARQUAND: No.

20 MR. DAMBLY: Some of them are. Some of
21 them aren't.

22 MR. MARQUAND: These are additional pages
23 from that selection package.

24 CHAIRMAN BECHHOEFER: So it wouldn't be
25 cumulative.

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1 MR. MARQUAND: No, it's not cumulative.

2 CHAIRMAN BECHHOEFER: I agree. The Board
3 rules that the document is admitted.

4 (Whereupon, the aforementioned
5 document, having previously
6 been marked for identification
7 as TVA Exhibit Number 149, was
8 received in evidence.)

9 MR. MARQUAND: Thank you, Mr. Fogleman.
10 I tender the witness, Your Honors.

11 JUDGE YOUNG: How much time would you
12 like?

13 MR. DAMBLY: Oh, ten minutes is fine.

14 JUDGE YOUNG: All right. Ten minutes.

15 CHAIRMAN BECHHOEFER: 4:00 o'clock.

16 MR. DAMBLY: 4:00 o'clock. Okay. My
17 guess is we will be returning tomorrow.

18 (Whereupon, the foregoing matter went off
19 the record at 3:52 p.m. and went back on
20 the record at 4:07 p.m.)

21 CHAIRMAN BECHHOEFER: Back on the record.

22 Mr. Dambly?

23 CROSS EXAMINATION

24 BY MR. DAMBLY:

25 Q Mr. Fogleman, I guess it was represented

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1 you're an expert on TVA's reduction-in-force
2 regulation; is that correct?

3 A That's correct.

4 Q And the TVA regulations implement the
5 congressionally mandated OPM regulations on reductions
6 in force?

7 A That's my understanding, yes.

8 Q Your understanding. And the OPM
9 regulations control what's appropriate in reduction-
10 in-force?

11 A In TVA, when we're doing a reduction-in-
12 force, I'm going to use our TVA policies and
13 practices. That's an implementation of the OPM
14 regulations.

15 Q That's what you've been told.

16 A That's what I do.

17 Q No. You've been told that the regulations
18 are an implement of the OPM regs -- implementation of
19 the OPM --

20 A Yes, sir.

21 Q You have never read the OPM regulations.

22 A Not cover to cover; no, sir, I have not.

23 Q And you didn't -- I mean back in December
24 when I asked you, you didn't even know what was in the
25 OPM regulations.

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1 A That's correct.

2 Q Now, in a reduction-in-force, there's been
3 some statements here where either you file the RIF
4 regs or employees compete for the positions if you
5 post them; is that correct?

6 JUDGE YOUNG: What was the word you said
7 before, "is that correct?"

8 MR. DAMBLY: Post them?

9 THE WITNESS: I didn't understand the
10 question.

11 JUDGE YOUNG: I missed a couple of words.

12 BY MR. DAMBLY:

13 Q I think there was a question and some
14 testimony earlier that said if we're dealing with a
15 downsizing, okay, where they're going to be less
16 employees afterwards than there were before --

17 A Yes, sir.

18 Q -- you either follow the RIF regs, if you
19 will, go through retention registers and all if the
20 competitive level stays the same, or if you create new
21 positions, you compete for the jobs. You post them
22 and employees compete; is that correct?

23 A If we're just doing a straight reduction,
24 we would just go by the retention registers. If we're
25 reorganizing and there is new jobs and people, we

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1 would post those jobs. And if there was anybody left
2 on the old retention register, we'd conduct our RIF or
3 our transfer to services; yes, sir.

4 Q Okay. My question is in a reduction-in-
5 force situation, employees compete for positions,
6 don't they?

7 A I'm not sure I understand your question.

8 Q Well, what are the areas in which you look
9 to set the widest boundaries in a reduction-in-force?

10 A We'll look at --

11 JUDGE YOUNG: The widest? Did you say the
12 widest boundaries?

13 MR. DAMBLY: Right.

14 THE WITNESS: Our widest boundaries would
15 be the competitive area.

16 BY MR. DAMBLY:

17 Q That's the competitive area, right?

18 A Competitive area.

19 Q And what are the levels called?

20 A Competitive levels.

21 Q And under those levels, there are certain
22 criteria set by Congress and OPM by which employees
23 compete on a retention register.

24 MR. MARQUAND: Is that a question?

25 BY MR. DAMBLY:

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1 Q Is that correct?

2 A I don't know that to be certain. That's
3 the way our competitive level is established.

4 Q There are criteria by which employees
5 compete for who comes out top on the retention
6 register.

7 A That's correct.

8 Q So that is a competition.

9 JUDGE YOUNG: So that is a -- could you --
10 the word before "competition." I'm missing some of
11 your words because maybe you're either not close
12 enough to the microphone or you're slurring them
13 together.

14 MR. DAMBLY: Okay. Now I forgot what my
15 question was.

16 JUDGE YOUNG: Can you play that back?

17 (Question played back.)

18 JUDGE YOUNG: I want to make sure I hear
19 every word.

20 CHAIRMAN BECHHOEFER: Every grunt.

21 MR. DAMBLY: I hope you want to withdraw
22 that. Now, the difference between a competition, if
23 you will, under the reduction-in-force regulations and
24 a competition with a posting is that TVA has no
25 control over the outcome of a competition under the

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1 RIF regulations. People have a certain amount of
2 seniority, they're veterans or they're not veterans,
3 whatever the rest of the factors are that go in there
4 you can't change those.

5 THE WITNESS: That's correct. You can't
6 change veteran status.

7 BY MR. DAMBLY:

8 Q You can't change years of seniority.

9 A Federal service dates, none of that;
10 that's correct.

11 Q None of that stuff. So it's a pre-
12 determined outcome under the rules established that
13 competition takes place.

14 A Yes. The retention register establishes
15 who would be affected by a reduction-in-force.

16 Q And if you do a job posting instead and
17 decide it's a new job, then you can decide what
18 criteria are going to be applied and who the Selection
19 Review Board is and who you want to choose. You
20 basically get to make ultimately the selection between
21 the employees. TVA does that. They're in control of
22 that process.

23 A TVA is able to -- in that particular
24 situation, TVA establishes its selection criteria and
25 follows the selection process at that point, that's

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1 correct.

2 Q And if you go through that as we saw in
3 the retention register from Mr. Fiser, if we follow
4 the reduction-in-force procedures, the most senior two
5 people would go -- or would stay, I'm sorry, and Mr.
6 Harvey would have gone out. And if TVA conducts a
7 competition by posting a new position, the most senior
8 person is the one that went out the door and not the
9 most junior person; is that right?

10 A If the jobs had not changed, then Mr.
11 Harvey would have been reduced in force.

12 Q Right.

13 A And when the job's changed, then the
14 selection process resulted in Mr. Fiser not being
15 selected and being reduced in force -- or being sent
16 to Services.

17 Q Now, in determining competitive levels and
18 making interchangeability determinations, when the
19 employees -- and assuming we're talking PG levels
20 here, because I would assume with wage people and
21 hourly and whatever, it may not be the same kind of
22 system, but if you're in your PG system, to be on the
23 same competitive level, both jobs have to be the same
24 PG-7s or PG-8s, whatever the level is. It's got to be
25 a PG-8 to a PG-8 for there to be interchangeability.

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1 MS. CAMPBELL: Is that a question?

2 BY MR. DAMBLY:

3 Q I'll start saying, "right" after
4 everything. Right?

5 A Generally speaking, yes, that would be
6 true.

7 Q Well, can you tell me a situation you can
8 have a promotion or a demotion and be on the same
9 competitive level?

10 A Well, I don't know about specifically a
11 promotion or a demotion, but what I said was typically
12 the same grade level job would be on the same
13 competitive level.

14 Q Well, can you give me an example where it
15 wouldn't be, where a PG-9 would be on the same
16 competitive level as a PG-8?

17 A Off the top of my head I can't.

18 Q And it's also true that in order for jobs
19 to be interchangeable the minimum qualifications have
20 to be the same.

21 A The same or similar, yes.

22 Q Well, jobs can't be interchangeable if a
23 person would meet the requirements for one position
24 but doesn't meet the requirements for the other
25 position if a given set of background, experience,

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1 whatever you want to call it.

2 A I don't think I agree with that. I think
3 you could have interchangeability. For example, if
4 one job required a BS and another job required --

5 Q A Masters?

6 A Well, that wouldn't be a good example. If
7 one job required a -- they should have similar
8 qualifications.

9 Q Well, isn't it true that for the jobs to
10 be interchangeable you've got to be -- whoever, any
11 set of qualifications would have to be able to meet
12 the minimum qualifications for it.

13 A Should meet the minimum qualifications,
14 yes.

15 Q If you had one job at, let's say, a PG-8
16 level that said that you had to have either an MBA
17 with eight years of experience in accounting or a law
18 degree with eight years experience in corporate law
19 and you had a second position at the Grade 8 level
20 that said you had to have a law degree and eight years
21 of experience in a corporate law department, would
22 those be interchangeable?

23 A Just looking at minimum qualifications
24 they may not be, but I'd like to see the duties of the
25 job to make that determination.

1 Q Well, how could somebody who was an MBA
2 qualify for the second job if he didn't have the law
3 degree? Can you be placed in a job that you don't
4 meet the minimum qualifications for?

5 A Not unless there's an equivalency that
6 would be performed, no.

7 Q What equivalency?

8 A Well, there's times where people have
9 plant experience or experiences would be equivalent to
10 minimum qualifications -- educational experiences and
11 things like that.

12 Q So you're saying if the minimum qual said
13 you must have a bachelor's degree or five years of
14 similar engineering experience where there would be an
15 equivalency in the minimum qualifications, that would
16 be okay.

