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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

ASLBP No. 01-791-01-CivP-EA 99-234

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

TENNESSEE VALLEY AUTHORITY'S POSTHEARING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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TENNESSEE VALLEY AUTHORITY'S POSTHEARING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. INTRODUCTION

a. Basis For This Proceeding.

1.0 This proceeding was initiated by the Tennessee Valley Authority (TVA) which requested a hearing before an Atomic Safety and Licensing Board (Board) with respect to a May 4, 2001, order from the Nuclear Regulatory Commission (NRC) Staff (Staff) imposing a civil monetary penalty of $110,000.[1] The order is based on a February 7, 2000, Notice of Violation (NOV; JX47) against TVA for allegedly violating 10 C.F.R. § 50.7[2] by discriminating against Gary L. Fiser, a

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1 The order was admitted into the record as Joint Exhibit 53. Joint Exhibits will be referred to herein as "JX__"; TVA Exhibits will be referred to as "TVAX__"; and Staff Exhibits will be referred to as "SX__." Exhibit pages will be referred to by the Bates Number where so marked. Citations to the transcript of the prehearing conferences and the hearing will appear as "[witness] p. __, *l.* __."

2 Section 211 of the ERA prohibits an NRC-licensed employer from discriminating against an employee for engaging in certain defined protected activities. The NRC's employee protection provision, 10 C.F.R. § 50.7, is based upon section 211

former TVA employee, for engaging in "protected activities." According to the NOV, TVA retaliated against Fiser for his protected activity when it eliminated his job in Nuclear Operations Support as part of a reorganization and took subsequent actions to ensure that he was not selected for a new job (JX47 at AB000026). These findings and rulings address all outstanding issues with respect to the May 4, 2001, order and the February 7, 2000, Notice of Violation.

1.1 The case was heard by Board over a period of six weeks beginning in April and ending in September 2002. These posthearing findings of fact and conclusions of law are submitted in accordance with the Board's September 13, 2002, order and (a) provide a statement of the proposed findings that TVA believes are supported by the evidence in the record and (b) address the legal issues relevant to a proper outcome in this case.

b. The Staff's Theory of the Purported Violation Keeps Changing.

1.2 The Staff's September 20, 1999, letter notifying TVA of an apparent violation, the NOV and the May 4, 2001, order were based on the findings of an investigation by the NRC's Office of Investigation (OI) (JX44 at AB000003, 06, 07; JX47 at AB000020, 26; JX53 at AB001003, 07). Despite the Staff's express reliance on OI's report of its investigation and the Staff's use at the hearing of various statements made during the investigation (See, e.g., SX6, 26, 53, 73, 97, 111), the Staff did not offer OI's report into the record. In fact, the Staff divorced itself from the OI report and took the position that it should "not be a part of the record" (Dambly p. 91, *l.* 17—p. 92, *l.* 7). Indeed, the Staff's view of the facts continues to change as do the bases asserted by the Staff for the purported violation. Moreover, the "facts" asserted by the Staff are based on speculation and conjecture.

(. . . continued) (see 47 Fed. Reg. 30,452, July 14, 1982) and in fact expressly incorporates the ERA's definition of protected activities.

c. The Staff Initially Relied Upon the OI Report.

1.3 The Staff's September 20, 1999, letter states that the OI "investigation indicated that discrimination [was undertaken] by two corporate level TVA managers" (JX44 at AB000003). The summary of the OI report enclosed with the letter identifies the two managers as Thomas J. McGrath and Dr. Wilson C. McArthur by their positions (*id.* at AB000007). Both the letter and the summary of the OI report state that Fiser's protected activity was his filing of a Department of Labor (DOL) complaint in September 1993 (*id.* at AB000003, 07). The summary of the OI report expressly states that the two individuals "*were named as culpable parties in [Fiser's] 1993 DOL complaint.*" The summary further states that "in his DOL complaint, [Fiser] named as parties to his discrimination the individuals who served as Committee Members, Nuclear Safety Review Board (NSRB) [McArthur] and Chairman, NSRB [McGrath], in 1993" (JX44 at AB000007).[3] Thus, the basic premise of the letter and the OI report was that McGrath and McArthur discriminated against Fiser in 1996 in retaliation for his 1993 DOL complaint. Neither the letter nor the summary of the OI report suggest that Fiser had engaged in any other protected activity.

1.4 The OI summary further alleges that "the selection process was contrived to preclude" Fiser's selection, that "the individual selected for the position of PWR, Chemistry Program Manager [Sam Harvey], was preselected," that Harvey "could have been placed in a vacant site chemistry position," and that "the request for placement of [Harvey] at the site was rejected by" McGrath (JX44 at AB000007). The Staff's letter and the OI summary state that "discrimination was substantiated through a showing of disparate treatment" [*id.* at AB000003, 06). Neither the letter nor the report state that discrimination was substantiated in any other way. The OI summary

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3 Emphasis added unless otherwise noted.

identifies the alleged disparate treatment. It alleges that "TVA subjected [Fiser] to disparate treatment" in that McArthur was "appointed to the position of RadCon Chemistry Manager . . . without competition in contravention of TVA policy, while [Fiser] was required to compete for one of the two Chemistry Program Manager positions" (JX44 at AB000007).

1.5 Simultaneously with the September 20, 1999, letter to TVA, the Staff sent McArthur and McGrath each a letter accusing them of discriminating against Fiser "as a result of [his] engaging in protected activity" (JX45, 46). Just like the letter to TVA, the letters to McArthur and McGrath stated that the OI report " forms the basis for the NRC's conclusion that an apparent violation occurred" (JX44 at AB000003, JX45 at 1, JX46 at 1). Finally, like the letter to TVA, the summaries of the OI report sent to McArthur and McGrath stated that Fiser's "protected activity involved [his] filing of a discrimination complaint with the DOL in September 1993." Also like the letter to TVA, the letters to McArthur and McGrath included a summary of the OI report which stated that they each were " named as a culpable party in [Fiser's] 1993 DOL complaint." JX45 at 6; JX46 at 6.

d. The Staff Changed Its Theory of Discrimination in the NOV.

1.6 Predecisional enforcement conferences were held with respect to McGrath and McArthur on November 22, 1999 (SX133, 134), and with respect to TVA on December 10, 1999 (SX135). It was pointed out at each conference that the basic premise of the OI report was incorrect—Fiser's 1993 DOL complaint did not accuse either McArthur or McGrath of discrimination and they were not " named as culpable parties in that complaint." To the contrary, it was pointed out that McGrath is not even mentioned by name or position and McArthur is described in the complaint as an ally. McGrath pointed out that he was not even aware of the 1993 DOL complaint until Fiser threatened to file a new DOL complaint in June 1996, and he did

not actually see the 1993 DOL complaint until 1999 (SX133 at 81-82; SX134 at 14-15; SX135 at 23-24; SX34). In fact, OI did not have a copy of Fiser's 1993 DOL complaint in its investigative file and the Staff did not see the contents of that complaint, in connection with the charges in this proceeding, until TVA, McGrath, and McArthur provided copies at the preenforcement conference in 1999 (Luehman p. 316, *l.* 4—p. 318, *l.* 23).

1.7 Confronted with the fact that McArthur and McGrath could not have been motivated to retaliate for being accused as discriminators or "culpable parties," the Staff took a new tack. On February 7, 2000, the Staff issued NOVs to TVA, McArthur, and McGrath (JX47, 48, 49). In the NOVs, the Staff stated that the assertion in the September 20, 1999, letters that McArthur and McGrath "were named as culpable parties in [Fiser's] 1993 DOL complaint" (JX44 at AB000007) was merely "misstated" and "inaccurate" (JX47 at AB000022; JX48 at 2; JX49 at AB000920). In the NOVs, the Staff broadened the protected activity which it claimed was the reason for the purported retaliation. Instead of identifying Fiser's protected activity as solely "the filing of a . . . DOL complaint in September 1993" (JX44 at AB000003), the NOVs new claim was that his protected activity was the filing of the 1993 DOL complaint which alleged that he had been discriminated against "for raising nuclear safety concerns" and that those concerns "included his identification of various chemistry related issues at the Sequoyah facility in the 1991 to 1993 time frame" (JX47 at AB000020-21; JX48; JX49). Amazingly, despite the Staff's newly-expanded view of Fiser's protected activity, the Staff apparently did not conduct a review to determine if Fiser in fact raised any "chemistry related issues in the 1991 to 1993 time frame." James Luehman, the Deputy Directory of the NRC's Office of Enforcement, and who sat on the Staff's enforcement review panel in this matter (Luehman p. 281, *ll.* 17-24), was unable to say whether the Staff determined that Fiser raised any specific issues (Luehman p. 320, *ll.* 6-13). In fact, Fiser's 1993 DOL complaint was investigated by

OI which issued a report on May 22, 1995 (SX177). If the Staff had reviewed that report in connection with the decision to issue the NOV in this case, they would have learned that NRC Regional Counsel reviewed Fiser's interview and the material submitted by Fiser in support of his 1993 DOL complaint and concluded that " Fiser had not engaged in protected activity" but that "'there were performance based issues with Fiser nothing more'" (JX67 at 1).