17 A Yes.

18 Q But you wouldn't say you have to a BS in
19 engineering in one job and you have to have a BS in,
20 let's see, chemistry for the other job. If you had
21 those two, one required a BS in chemistry, one
22 required a BS in engineering.

23 A They probably would not be mutually
24 interchangeable.

25 Q Because people would qualify for the one

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1 with an engineering degree and that wouldn't qualify
2 them for the chemistry position.

3 A That might qualify them for the chemistry
4 position, but based on the type of equivalent
5 experience, it's likely that the chemistry person
6 would qualify for the engineering position.

7 Q It's not likely.

8 A Not likely.

9 Q And if you had a position in which the
10 minimum quals where one could either have, I forget
11 the number of years, but five years experience and a
12 degree in physical security or five years experience
13 in emergency preparedness or five years experience in
14 radcon or five years experience in chemistry and you
15 had another job that required five years experience in
16 radcon or chemistry, are those interchangeable?

17 A Go through that list again for me, please.

18 Q Physical security, if you can meet the
19 qualifications on one job where it's either five years
20 in physical security, five years in chemistry, five
21 years in radcon control, five years in emergency
22 preparedness, the second job requires five years in
23 either radcon or five years in chemistry, are they
24 interchangeable? Can the physical security guy meet
25 the radcon chemistry job?

1 A I want to be sure I understand what you're
2 saying to me. You're saying a person who has physical
3 security or chemistry or radcon or emergency?

4 Q Yes. Let's say you're talking about a
5 position that's a management position and you're
6 managing five different functions, and the
7 qualifications for that job require that you have
8 expertise and experience in one of those five
9 functions, okay? There's another management job that
10 covers two of those functions and requires that you
11 have expertise in one of those two functions. Are
12 those two jobs interchangeable?

13 A Probably not.

14 Q Now, you talked about this PD of record
15 that TVA uses to determine interchangeability of
16 positions. If we can go to I think it must be Joint
17 65. Do you have that in front of you, the personnel
18 manual on RIFs in the Joint exhibits?

19 A Did you say 65?

20 Q Yes, I did.

21 JUDGE YOUNG: Do any other people need to
22 make phone calls? He said you needed to make a phone
23 call.

24 MR. MARQUAND: We can wait for a few
25 minutes? Why?

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1 CHAIRMAN BECHHOEFER: Judge Cole had to
2 make one.

3 JUDGE YOUNG: So if other people do, now
4 would be a good time.

5 MR. DAMBLY: Let's go off the record for
6 five minutes.

7 CHAIRMAN BECHHOEFER: Okay. Let's go off
8 the record for five minutes. But he said he could
9 hear everything in there while he was making the phone
10 call.

11 (Whereupon, the foregoing matter went off
12 the record at 4:24 p.m. and went back on
13 the record at 4:40 p.m.)

14 CHAIRMAN BECHHOEFER: Back on the record.

15 BY MR. DAMBLY:

16 Q I believe we were talking about or about
17 to discuss Joint Exhibit 65. That's the Personnel
18 manual on reductions-in-force, correct?

19 A Yes.

20 Q And going over to Page 14, under
21 "Competitive Level" at the bottom where it says, "The
22 Determination is made by comparing for each position
23 the qualifications as stated in the official job
24 description." Is that correct?

25 A That's correct.

1 Q And the official job description is the
2 job description for an employee's official position?

3 A Official job description, we've
4 interpreted this to be the position that we have -- or
5 the position description we have in our records, our
6 PHR.

7 Q Well, TVA wrote it, and you've been using
8 the term "position description of record," but that's
9 not in this anywhere.

10 A That's not in this, no. Those words,
11 those exact words are not.

12 JUDGE YOUNG: Mr. Fogleman, could you move
13 forward a little bit or pull those closer to you.

14 BY MR. DAMBLY:

15 Q And you indicated, I believe that while
16 you hadn't looked at the OPM regs and didn't know what
17 was in them, TVA updates these things to take into
18 account the various decisions that come out on proper
19 ways to conduct RIFs and what's covered, the MSPB
20 decisions.

21 A The MSPB decisions and, you know, we give
22 strong consideration to the decisions that TVA has had
23 rendered.

24 Q Now, can you show me, and I will read to
25 you so we don't waste a lot of time, it's out of TVA

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1 Exhibit 111, which was a document entered the last
2 time we were all together, I believe. It's a letter
3 to Ms. Bolin to I don't know who it's from -- oh, Mark
4 Burzynski. And the thing that I would like you to
5 comment, there's a statement in the attachment that
6 says, and this is provided to us by TVA, "The Board,"
7 referring to MSPB, "has long held that it is the
8 official position occupied by an individual which
9 determines the competitive level in which he is
10 properly placed."

11 JUDGE YOUNG: Where are you reading from? . .

12 MR. DAMBLY: This is TVA Exhibit 111.

13 JUDGE YOUNG: I've got the exhibit. Which
14 page and which --

15 MR. DAMBLY: It's like the next to the
16 last, FG, a bunch of zeros, I guess a 6.

17 JUDGE YOUNG: And where on the page?

18 MR. DAMBLY: The indented quote.

19 JUDGE YOUNG: Okay. Thank you.

20 BY MR. DAMBLY:

21 Q The indented quote there, "The Board has
22 long held that it is the official position occupied by
23 an individual which determines the competitive level
24 in which he is properly placed," do you see that?

25 A Yes, I see that.

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1 Q An employee's official position is the one
2 to which they've been appointed; is that correct?

3 A Well, it says in which he is properly
4 placed.

5 Q Competitive level in which he is properly
6 placed.

7 A Competitive level which he is properly
8 placed.

9 Q It doesn't say the official position
10 description.

11 MR. MARQUAND: It does too, Counsel. What
12 are you misreading it for? Right above that,
13 preceding that --

14 MR. DAMBLY: I'm reading -- no. I would
15 like to ask my questions.

16 JUDGE YOUNG: One at a time.

17 MR. MARQUAND: Quite misleading the
18 Witness.

19 MR. DAMBLY: I'm not misleading. It's
20 your quote, you put it in here, and that's what the
21 Board held.

22 JUDGE YOUNG: And don't be arguing with
23 each other. If you have an objection, state it, and
24 then we'll hear the response and then we'll rule.

25 THE WITNESS: Would you ask your question

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1 again, please?

2 BY MR. DAMBLY:

3 Q My question is does this quote say, "The
4 Board has held it's the official position that
5 determines competitive level," or "position
6 description of record"?

7 A The quote says official position, but when
8 you kind of look at it in context with the previous
9 paragraph, it's talking about that we had an employee
10 reduced-in-force as an M3 general foreman and said
11 that he was actually doing planner duties. And so
12 when you look at that whole context, we reduced that
13 person based on his duties as a general foreman, not
14 as a planner.

15 Q In the position he actually occupied --
16 you went and got a PD for the position he actually
17 occupied and used that.

18 A We got a position for the job. His
19 position of record would have been general foreman.

20 Q That was his official position.

21 A Official position, position of record,
22 whatever you'd like to call it, but his job, the job
23 that we had a position description, just from reading
24 this information here, looks like his job that we had
25 him -- that his position of record was the general

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1 foreman, M3 general foreman.

2 Q And the position at TVA that an individual
3 occupies is the position shown on the HRIS system; is
4 that not correct?

5 A It may be.

6 Q Is that not the official personnel system
7 for TVA?

8 A It is our information system. Our
9 official personnel records would be contained in the
10 PHR, the personal history record.

11 Q Would it surprise you to know that Mr.
12 Boyles and Mr. Reynolds and Mr. Sewell have testified
13 that to the extent there's a difference between HRIS
14 and the PHR HRIS controls?

15 MR. MARQUAND: Objection. That's a
16 mischaracterization. Mr. Sewell clearly testified
17 that the position descriptions are contained in the
18 PHRs.

19 JUDGE YOUNG: You look like you have the
20 transcript.

21 MR. DAMBLY: I have the transcripts.

22 MR. MARQUAND: Well, he's not being fair
23 and accurate with respect to his questions.

24 MR. DAMBLY: Yes, I am.

25 JUDGE YOUNG: Well, if he has it

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1 different, why don't you read what he said?

2 MR. DAMBLY: It says, and this is on Page
3 4496 --

4 JUDGE YOUNG: What date?

5 MR. DAMBLY: I'm told it's June 20.

6 JUDGE YOUNG: Forty-four --

7 MR. DAMBLY: Well, we could start with
8 4485.

9 JUDGE YOUNG: And this is which witness?

10 MR. DAMBLY: Mr. Sewell, the witness who
11 was put on by TVA to discuss PHRs and their records.
12 He was apparently official custodian of PHRs or some
13 such thing at one point. On Page 4485, Line 19,
14 question by me, "If the HRIS system has an entry in
15 which somebody receives a pay increase, a promotion or
16 whatever, that governs over in terms of they get paid
17 or they get promoted, even if it doesn't make its way
18 into the PHR." Answer: "That's correct."

19 And then if we go to Page 4496, again
20 start on Line 21, a question by me, "If you don't get
21 one, the HRIS system still controls in terms of what
22 happens to the employee. If somehow it doesn't show
23 up in your records, they still get the promotion."

24 The Witness: "It is the HRIS. That's the official."

25 "Is it in point of fact true the HRIS

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1 system is your official personnel records, not the
2 employee's PHR, the HRIS system is TVA's official
3 personnel system?"

4 THE WITNESS: I think there's a -- I don't
5 necessarily agree with that, and let me tell you why.
6 What Mr. Sewell said in the answer to your first
7 question about the HRIS system controlling pay, as I
8 said earlier, I think today or maybe yesterday, I'm
9 not sure now. that one of the functions of the HRIS
10 system is to interact with our payroll system and
11 ensure people are paid properly. And so from that
12 standpoint, our HRIS system would be -- that's the way
13 we pay people, and it has the official record of
14 people's birth dates and their home addresses and
15 their telephone numbers and who their beneficiaries
16 are and things like that.