1.8 Besides ignoring their own mistake in assuming that McGrath and McArthur were not named as "culpable parties" in Fiser's 1993 DOL complaint and expanding the scope of Fiser's protected activity, the Staff chose in the NOV to disregard McGrath's sworn statement that he was unaware until 1996 that Fiser had filed a 1993 DOL complaint (McGrath p. 683, *l.* 13—p. 685, *l.* 3). Instead, the Staff asserted that it was "more likely than not that" McGrath knew of Fiser's 1993 DOL complaint before 1996 based on "his position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews" (JX47 at AB000022). One might assume from the Staff's use of the words "given his position in the organization," that McGrath would have known as a matter of course who was interviewed in connection with Fiser's 1993 DOL complaint (*id.*). On the contrary, the Staff failed to explain how McGrath's position in a different organization, with a different chain of command, and at a different location could possibly support the Staff's conclusion that it was "more likely than not" that McGrath learned of that complaint before 1996. Once again, the Staff was guilty of not checking their facts before accusing McGrath of discrimination. In fact, there were no DOL interviews and had the Staff reviewed DOL's investigative file on Fiser's 1993 DOL complaint, they would have learned that the case was resolved before DOL conducted a single interview (McGrath p. 726, *l.* 10—p. 727, *l.* 6; p. 723, *l.* 10—p. 724, *l.* 19). Similarly, there is no evidence that OI or the Staff reviewed, as a part

of the decision to issue the NOV in this proceeding, the investigative file of the TVA Office of Inspector General (TVA OIG) on Fiser's 1993 DOL complaint.

1.9 In expanding the scope of Fiser's protected activity, the Staff asserted that McGrath and McArthur "were knowledgeable and critical of Fiser's 1991-1993 protected activity involving chemistry related safety concerns and their actions in this regard were part of the information developed associated with the 1993 DOL case" (JX47 at AB000022). Throughout the course of the hearing, the Staff's apparent theory has been that Fiser raised safety issues to the NSRB and, that in retaliation, McGrath and McArthur discriminated against him in 1992 by giving directions that caused him to be removed from his position in Sequoyah Chemistry in 1992 and prevented him from returning in 1993. Such a theory is inconsistent with the claims in Fiser's 1993 DOL complaint and OI's investigation of that complaint. Fiser's 1993 DOL complaint (SX34) was that he was removed by plant management and OI's investigation (JX67; SX177 at 8) confirmed that he was removed by management for performance-based issues. The record here does not show that the Staff reviewed these matters prior to sending its letters notifying TVA, McArthur, and McGrath of an apparent violation (JX44, 45, 46).

e. Summary of Findings Supported by the Record.

1.10 The evidence presented at the hearing shows that TVA—and in particular McGrath and McArthur—did not discriminate against Fiser for engaging in protected activities. The decisions cited by the Staff in the NOV were in reality organizational decisions involving many matters transcending Fiser and involving many people and organizations beyond the two immediate supervisors accused by the Staff. The decisions made in connection with the reorganization of TVA Nuclear (TVAN) in July 1996—and in connection with the related elimination of Fiser's position of Chemistry and Environmental Protection Program Manager in Nuclear Operations

Support and the selection of individuals to fill new positions—all were made solely for legitimate business reasons. Notwithstanding the Staff's assertion of contrary inferences, these actions were not undertaken in retaliation for Fiser's engaging in protected activity. Moreover, contrary to any Staff perceptions otherwise, there is nothing pretextual about these legitimate reasons.