17 When you're talking -- so in that context,
18 yes, it is an official record or an official
19 authorized personnel system or whatever you want to
20 call it. But when you're starting to chase down or
21 look for a PD, that PD is not going to be in that HRIS
22 system. It's not designed to handle that system. And
23 when we're going to look for a position description,
24 we're going to go to the personal history record,
25 because that's where that information is going to be

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1 stored.

2 BY MR. DAMBLY:

3 Q Yes. And my question had nothing to do
4 with where you would find a position description. My
5 question is, as Mr. Reynolds testified and Mr. Boyles
6 testified and what we got out of Mr. Sewell, the HRIS
7 system is TVA's official personnel record system.
8 When you go to look what position an employee is in,
9 what they've been appointed to, whether they've been
10 promoted, it's HRIS that's the controlling system.

11 MR. MARQUAND: I object to the
12 characterization that it is the official personnel
13 record system. Counsel, Mr. Fogleman said, no, that's
14 not where you go if you want the position description.
15 There's different official systems for different
16 official functions. Mr. Sewell, the PHR records
17 custodian testified to that. It's a
18 mischaracterization and an oversimplification by
19 Counsel's question.

20 MR. DAMBLY: I don't think it's
21 oversimplified, and I think the record will reflect
22 the testimony of Mr. Boyles and Mr. Reynolds. Who is
23 Mr. Reynolds, your boss?

24 THE WITNESS: Yes, sir.

25 BY MR. DAMBLY:

1 Q He knows what the systems are, do you
2 think?

3 A Probably does.

4 Q Probably does. Okay.

5 CHAIRMAN BECHHOEFER: Let me ask an
6 inquiry. The way I read this recitation from this
7 Merit Service Protection case it says that what's
8 equivalent to the official position of record is what
9 governs, rather than duties actually performed. And
10 so I seem to see this case as being possibly
11 misinterpreted. It seems to say that you don't look
12 at what he's doing, you look at what his official
13 description of record says his job is.

14 MR. DAMBLY: No. It says --

15 MR. MARQUAND: That's what we argued, Your
16 Honor.

17 CHAIRMAN BECHHOEFER: That's just what
18 this quote seems to say.

19 MR. DAMBLY: No. The quote says you look
20 at the official position and then there's plenty of
21 case law that will tell you the first place you could
22 look to see what the official duties are are a
23 position description for the official position. But
24 official position, and we'll cite you plenty of case
25 law, for a federal employee is the position to which

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1 you've been appointed, not whatever OPD they can find
2 in your records somewhere. You will find no cases
3 that say if the only thing they can find is an
4 attorney PD and you're an engineer, they look at an
5 attorney PD to determine your competitive level.
6 There's no such. You start with the official position
7 everything. If you look at the OPM regs, you will see
8 the term, "official position," and that is the
9 position to which you've been appointed.

10 JUDGE YOUNG: I think we're really getting
11 into legal argument here. The objection to your
12 question was based on your characterization of other
13 people's testimony. Is it necessary to refer back to
14 the testimony? Can you just ask Mr. Fogleman --

15 MR. DAMBLY: Pardon?

16 JUDGE YOUNG: Is it necessary to refer
17 back to the other testimony? Can you just ask Mr.
18 Fogleman his opinion?

19 BY MR. DAMBLY:

20 Q Well, Mr. Fogleman, if you have appointed
21 a person to a position at TVA, we'll take Mr.
22 McArthur, and again I will represent, and I'm sure
23 we'll get an objection, but both Mr. Boyles and Mr.
24 Reynolds have said there's no question that Dr.
25 McArthur was appointed to and occupied the RadCon

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1 Manager PG-11 position in 1994 to 1996.

2 MR. MARQUAND: Just so as not to
3 disappoint you, I will object because I don't believe
4 either one of them said he was appointed to that
5 position.

6 MR. DAMBLY: Yes. Well, it's in the
7 record.

8 JUDGE YOUNG: Again, without taking the
9 time to go back and look and see what previous
10 witnesses said, they said what they said, it will be
11 in the record, and so without taking a whole lot of
12 time to argue about what they said, can you ask the
13 question without making reference back to what other
14 witnesses said or giving paraphrases of what other
15 witnesses said? Either that or it would be better to
16 refer to specific lines and read them rather than
17 characterize.

18 BY MR. DAMBLY:

19 Q Assuming for the moment that Dr. McArthur
20 officially occupied the position of RadCon Manager in
21 1994 to 1996, and you were doing a reduction-in-force
22 or looking at a potential reduction in force in 1996,
23 and you went back in and you looked and for some
24 reason even though it was attached to the vacancy
25 notice, there's no position description you can find

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1 for the job he's in, who, if anyone, told you or on
2 what basis do you decide that you would use a position
3 description for a position which you know a person
4 does not occupy and determining they would have under
5 the federal mandated RIF regulations?

6 A And you asked me who told me that?

7 Q If anyone, or the basis on which you would
8 conclude that.

9 A The basis I would conclude that has been
10 our practice in the past of doing that at TVA.

11 Q Your practice in the past would be to use
12 a position description which you knew was for a
13 position different than the one the person occupied?

14 A That's correct.

15 Q And where is that written anywhere in your
16 policies?

17 A When you look at I think it's Joint
18 Exhibit 65, on Page 15, at the top of the page, first
19 paragraph, it talks about the determination must be
20 based solely on the content of accurate up-to-date job
21 descriptions. I think I said earlier that our job
22 descriptions -- in some of the questioning, either by
23 the Judges or Mr. Marquand -- that sometimes our job
24 descriptions are not always up to date. But it has
25 been our practice and it's been my understanding, the

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1 interpretation, the advice I've got from counsel as
2 we've gone through these processes that when we get
3 into this situation we should use the official
4 position of record or the official PD, and that's the
5 PD that we found in the PHR. Now, that may not be
6 according to OPM regulations, but that's the way we've
7 conducted RIFs.

8 Mr. Boyles, for example, is a good example
9 when we went through our reorganization of this HR
10 organization about a year ago. When I went to surplus
11 his position I discovered that I had issued him the
12 wrong PD, and I had to conduct the surplus according
13 to the PD of record, and I did that.

14 Q You had issued him a PD for the position
15 he was in.

16 A I had issued him a -- he had a joint
17 responsibility of workforce planning and human
18 resource manager. He had been issued a PD for
19 workforce planning manager, and I had to conduct our
20 surplus using the PD of workforce planning manager.

21 Q Had he been in a situation where he was
22 originally a workforce planning manager, then he was
23 appointed to a position of HR specialist or whatever,
24 and then there was a reduction in force and for some
25 reason you couldn't find the PD for his HR specialist

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1 job which you had appointed him to, you'd signed the
2 paperwork, he was officially in it, he got paid at it,
3 he got performance appraisals based on it, it's in
4 HRIS as his position, and then you go to do a
5 reduction in force, you're telling me counsel's told
6 you you should use the workforce planning PD if you
7 couldn't find the other one.

8 A That's correct. When I went to the
9 official record, if I had the workforce planning,
10 that's been our understanding -- TVA when I say "our"
11 -- TVA's understanding of our policies, and that's the
12 way we've implemented our practices and policies.

13 Q And so you've been told by counsel, this
14 part that says "Up-to-date, accurate job descriptions"
15 is just fluff and doesn't belong in this provision
16 here?

17 A No, that's not fluff. We make an effort
18 to ensure that there's up-to-date job descriptions.
19 It does not always occur.

20 Q You don't audit job descriptions.

21 A No.

22 Q And you've also been told you can't change
23 PDs before a RIF; is that correct?

24 A That's correct.

25 Q And that's because it wouldn't be fair to

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1 employees to have people changing around and jockeying
2 and whatever.

3 A I don't know that fair to employees is a
4 good way to characterize it, but we're told it
5 probably would not meet the standards when we got into
6 the review process to be changing the job
7 descriptions.

8 Q What standards?

9 A If we went to through an appeal process,
10 it may not -- if we change the job descriptions, we
11 would not be able to successfully defend that.

12 Q Who told you that?

13 A That's advice we've gotten from our
14 counsel.

15 Q So they told you that if people had
16 accurate position descriptions, they would somehow
17 have a right to an appeal.

18 A No, that was not what they told us. That
19 wasn't what I said.

20 Q Well, if you went in before and people's
21 position descriptions before -- in fact, I think if
22 you look even in yours and certainly in the OPM thing,
23 you will find that pre-RIF planning requires that
24 people should go in in preparing to do a reduction and
25 make sure everybody has accurate, up-to-date PDs. But

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1 you don't do that.

2 A We don't do that.

3 Q And somehow you think there would be some
4 prohibition against making sure people have accurate
5 position descriptions before you determine competitive
6 levels.

7 A Once we've made the decision to go into
8 the RIF process, I think that, yes. Yes, sir; I do.

9 Q So it's unfair for employees to actually
10 have accurate PDs. It's better to avoid their rights
11 under RIF and just change them and reflect what
12 they're actually doing and then post the job.

13 A Ask that question again, please.

14 Q Well, somehow if you were to change and
15 say you had three people and they're performing X
16 duties and their PD says they're doing X plus one or
17 X plus two or X minus one duties, okay? And in point
18 of fact, the supervisor, the employees all agree
19 they're doing X duties. And you went in and changed
20 the PDs to accurately reflect what they're doing and
21 made a determination in a RIF situation on competitive
22 levels. What's the problem with doing that?

23 A That wouldn't be -- I don't think that's
24 according to the way we've handled it, according to
25 our past practice. I don't think it's according to

1 our policy.

2 Q Well, where do you see in the policy that
3 -- it says accurate, up-to-date job descriptions. How
4 does that violate the policy by complying with that
5 provision?

6 A What you said, that we'd go in and change
7 them as we started down the RIF process, I believe,
8 and advice and the way we've conducted the RIFs in the
9 past has been that we've not changed the job
10 descriptions once we make a decision that a RIF is
11 going to occur, that we're going to have a reduction.

12 Q Even if you know they're inaccurate.

13 A Once we've made that decision that we're
14 going to have a RIF, no.

15 Q So you'd rather use inaccurate documents
16 in determining rights than accurate ones.

17 MR. MARQUAND: I'll object. He's just
18 arguing with the Witness. We've been over this same
19 thing. There's no question in anybody's mind what
20 TVA's policy and practice is here. I don't think this
21 is being helpful.

22 JUDGE YOUNG: I think I actually asked him
23 the same question earlier, and it is pretty clear what
24 TVA's position is.

25 BY MR. DAMBLY:

1 Q Well, then if it's clear what TVA's
2 position is, can you explain to me in 1993, I think,
3 or '92 how Mr. Fiser was reduced from a position when
4 his -- from a position -- he was occupying at that
5 point a position in TVA nuclear headquarters, a
6 Chemistry Program Manager position, but his PD of
7 record was for the Sequoyah Chemistry Superintendent
8 position, and he was reduced from -- one, I think he
9 was actually reduced from the Sequoyah position, even
10 though it was in existence. And, two, the
11 determination was made by Mr. Reynolds, and we have it
12 in his affidavit, that since the paperwork hadn't
13 caught up and he was really in the Corporate position,
14 that they would resolve that by giving him a position
15 in Corporate. How is that consistent with the rules?
16 Can you RIF a person from a position that's in
17 existence?

18 A Can you RIF -- yes.

19 Q From one they will continue? They're the
20 only person, it's a one-person position, they're the
21 incumbent. Can you do a RIF if that position will
22 continue?

23 A If that's their position of record, yes.
24 I mean I'm not sure what you're asking me here. You
25 had a long strung out question there. If you could

1 kind of --

2 Q Can you -- if you are in the position
3 you're in right now and you're the only one in that
4 job --

5 A Correct.

6 Q -- and they're not eliminating that job,
7 can they give you a RIF notice?

8 A If they're not eliminating the job, no.

9 Q Well, that's what I asked a minute ago.
10 I must have confused you and I'm sorry. So if Mr.
11 Fiser's PD of record was for the Sequoyah Chemistry
12 Manager position and that position wasn't eliminated,
13 you can't be RIF'd from that position?

14 A If he was the Sequoyah Chemistry Manager
15 --

16 Q On paper.

17 A -- on paper, and if that was his position
18 of record and we weren't going to eliminate the
19 position, then he probably shouldn't have been RIF'd
20 from it.

21 Q And you indicated earlier also today about
22 one of the problems with changing is you just can't
23 let employees change their PDs to put themselves in a
24 better position for a RIF. Do you recall saying that?

25 A I don't recall those words, no, but -- no,

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1 I don't recall those --

2 Q Employees can't change PDs, can they?

3 A Employees can't change PDs. Managers have
4 to change the PDs.

5 Q Are you familiar with the term, "lateral
6 transfer?"

7 A Lateral transfer, yes.

8 Q What is it?

9 A It would be a transfer from -- I went
10 blank, excuse me. It would be a transfer from, I'll
11 use, an electrical engineer senior position to another
12 electrical engineer senior position.

13 Q Does that require competition?

14 A If it is a positing or a new job in
15 another organization, it would be. I mean if the job
16 is the same, it would not require competition, but a
17 lateral transfer could be also a new job in another
18 organization, and there is no additional pay. You
19 make \$65,000 in this organization, the other
20 organization selects you in the job posting process,
21 and that job pays the same. So that could be
22 considered a lateral transfer.

23 Q Back up for a moment. If you went into,
24 not the HRIS system, but the PHR system and found a
25 position description for an employee, and the most

1 recent one you could find is for a position that had
2 been abolished, so their official position of record,
3 according to the way you do things, was no longer in
4 existence, would you give them a RIF notice?

5 A No.

6 Q You wouldn't?

7 A No.

8 Q So they officially occupy a position
9 that's not there?

10 A No. You asked me would I give them a RIF
11 notice because we found the PD of record being in a
12 job that had been eliminated. And we wouldn't RIF a
13 person because of that.

14 Q Why wouldn't you? If their job had been
15 abolished, why aren't they then reduced because they
16 don't have a job?

17 A Well, obviously they have a job because
18 we've got them in there doing something and we're
19 paying them.

20 Q But you wouldn't use the position or a
21 description of the duties in the job that they're
22 actually in. You'd look for the one that had been
23 abolished and that's what you'd use.

24 A Abolished for what?

25 Q It had been eliminated in a previous

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1 reorganization.

2 A Okay.

3 Q It's not there.

4 A So what are we doing with the employee?

5 Q Well, that's what I'm asking you. We're
6 now going to another reorganization. We look and
7 instead of being the position description for the one
8 he's been appointed to and occupies, you find one for
9 a position that's been abolished four years ago or
10 three years ago or two years ago. Now he's
11 officially, according to the way you're looking at
12 stuff, in a job that doesn't exist. Why doesn't he
13 get a surplus notice?

14 A Well, I guess we'd be looking at, first of
15 all, what position -- is the position that he's in
16 today are we eliminating it, and is there any need to
17 look at the official -- what's in the official record
18 to determine what his PD of record is? Are we making
19 a competitive level call? If his position is not
20 being impacted by the reduction in force or by the
21 reorganization, then we may not have any reason to go
22 back and look for the PD of record.

23 Q Okay. I'll give you a hypothetical --
24 well, not even a hypothetical. You've got two
25 managers, both at the PG-11 level. Both those

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1 positions are going to be eliminated in the
2 reorganization and replaced by one manager at a higher
3 level. You've got two management jobs that are going
4 to be eliminated, and you're going to have one manager
5 at a higher level. You go in and look and you find
6 that one of those managers, although he's been
7 appointed and occupies in whatever that job, the only
8 thing you can find is a position description for a job
9 he held six years earlier, whatever. It's not the job
10 he's in. He's in a job that has been abolished and
11 does not exist.

12 A Okay.

13 Q Do you give him a RIF notice because he
14 doesn't have a job?

15 A I think we've already -- it sounds to me
16 from the example you're giving or it's not the
17 example, I guess you're talking about Mr. McArthur, is
18 that we'd already made -- or TVA had already made a
19 decision that his position that he was in currently
20 wasn't going to exist, so he was going to be not
21 reduced-in-force but was going to be sent to TVA
22 Services.

23 Q But that didn't happen because they looked
24 and compared a position description for a position
25 that had been abolished and that he wasn't in and

1 decided that gave him rights to another position. How
2 does that work?

3 A Well, they were making a determination,
4 they established a new position, and it's my
5 understanding that they went in and looked at the two
6 individuals and looked at their PDs of record to see
7 if the new positions were interchangeable. And a
8 decision was made that Mr. McArthur's position was
9 interchangeable based on his PD from I think 1990.

10 Q And have you looked at those PDs?

11 A I've looked at Mr. McArthur's.

12 Q You looked at the 1990 Technical Program
13 Manager position and you saw that it has in the
14 minimum qualifications experience in either security
15 or, I forget, the emergency preparedness or radcon or
16 chemistry, and I think there might even be another
17 one? And then you looked at the RadCon/Chemistry
18 Manager position that had minimum quals that required
19 either RadCon or Chemistry. Did you reach a
20 conclusion as to the interchangeability of those two?

21 A When I looked at them, given the set of
22 circumstances that -- let me start over. When I
23 looked at the position description, I may not have
24 made the same call that the people made that made that
25 decision, but I wasn't asked to make that decision in

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1 '96 and wasn't aware of all the circumstances that
2 they were considering when they made that decision.

3 Q I understand that, but earlier today I
4 asked you, it's in my hypothetical, if you had one job
5 that had either one of five specialties would qualify
6 for that management position and you had another one
7 that only two of those five would qualify for, you
8 said they wouldn't be interchangeable, because there's
9 three over there that aren't going to meet that
10 requirement.

11 A I think I actually said probably not, but
12 -- and that's what I said. I may not have made that
13 same call.

14 Q But as a matter of fact, you must be able
15 -- for those jobs to be interchangeable, minimum quals
16 -- even if you look at your definition of what they've
17 got to be doing is for a fully qualified person, what
18 they would do if they were brought on board.

19 A Interchangeability is to be sure that
20 there's no loss in productivity, other than the
21 learning curve that any new job would have.

22 Q And it doesn't matter what the individual
23 employee -- the fact that Dr. McArthur had RadCon
24 experience and chemistry experience, we don't look at
25 his individual qualifications. We look at that

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1 position's qualifications.

2 A Like I say, if I had been doing it, I
3 probably wouldn't have made -- you know, I may not
4 have made that same call. Looking at the
5 qualifications and the job duties, you could probably
6 make a good -- because, you know, the security portion
7 of that job was not a significant portion of the job,
8 it's my understanding. But when you start looking at
9 minimum qualification, may not have made that same
10 call.

11 Q And when you say -- who was it told you
12 that security wasn't a big part of that job?

13 A Nobody told me it wasn't. That's my
14 recollection from remembering the organization back in
15 the 90s.

16 Q Well, if you looked at those two PDs and
17 saw that under one, under Technical Program Manager
18 job, there was 600 and I forget what it is, 40 or 50
19 people. And I think Dr. McArthur said about 450 or
20 500 of those were security, and they had corporate-
21 wide security responsibilities. And the other PD had
22 22 people, I think, and only did Rad Con Chemistry.

23 A Uh-huh.

24 Q You think those duties are similar enough?

25 A Well, my recollection was that the

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1 security function was handled by outside
2 organizations.

3 Q Well, that's not what's in the PD. Would
4 you like to see the 1990 PD?

5 A Whatever. What exhibit is it?

6 Q Let me get it for you. It's Staff Exhibit
7 100. And looking at Staff Exhibit 100, do you see
8 down under the employees direct and indirect, 635 on
9 the first page?

10 A Yes.

11 Q Would that help refresh your recollection
12 as to the scope of the security duties?

13 A Well, that's for direct or indirect. And
14 I haven't looked at the organization to see how that
15 was put together back in 1990. And what I said is I
16 looked at this. It was my recollection that the site
17 security function was handled and managed by the site.
18 And what this says, there were 635 employees either
19 directly or indirectly supervised by Mr. McArthur.
20 Now that still may mean that indirectly those security
21 folks may still be managed by the site, because
22 indirectly would mean he may not have direct
23 supervision over them, but he may have had
24 programmatic responsibility for what they were doing.

25 Q Well, they wouldn't necessarily, all 635

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1 be direct reports.

2 A Yeah, but -- no, of course not.

3 MR. MARQUAND: Objection. I don't think
4 direct refers to direct reports. I think what Mr.
5 Fogleman, what the witness is referring to is whether
6 he has indirect programmatic responsibility for them,
7 as opposed to whether he --

8 MR. DAMBLY: Objection to counsel trying
9 to testify again.

10 MR. MARQUAND: I think he's misusing the
11 words.

12 JUDGE YOUNG: Okay. It says what it says,
13 and let's let the witness give the testimony about
14 what it means.

15 MR. DAMBLY: Would you like to go ahead
16 and say what Mr. Marquand told you to say?

17 THE WITNESS: I think I've already said
18 it.

19 CHAIRMAN BECHHOEFER: Which of these
20 categories, broad categories, the 635, 587 or the 48
21 would include security personnel? I assume that means
22 guards.

23 THE WITNESS: Yes, sir. It would be the -
24 - I would think it would be the 587. Let me -- it
25 would have to be the 587, because the 48 employees are

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1 trades and labor employees, and those are like
2 steamfitters and people like that.

3 CHAIRMAN BECHHOEFER: It's not guards.

4 THE WITNESS: Not guards. Guards are not
5 trades and labor employees.

6 CHAIRMAN BECHHOEFER: Okay.

7 BY MR. DAMBLY:

8 Q Okay. Going back to the surplusing
9 process in TVA services, and retention registers, when
10 you do, as we saw in the exhibit, I think it's 93 that
11 had the retention register with Harvey and
12 Chandrasekaran, and Fiser, and two of those people got
13 selected for jobs, but you had a retention register
14 anyway. Correct?

15 A Correct.

16 Q Now if you have a situation you've got
17 five employees, and we'll say you've got five
18 engineers, widget engineers. We'll just make them
19 widgets because that's easy. You're reducing,
20 strictly reduction to three widget engineers. You do
21 a retention register. You follow the regs, seniority
22 wins, and the three more senior stay, and the other
23 two get surplusd out and go to TVA services.

24 A That would be correct.

25 Q And if you have the same five widget

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1 engineers but you're in a reorg and a reduction, you
2 change it to widget primes, you add a duty or take one
3 away, you do something that you think is significant
4 enough to post. You do the same retention register,
5 but then you post the three positions, and the manager
6 involved selects out of those five, or whoever applies
7 to people he wants to keep, and the other two go to
8 services.

9 A He would select the people who applied on
10 the position and, you know, go through the selection
11 process and determine who is the best qualified.
12 Select those, and then the other remaining employees
13 would go to TVA Services.

14 Q And of those two processes, which is the
15 easiest to manipulate?

16 MR. MARQUAND: Objection. This is almost
17 identical to a question we started off with. Can we
18 move on?

19 JUDGE YOUNG: I think that's a fair
20 question. I mean, it's been sort of out there all
21 day.

22 MR. MARQUAND: The same question we had
23 earlier. It may not have been widgets, but it was
24 something else.

25 MR. DAMBLY: I don't think I've asked this

1 question before.

2 CHAIRMAN BECHHOEFER: Objection overruled.

3 THE WITNESS: Manipulate? That's a pretty
4 strong word. I think the RIF process is pretty
5 straightforward. When you get into posting positions
6 and reorganizing then there's a lot, sometimes, room
7 for interpretation, and there's opportunities to take
8 exception with management decisions. Manipulate, I
9 don't know if that's a fair word to describe it. But
10 management - I think you asked me the question a
11 little earlier, which process do they control. And
12 they probably have more control, or there's more
13 control in the reorganization. I don't mean it's
14 wrong. I don't mean it's evil. I don't mean it's
15 trying to do anything to violate people's rights, you
16 know, especially when the reorganization is for valid
17 reasons.

18 Q Okay. Now if you would turn to, and I
19 know you have it there, Joint Exhibit 28.

20 CHAIRMAN BECHHOEFER: Pardon me. Has
21 Staff 100 been offered?

22 MR. DAMBLY: I'm sure 100 has been in for
23 a long time.

24 CHAIRMAN BECHHOEFER: Okay. I just wanted
25 to check.

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1 MR. DAMBLY: I would be virtually certain
2 that with Dr. McArthur, if not before, all those Pds
3 came in.

4 CHAIRMAN BECHHOEFER: I just wanted to
5 make sure, and determine you want it in the record.

6 MR. DAMBLY: Unfortunately, my list-keeper
7 left.

8 JUDGE YOUNG: It was.

9 CHAIRMAN BECHHOEFER: Okay.

10 JUDGE YOUNG: And what was the next one?

11 MR. DAMBLY: Joint Exhibit 28, the
12 assignment to TVA Services for Mr. Fiser.

13 THE WITNESS: Yes, sir.

14 BY MR. DAMBLY:

15 Q Now you discussed with Mr. Marquand the
16 Option 1, the severance pay, and the lump sum pay,
17 lump sum salary, annual leave and immediate retirement
18 benefit, which you said was a good thing, and a
19 generous thing.

20 A Well, I don't know if it's a generous
21 thing, but it's an opportunity that a normal
22 resignation would not -- that would not be a benefit
23 that would be offered to a normal resignation. This
24 is an unfortunate situation you have to go through
25 this but, you know, it's a benefit that would not

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1 normally come with a resignation.

2 Q And I don't know if you can answer, but
3 what you're talking about here is the equivalent to
4 what the rest of the federal service would call an
5 early-out option, if you meet certain minimum age and
6 service requirements, you can take retirement
7 immediately.

8 A Yes. In TVA there's a similar provision,
9 that if you are at certain level of service and
10 certain age, at this given time you would -- before
11 you have an ability to take the immediate benefit. In
12 other words, draw the retirement immediately.

13 Q Immediately. Right?

14 A Yes, sir.

15 Q But to your knowledge, Mr. Fiser wasn't
16 eligible for that, was he?

17 A He would have been if he would have taken
18 Option 1. He would have had the ability to get
19 immediate retirement.

20 Q If he met certain requirements.

21 A If he took Option 1, he would have --
22 there's no --

23 Q It says, "If eligible."

24 A That meant if he was -- it's my
25 understanding what that meant was if he was vested.

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1 Q What does that mean?

2 A He had the prescribed number of years to
3 be vested in the system. So any employee who took
4 Option 1 could immediately be drawing their
5 retirement benefits. The eligibility was whether or
6 not they were vested in the program. And if I recall
7 right, at this period of time, it was five years to be
8 vested in the program.

9 Q So Mr. Fiser then, did he take Option 1?

10 A Yes, I think he did.

11 Q You get -- when you retire you keep your
12 medical benefits, as well?

13 A You have the ability to have medical
14 benefits within the retirement system. And they're
15 different than the benefits you would have as an
16 employee, the retiree medical benefits.

17 Q What's the difference?

18 A Cost of the plan primarily.

19 Q Okay. Now I guess Mr. --

20 CHAIRMAN BECHHOEFER: Would a person who
21 took the one year option be in the active duty medical
22 plan for that year, or the retired medical plan?

23 MR. DAMBLY: You're talking about if they
24 went to TVA Services for the year.

25 CHAIRMAN BECHHOEFER: Yes.

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1 THE WITNESS: If they went to TVA Services
2 for the year, there's really no change in their
3 employment status.

4 CHAIRMAN BECHHOEFER: No, no, no. I
5 didn't mean TVA services. If they took option 1,
6 which meant they would --

7 THE WITNESS: Oh, okay.

8 CHAIRMAN BECHHOEFER: -- get a lump sum
9 payment of the salary for a year.

10 THE WITNESS: Yes, sir.

11 CHAIRMAN BECHHOEFER: For that -- for the
12 period that would have been covered by that salary,
13 which type of medical plan would the employee, or ex-
14 employee as the case may be, be in?

15 THE WITNESS: Let me think just a minute
16 about that. Typically, when you start drawing a
17 retirement, you're in the -- immediately if you're
18 going to keep your medical insurance, you start in the
19 retiree medical plan. I just need to think a minute if
20 we made any provisions in this process. I don't think
21 we did. I think you immediately went into the retiree
22 medical. That's my -- my recollection is you did.

23 CHAIRMAN BECHHOEFER: Okay. Thank you.

24 MR. MARQUAND: Your Honor, I do believe
25 this document does specify how long they can keep

1 medical coverage after termination.

2 JUDGE YOUNG: Three months.

3 JUDGE COLE: Well, it does say if you're
4 under age 50, you could retain it for three months.

5 BY MR. DAMBLY:

6 Q Do you know how old Mr. Fiser was back in
7 '96?

8 A No, I don't.

9 Q Okay. The other area I'd like to ask you
10 about on this document is Mr. Marquand asked you
11 questions, and then showed you, I think, even the
12 other surplus we're talking about, or it was on one
13 piece of paper about 1997, FY97, how long the services
14 thing would be.

15 Down in Option 2, if he had taken
16 Services, you see where it says, "The assignment to
17 Services to end no later than 1997, barring emergency
18 in power system", and then the "However" sentence?

19 A Yes, sir.

20 Q "However, should you refuse a reasonable
21 offer during this time, you will be issued a reduction
22 of force notice as soon as you can be reached on the
23 retention register. Employment will be terminated on
24 the RIF effective date." And it goes on to define,
25 and Mr. Fiser was making more than \$30,000 wasn't he?

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1 A Yes, sir. I believe he was.

2 Q And it says a reasonable offer is one
3 that's 80 percent of what his salary was before, and
4 it doesn't matter if it's not in a commuting area, so
5 if Mr. Fiser had been -- had taken Option 2 to
6 Services, the day after he got there, they could have
7 given him a notice saying you're now going to Brown's
8 Ferry at 80 percent of your salary. And if you don't
9 take it, you're on the street.

10 A Give me your example again about Brown's
11 Ferry. I'm sorry. I was reading this.

12 Q Was Brown's Ferry within the local
13 commuting area from Chattanooga? I think it says 60
14 miles.

15 A It's not within 60 miles of Chattanooga.
16 No.

17 Q No, I didn't think so. So he's offered a
18 job more than 60 miles. If you're in the higher pay
19 grade, they can offer you a job outside of the 60 mile
20 radius, and you have to take it, as long as relocation
21 expenses are paid.

22 A That's correct.

23 Q And they give you at least 80 percent of
24 your salary.

25 A That's correct.

1 Q So there was nothing if you chose Option
2 2, to stop TVA from a day, a week after he went to
3 Services, saying we got you a job at Brown's Ferry at
4 80 percent of what you're making now. Take it, or
5 you're on the street.

6 A He could have been offered a job at
7 Brown's Ferry. Yes, that's correct. It could have
8 been 80 percent. If he had -- and it would have
9 provided relocation opportunities for him. And
10 essentially, we would have moved him. He'd have had
11 some temporary quarters type of arrangements and some
12 things like that. That could have happened, yes.

13 CHAIRMAN BECHHOEFER: At that point in
14 time, did relocation costs include costs of either
15 refinancing your mortgage, or getting a new mortgage,
16 sale of your house, and purchase of another house,
17 commissions, that type of thing?

18 THE WITNESS: When you're relocated, it
19 covers one way travel, the travel to the new location,
20 the reporting expense. It covers some of the closing
21 costs on a home. It covers --

22 CHAIRMAN BECHHOEFER: Both ways? I mean,
23 both --

24 THE WITNESS: Sell and buy, purchase of
25 the home. And typically, I think temporary quarters

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1 for like 30 days, and our house hunting trip could be
2 offered.

3 CHAIRMAN BECHHOEFER: Thank you.

4 BY MR. DAMBLY:

5 Q Okay. And again, just to make sure we get
6 the complete answer. If Gary had refused that offer,
7 said I'm not leaving my house. I don't want to leave
8 Chattanooga, if he didn't get to spend the year in TVA
9 Services, he would have been issued a reduction in
10 force notice.

11 A Yes. If he would have turned down a
12 reasonable offer, he would have been issued a
13 reduction in force. And when that would have
14 happened, what essentially would have happened, he
15 would have -- I think at the time, I'm trying to
16 remember if it was 30 or 60, but he would have been
17 issued a notice given his period of time that he would
18 have had to -- would be still in working pay status.
19 He would have got his severance pay, and when you're
20 reduced in force involuntarily, the retirement benefit
21 is blocked. It was in Option 1. And he would have
22 got his unused sick leave too, or annual leave.
23 Excuse me.

24 CHAIRMAN BECHHOEFER: Does sick leave get
25 added to the equivalent years of service to

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1 determine --

2 THE WITNESS: Yes, sir. Unused sick leave
3 does.

4 CHAIRMAN BECHHOEFER: Unused sick leave.

5 THE WITNESS: Yes, sir.

6 CHAIRMAN BECHHOEFER: Yes.

7 THE WITNESS: And the first thousand hours
8 is an hour for hour transfer, I'll say, or you get
9 credit on an hour to hour basis. Once you go over a
10 thousand hours, it doubles.

11 CHAIRMAN BECHHOEFER: I see. All right.
12 I see. I have over 3,000.

13 THE WITNESS: I do too.

14 MR. DAMBLY: I think I'd have some long
15 sustained illness for a year or so, something
16 requiring physical therapy on a golf course for quite
17 a few hours.

18 JUDGE YOUNG: It's getting late.

19 THE WITNESS: Yes, ma'am.

20 BY MR. DAMBLY:

21 Q Staff 63 - I'm sorry. Joint Exhibit 63,
22 same book that had the manual on reduction in force,
23 just two exhibits earlier.

24 A What number did you say again?

25 Q 63. This is the management and selection

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1 process that was in effect from, I guess, '93 forward,
2 at least through '96 time frame.

3 A Yes, sir.

4 Q And under number 3, "Instructions. 3.1
5 Advertising Management Specialist Positions." And
6 then we get down A, B, C. It says, "The supervisor
7 requests Nuclear Employee Relations and Development
8 PR&D, to post the position and provide a current
9 position description." If that's a requirement, how
10 can you have a person in a position that doesn't have
11 a position description, if the position was posted?

12 JUDGE YOUNG: Repeat that, please.

13 MR. DAMBLY: I said if the requirement is
14 as stated here that you have to post a position, you
15 provide a current position description, how can an
16 employee be in a position that was posted, and there
17 be no position description?

18 THE WITNESS: There probably was a
19 position description when the person -- when we posted
20 the job.

21 BY MR. DAMBLY:

22 Q Okay. And so if somebody lost the PD,
23 then you get rights that you wouldn't otherwise have,
24 because then you go to another PD in a reduction
25 situation?

1 A In reduction, I don't know they
2 characterize them as rights that you might not
3 normally have but, you know, I've already said that
4 when you don't have the PD of the position, or going
5 to the official PD of record, and we're going to the
6 PHR and look for the latest PD.

7 Q You wouldn't look for the position
8 description that was part of the posting for the job
9 the employee was in.

10 A We try to. That's why we're going to the
11 PHR, because that's where it should be recorded.

12 Q Well, would you go back to the VPA folder
13 and see if it was in there?

14 JUDGE YOUNG: What folder?

15 MR. DAMBLY: VPA.

16 JUDGE YOUNG: Oh, VPA.

17 MR. DAMBLY: Vacant position announcement
18 folder, or whatever.

19 MR. MARQUAND: You're looking for
20 employee's official position description?

21 MR. DAMBLY: Looking for the position
22 description for the position the employee occupies.

23 THE WITNESS: I don't think so. I think
24 you -- I mean, to assure some -- I mean, continuity,
25 it's been my experience, I've always gone to the PHR

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1 to look for it.

2 BY MR. DAMBLY:

3 Q But suppose you go there and you don't
4 find it?

5 A Well, I'm probably going to focus in on
6 the one that's there and see what it looks like. Yes.

7 Q How about if it's the first job the
8 employee ever had?

9 A I guess that's the one I'm going to use.
10 Which one?

11 Q No, I'm talking about the employee now.
12 This is his job at TVA, and you go and you don't find
13 a PD. So you just go out the door, sorry about that.
14 Tough luck. We screwed up, because he doesn't have an
15 official job at that point. Right?

16 A He's got a job, but he doesn't have a PD.
17 And that's a good question. I don't know if I -- I've
18 never run into that situation.

19 Q Well, tell me what you think you'd do.

20 MR. MARQUAND: Objection. Why are we
21 dealing with --

22 MR. DAMBLY: He's an expert.

23 MR. MARQUAND: -- things that have no
24 relevance to this case? It's not relevant at all to
25 Fiser's situation, or McArthur's situation.

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1 JUDGE YOUNG: I think Mr. Fogleman already
2 testified that he might not have treated the McArthur
3 situation the same, and that, I presume, is what
4 you're getting to.

5 MR. DAMBLY: Well, I'm asking the whole
6 issue on PD and PD of record, which has more to do
7 than just whether they made the right call. Which
8 clearly I think Mr. Boyles would even agree that they
9 weren't -- didn't meet the -- weren't interchangeable,
10 didn't meet the same quals at this point. But it's a
11 different point that goes to other issues in this case
12 about when they developed this theory in the first
13 place.

14 BY MR. DAMBLY:

15 Q If you didn't have a PD, the employee
16 didn't have one at all, whether it was the first job,
17 the last job, but for whatever reason the PHR didn't
18 have one, and you were in a reduction in force
19 situation. You had to make competitive level
20 determinations, what would you do?

21 A Well, the first thing I'd do is find out
22 had this situation ever occurred anywhere else in TVA,
23 and see what the precedent was on doing that. The
24 second thing, if I did not uncover any precedent for
25 how to handle this situation, I would consult with our

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1 attorneys, and ask them to give me an interpretation
2 and understanding of what my next step was. And is
3 there any MSPB regulations, are there any rules, or
4 prior hearings that we've had, prior decisions we've
5 had in TVA that would help us resolve this situation.
6 That would be my course of action, and see what they
7 came back with.

8 MR. DAMBLY: This might be as good a place
9 to stop as any. Actually, I don't have that much
10 more, but I'm sure we'll be here for more than that
11 much more, so hopefully we can finish fairly early
12 tomorrow.

13 MR. MARQUAND: Well, I don't know if the
14 Board's got any questions or not. The Board hasn't
15 been hesitant all day to asking. If there aren't any
16 questions, maybe Mr. Dambly could finish, and Mr.
17 Fogleman wouldn't have to come back, if he doesn't
18 really have that much more.

19 MR. DAMBLY: Well, I would think it's
20 going to take a half hour, maybe. As I said, I have
21 a need to be gone at this point, but since we're going
22 to have to do the documents and all the rest.

23 (Judges confer.)

24 JUDGE COLE: Does anybody have any time
25 constraints that are greater than a half an hour? Or

1 would you prefer to do it tomorrow morning?

2 MR. DAMBLY: Well, quite frankly I'd
3 prefer to finish.

4 MR. MARQUAND: Me too.

5 MR. DAMBLY: My guess is we won't. I
6 mean, I might be able to be done in 15 minutes. I'm
7 supposed to pick up somebody at 6, but if I pick them
8 up at 6:15, that's not a big problem. But if we go to
9 6, and then we come back anyway, then I don't know
10 what we've accomplished.

11 MR. MARQUAND: I was just thinking we
12 could get the witness done and out of here, and have
13 the testimony finished. And then tomorrow we could
14 deal with the documents in an appropriate fashion.

15 MR. DAMBLY: Does anybody have questions
16 besides me at this point?

17 (Judges confer.)

18 JUDGE COLE: Why don't we go on until
19 6:00, and you make every effort to finish by 6. If
20 not, we'll come back tomorrow morning.

21 MR. DAMBLY: Yeah. I guess --

22 JUDGE COLE: Is that putting you in an
23 unfair position?

24 MR. DAMBLY: No. I mean, it's not a
25 problem.

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1 JUDGE COLE: We want you to have all the
2 time you need.

3 MR. DAMBLY: Probably I've already had
4 more than -- since almost all of this has been covered
5 by other people. In fact, let me ask you this one
6 question.

7 BY MR. DAMBLY:

8 Q What part, if any, did you personally
9 play, other than reviewing this thing with Ms. Welch,
10 in the Op Support reorg in 1996?

11 A I didn't play any part in it.

12 Q That's what I thought.

13 JUDGE YOUNG: How did you characterize
14 that reorg? I just didn't catch the word.

15 MR. DAMBLY: The Op Support reorg.

16 JUDGE YOUNG: Operation Support.

17 MR. DAMBLY: Operation Support. I'm
18 sorry. Mr. McGrath's organization, the one we're
19 talking about here.

20 THE WITNESS: Let me just clarify a point
21 when I said I had no involvement in the
22 reorganization. I was responsible for -- we were
23 issuing a lot of Services letters, a lot of reduction
24 in force notices, and I was responsible for kind of
25 overseeing that administrative effort to get all the

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1 letters coordinated and out. But as far as the actual
2 decisions related to the reorganization, I was not
3 involved.

4 BY MR. DAMBLY:

5 Q Did Mr. Boyles report to you at that time?

6 A No, he did not.

7 Q He reported to Mr. Reynolds?

8 A That's correct.

9 Q And you had no involvement on the calls on
10 interchangeability, or what jobs had to be posted, or
11 didn't have to be posted in that organization.

12 A Right.

13 Q And you had no involvement in the
14 selection process whatsoever in that PWR position?

15 A Not in that selection process, no.

16 Q You indicated for the questions on an SRB,
17 and if the job had both inter-personal aspects, as
18 well as technical aspects, you'd ask questions or
19 expect questions so you could probe the behavioral
20 characteristics of an individual.

21 A Yes, sir.

22 Q And how do you do that in a five or ten
23 minute interview, or a twenty minute interview?
24 Supposing you say how do you interact with people?
25 And the individual says well, I try and treat them

1 with respect. And we work together in a team effort,
2 whatever. How do you know whether they're just lying
3 to you, and they'd do something totally different.

4 A You probably wouldn't ask the question how
5 you interact with people. You're probably asking
6 questions about -- a little less direct than how do
7 you interact with people. I don't come up with a good
8 example right off the top of my head but, you know --

9 Q What are your weaknesses? Would that be
10 a good one?

11 A Could be.

12 Q And you expect them to truthfully tell you
13 their weaknesses?

14 A I don't know about them, but that's --
15 when I'm asked that question, I'm pretty honest about
16 it. Yes, sir. That's what I'm expecting the people
17 I'm interviewing to do.

18 Q Since we're trying to get out of here,
19 I'll avoid the temptation to ask you how you would
20 answer that. Are you aware of, in your experience,
21 any employee at TVA who has filed a DOL complaint and
22 been promoted up the management chain subsequently?

23 MR. MARQUAND: I'm going to object.
24 That's beyond the scope of the direct, way beyond the
25 scope.

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1 MR. DAMBLY: We've got tons of documents
2 on how everybody is treated fairly, and whatever, and
3 I'm asking the question.

4 MR. MARQUAND: We haven't --

5 CHAIRMAN BECHHOEFER: We'll overrule the
6 objection.

7 THE WITNESS: I think --

8 CHAIRMAN BECHHOEFER: Yeah. We overruled
9 the objection, so you can answer the question.

10 THE WITNESS: So I can answer it. Okay.
11 I needed to be sure. I don't recall anyone that's --
12 I don't know everyone that's filed a DOL complaint,
13 but I'm not aware of the ones I'm familiar with being
14 promoted up the chain.

15 BY MR. DAMBLY:

16 Q And just briefly on -- I guess it's TVA
17 Exhibit 93, which is the one with the retention
18 register with Fiser, Chandrasekaran and Harvey.

19 A I don't think I have that.

20 Q It's TVA 93. Okay. And if we're looking
21 at, I guess, EH00032, and EH0033, 33 is the one with
22 Mr. Fiser's name on it. And then EH0034, there's
23 probably others, but they all have competitive area
24 nuclear operations competitive level program manager.
25 And if they all have the same competitive area and

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1 competitive level, why are they on different retention
2 registers?

3 A Well, they would probably -- I don't know
4 specifically, but just my guess would be that they've
5 got different position descriptions.

6 Q You wouldn't put Program Manager
7 Chemistry. You just put Program Chemistry?

8 A Yeah, our management classification
9 system, there's a lot of positions that are listed as
10 program manager, listed as manager, listed as
11 supervisor, and to really make a good competitive
12 level call, you've got to go look at the PD.

13 JUDGE YOUNG: But doesn't competitive
14 level involve interchangeability?

15 THE WITNESS: Yes, ma'am.

16 JUDGE YOUNG: So all these would be
17 interchangeable that would call for program manager?

18 THE WITNESS: On that particular retention
19 register, I don't have it in front of me, but the one
20 that had Mr. Fiser on it, all those individuals should
21 have been interchangeable. And then if you go to the
22 next one, and I think Mr. Flannagan was at the top of
23 that register, all those individuals should have been
24 interchangeable.

25 JUDGE COLE: So the description really

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1 isn't complete enough. Competitive level should have
2 said program manager chemistry.

3 THE WITNESS: Yes, sir. It probably
4 should have.

5 BY MR. DAMBLY:

6 Q And so basically, anybody looking at these
7 documents won't be able to tell just by looking at
8 them the correctness of any competitive level
9 determinations you made.

10 A A person looking at that document, you
11 know, if it had had the competitive level listed as
12 program manager chemistry or whatever, you know, I
13 guess what you're saying is, you know, really to make
14 that call you're going to look at the PD.

15 Q Now one last area. Again, let me show you
16 - I don't know if you have it in front of you - TVA
17 Exhibit 152, the letter to Mr. Harvey on the
18 harassment intimidation issue?

19 A Yes, sir. I do have it.

20 Q And you told us earlier you would consider
21 this a written warning, I think. Is that correct?

22 A I said this would be documentation of --
23 my interpretation of this document would be a
24 documentation of like a counseling session, a meeting
25 and counseling session.

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1 Q All right.

2 A A formal warning would have probably --
3 should have. Let me not say probably. If it was in
4 the proper format, would have had this memorandum
5 serves as a formal warning that you're doing something
6 wrong.

7 MR. DAMBLY: Could I have Exhibit 151?

8 CHAIRMAN BECHHOEFER: What number?

9 MR. DAMBLY: 151.

10 CHAIRMAN BECHHOEFER: Okay.

11 JUDGE YOUNG: Are you finished with 93?

12 MR. DAMBLY: Yes, I am, Your Honor.

13 BY MR. DAMBLY:

14 Q Do you recognize what that document is,
15 Mr. Fogleman?

16 A It's employee conduct and disciplinary
17 guidelines.

18 Q All right. And if you would turn to page
19 CB000126.

20 A Okay.

21 Q And that lists the range of penalties for
22 various offenses.

23 A Yes, sir.

24 Q And what's the first level penalty for
25 intimidation/harassment?

1 A Oral warning.

2 Q Do you see an X under oral warning for
3 intimidation or harassment?

4 A Oh, I'm sorry. I was looking at
5 tardiness. Intimidation and harassment is written
6 warning.

7 Q And if you follow the guidelines and this
8 was considered a written warning, would it go into the
9 PHR?

10 A If you consider this a written warning, it
11 would go into the PHR. I don't consider it a written
12 warning.

13 Q Well, who made the determination? Do you
14 have any idea who sent it to the PHR?

15 A No, I don't.

16 Q You don't know if Mr. Boyles thought
17 that's what it was, and sent it there?

18 A I don't know that.

19 MR. DAMBLY: I have no further questions.

20 MR. MARQUAND: Your Honors, I have a
21 couple of real quick questions to clarify some things,
22 and I'll just take 30 seconds. I promise.

23 CHAIRMAN BECHHOEFER: Okay. I have one or
24 two, but not significant.

25 REDIRECT EXAMINATION

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1 BY MR. MARQUAND:

2 Q Mr. Fogleman, TVA Exhibit 93, page --
3 counsel pointed you to EH33, that's the retention
4 register for Mr. Fiser.

5 A Correct.

6 Q And Mr. Fiser was the chemistry and
7 environmental program manager?

8 A Okay.

9 Q And page EH34, you said that that had Mr.
10 Flanagan at the top. Right?

11 A Right.

12 Q When he was a program manager, do you
13 recall what kind of job he had in RadCon?

14 A I think so. I don't specifically recall,
15 but I know he's currently doing RadCon work.

16 Q All right. And you would have had to look
17 at their specific Pds to determine which retention
18 register to put those individuals on.

19 A That's correct.

20 Q Counsel asked you about Joint Exhibit 28,
21 and Mr. Fiser's assignment to Services, and he asked
22 you about Option 1. He said could TVA offer Gary
23 Fiser a job at Brown's Ferry at 80 percent, and if he
24 refused, then RIF him. That was the policy, wasn't
25 it?

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1 MR. DAMBLY: Objection. That was Option

2 2.

3 MR. MARQUAND: Okay. I'm sorry. Option

4 2.

5 THE WITNESS: Yes, that was the policy.

6 BY MR. MARQUAND:

7 Q All right. Are you aware of any
8 situations where people in TVA Nuclear were offered
9 jobs at 80 percent of their salary, and refused them,
10 and then were RIFed?

11 JUDGE YOUNG: And then were or were not?

12 MR. MARQUAND: Were RIFed if they refused
13 the job. When they refused the job at such a salary.

14 THE WITNESS: I don't recall any.

15 BY MR. MARQUAND:

16 Q All right. You were asked if you knew of
17 any DOL complainants who had progressed up the
18 management chain. Do you know Ann Harris?

19 A Yes.

20 Q Do you know if she was ever -- she was
21 employed by TVA as a clerk. Do you know of any jobs
22 that she ever obtained on her own merit, or did she
23 obtain all of them by filing various grievances and
24 DOL complaints?

25 A She was in the management chain to the

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1 selection process, or the management not chain, but
2 the management -- she was in the management -- she
3 moved into the management schedule.

4 Q And how high did she progress in the
5 management schedule?

6 A I don't know. PG.

7 Q About a PG-7 or 8?

8 A She was a -- she worked in Human Resources
9 for a while, and she was training a development
10 person, and that was either a PG-7 or a PG-8 job.

11 Q All right. And the last question I have
12 is about lateral transfers. And you gave an example
13 of an individual moving from -- at the same grade and
14 the same pay, and that was defined by you as a lateral
15 transfer, where that individual would be selected for
16 a different job at the same pay and grade?

17 A Yes, sir.

18 Q All right. And that would be through the
19 selection process that they would move?

20 A Yes.

21 MR. MARQUAND: That's all the questions I
22 have.

23 JUDGE YOUNG: Your question about Ms.
24 Harris, I understood you to ask isn't it true that --

25 MR. MARQUAND: Well, he didn't -- he

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1 couldn't confirm that, but he did confirm that she
2 went --

3 JUDGE YOUNG: Well, what I want to know is
4 what was your question.

5 MR. MARQUAND: I asked was she -- did she
6 come in as a clerk, and then proceed up the chain to
7 a PG-7 or 8 in the management schedule, even though
8 she had -- by filing DOL complaints and grievances.
9 Couldn't answer that, but did say that she did
10 progress through the management chain.

11 JUDGE YOUNG: Well, but the question
12 seemed -- it's different whether you say by filing, or
13 even though. And I thought --

14 MR. MARQUAND: I understand.

15 JUDGE YOUNG: -- the question was by
16 filing, which would -- could imply that the only way
17 she got them was by someone from outside telling TVA
18 to give them to her. And I didn't know whether that
19 was what you meant to imply or not.

20 MR. MARQUAND: Well, that doesn't imply
21 that either. It implies --

22 JUDGE YOUNG: Pardon?

23 MR. MARQUAND: It might imply that, but it
24 could also imply she files them, and they get settled,
25 and giving something else.

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1 JUDGE YOUNG: That's why I'm asking you to
2 clarify what it was you were asking.

3 MR. MARQUAND: What I said was by filing
4 them, and I didn't say whether it was by her being
5 awarded those jobs, or by virtue of a settlement
6 either way. But that was my question.

7 JUDGE YOUNG: Okay. Your question was
8 unclear to me. I understand, Mr. Fogleman, you don't
9 know anything about Ms. Harris. Is that correct?

10 THE WITNESS: I know about Ms. Harris.
11 What I don't know about is what job she got through
12 selection through the vacant process, and what
13 positions she may have gotten through settlement
14 discussions and agreements.

15 JUDGE COLE: Did you know whether she
16 filed DOL complaints?

17 THE WITNESS: Yes, she did file DOL
18 complaints.

19 JUDGE COLE: Okay.

20 CHAIRMAN BECHHOEFER: Do you know what her
21 level was when she filed such complaints, to compare
22 it with the PG-7 or 8 that you said she reached? Was
23 it a lower level than that?

24 THE WITNESS: She filed complaints at a
25 lower level.

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1 MR. MARQUAND: At various lower levels.
2 Is that correct, Mr. Fogleman?

3 CHAIRMAN BECHHOEFER: But I just was going
4 to inquire whether she filed them at a 7 or 8 and got
5 stuck there?

6 THE WITNESS: She filed, and I don't know
7 -- I didn't work specifically on any of her cases, but
8 she did file several complaints. And I don't know on
9 the specifics when she filed the particular complaints
10 what level she was. But she had held various
11 positions in the organization, and probably the PG-7
12 or 8 position was her highest level she attained.

13 JUDGE YOUNG: Do you know anything about
14 whether subsequent to filing a complaint, she was
15 promoted for any reason other than as a settlement, or
16 as ordered by someone from outside TVA?

17 THE WITNESS: I just don't know.

18 JUDGE YOUNG: Okay. So you know that she
19 filed a complaint. Am I understanding you correctly
20 that you know that she remained an employee, and went
21 up the ladder, but you just don't know --

22 THE WITNESS: I don't know the
23 circumstances of how she went up --

24 JUDGE YOUNG: Okay. Hold on.

25 THE WITNESS: I'm sorry.

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1 JUDGE YOUNG: What I'm asking you is, I'm
2 understanding you to be telling me that you know she
3 filed complaints. You know that she subsequently had
4 higher level positions, and that you don't know how
5 she got those higher level positions.

6 THE WITNESS: That's correct.

7 JUDGE YOUNG: And that's all you know.

8 THE WITNESS: That's all I know.

9 JUDGE YOUNG: Thank you.

10 CHAIRMAN BECHHOEFER: Well, the question
11 I had mentioned that I wanted to ask was really the
12 reverse of that. Do you know what the history of
13 other employees, employees other than Mr. Fiser who
14 filed DOL complaints, and either eventually lost their
15 jobs, or resigned under pressure or some sort, or were
16 RIFed for that matter? Involuntary separations, in
17 other words.

18 THE WITNESS: Yes, sir. Yeah, we have had
19 employees who have filed Department of Labor
20 complaints, that have gotten RIF notices. We have
21 employees who have filed Department of Labor
22 complaints that are still working at TVA, so we've had
23 both situations.

24 CHAIRMAN BECHHOEFER: I see. Thank you.

25 JUDGE YOUNG: And with regard to Ms.

1 Harris, you know, she went up the ladder. You just
2 don't know how.

3 THE WITNESS: I don't know the -- I just
4 don't recall the specifics of how that happened.

5 JUDGE YOUNG: Thank you. Anything
6 further?

7 MR. MARQUAND: Nothing further.

8 MR. DAMBLY: Nothing further.

9 JUDGE YOUNG: Well, I guess you can go
10 home.

11 CHAIRMAN BECHHOEFER: Yeah, that's all I
12 have. Mr. Fogleman, thank you for appearing, and I
13 guess you're excused.

14 THE WITNESS: Thank you. I appreciate it.

15 MR. DAMBLY: Are we done for now?

16 CHAIRMAN BECHHOEFER: Pardon?

17 JUDGE COLE: We're done for now.

18 JUDGE YOUNG: So we'll meet back here
19 tomorrow morning, and start going through all these
20 documents. And yeah, I think it would be a good idea
21 to bring one of those bins.

22 MS. EUCHNER: Well, I'm assuming
23 maintenance or somebody, I don't know who you would
24 call to come pick up stuff, but they usually --

25 MR. MARQUAND: Are we dressing for success

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1 tomorrow, or what?

2 JUDGE YOUNG: Wear whatever you want,
3 within reason.

4 CHAIRMAN BECHHOEFER: I might even take my
5 coat off.

6 JUDGE YOUNG: There's nothing in here that
7 would need to be burned or anything, is there? Like
8 Social Security numbers, people's --

9 MS. EUCHNER: Your Honor, all the --

10 CHAIRMAN BECHHOEFER: We can go off the
11 record.

12 (Whereupon, the proceedings went off the
13 record 6:10 p.m.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Tennessee Valley Authority
Watts Bar Nuclear Plant,
Unit 1 Sequoyah Nuclear
Plant, Units 1 and 2 Browns
Ferry Nuclear Plant, Units
1,2,3

Docket Number: . 50-390-CivP; ASLBP No: 01-
791-01-CivP

Location: Rockville, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

15/ Rebecca Davis
Rebecca Davis
Official Reporter
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