1.11 Several key points were developed in the evidence presented in the hearing. For example:

- Contrary to the Staff's assertion that McGrath and McArthur were "knowledgeable and critical" of Fiser's protected activity, there is absolutely no evidence in the record that McGrath had any awareness that Fiser had purportedly raised concerns in 1991-93 or filed a 1993 DOL complaint prior to 1996. The Staff's assertion that McGrath was aware of the 1993 DOL complaint is based solely on the Staff's speculation and is not supported by any evidence in the record, moreover, McGrath's position in the organization was such that it could not reasonably be assumed that he would have learned of the complaint.
- While McArthur had knowledge that Fiser had filed a DOL complaint in 1993, there is no evidence that either he or McGrath were motivated by that complaint to discriminate against Fiser. Indeed, in 1994, at a time much closer in proximity to the alleged protected activity, McArthur was Fiser's second-level supervisor and later interacted as part of the selection process which resulted in the selection of Fiser for a position. There was no evidence introduced at the hearing that either McGrath or McArthur were ever even critical of any protected activity by Fiser.
- The 1993 DOL complaint (SX34) did not allege that Fiser ever raised any safety issue. Rather, it simply highlighted Fiser's own performance deficiencies and his desire to escape accountability for those deficiencies. There was nothing in the complaint that would create a motivation on either McGrath's or McArthur's part to retaliate against Fiser at any time—much less years later in 1996.
- The nuclear safety-related issues referenced in the 1993 DOL complaint do not constitute protected activity by Fiser since they were not identified, raised, documented, or championed by Fiser. Rather, he was on assignment in other organizations when those issues were identified and documented by others.

- The NSRB, of which McGrath and McArthur were a part, was responsible for identifying problems in the Sequoyah Chemistry program. Fiser's inability or refusal to resolve the NSRB's concerns was not protected activity.
- OI concluded in 1995 that the allegations of discrimination in Fiser's 1993 DOL complaint could not be substantiated based in part on a conclusion that the issues in his complaint and his "Sequence of Events" (JX27) were disputes about his performance and did not constitute protected activity.
- Although the Staff infers discrimination based in part upon the "temporal proximity between the appointment of [McGrath and McArthur] as Fiser's supervisors and his non-selection in July 1996" (Feb. 7, 2000, JX47 at AB000022), nearly three years lapsed between even the filing of the 1993 DOL complaint and the alleged adverse action. An inference of retaliatory motive based on such attenuated "proximity" is contrary to law. The courts allow an inference of discrimination based on temporal proximity between protected activity and adverse action only if the proximity is measured in terms of mere days or weeks, not three years. Moreover, in fact, such an inference is not credible. McArthur was in Fiser's chain of command from April 1994 until August 1994 and they worked together until the nonselection in 1996, so this temporal proximity does not exist. And there is no factual basis to support an inference that either McGrath or McArthur bore such hostility toward Fiser that they would wait for an opportunity for, literally, years to discriminate against Fiser.
- The evidence shows that a TVAN-wide reorganization (that had nothing to do with Fiser other than that he was affected) eliminated Fiser's position. The reorganization clearly was undertaken for nondiscriminatory reasons and affected numerous other employees in Fiser's organization and throughout TVAN.
- Fiser was not subject to disparate treatment. His job was eliminated as were hundreds of other jobs in TVAN. The decision to advertise the new Chemistry Program Manager jobs was in accordance with TVA policies and consistent with the way the vast majority of new jobs were treated.
- The Staff's attempt to infer disparate treatment based on how McArthur's position was handled at another time is both wrong and inapposite. The decision not to advertise that job was made by Human Resources (HR), not McGrath or McArthur, in accordance with established TVA policies, Even if that decision was incorrect, it was not made with a discriminatory animus toward Fiser.

- Fiser's nonselection for a new position was based on objective nondiscriminatory reasons in accordance with normal TVAN practices. He was the lowest rated of the three candidates by a Selection Review Board that was staffed by three individuals other than McGrath and McArthur. Even though two members of the SRB were aware of Fiser's DOL complaint, a statistical analysis of the candidate's scores shows that their knowledge of his protected activity was not a factor.

- The composition of the SRB was consistent with TVAN policy and fair and impartial. The inability of Jack Cox to serve on the SRB was not procured by either McGrath or McArthur and did not prejudice Fiser since the members are supposed to be impartial, not advocates for any particular candidate. The SRB was not rescheduled due to administrative inconvenience and for the need to proceed with the selections, not due to a discriminatory animus toward Fiser.

- Contrary to the Staff's inferences and allegations, the selection process was fair and impartial. Notwithstanding the Staff's attempt to show flaws in this process, those alleged flaws are in reality nothing more than normal variations that enter any human process. The facts are that no other employee received preferential treatment or was preselected.

- Fiser tried to put himself in a position to create a claim of discrimination by threatening to file a DOL complaint prior to the job being posted, by filing a complaint before the selection process occurred, and by informing Charles Kent of his complaint, knowing that Kent would be on the SRB.

- The questions asked by the SRB of the candidates for the PWR Chemistry Program Manager position were fair and not intentionally slanted toward Harvey. To the extent they addressed secondary chemistry, they addressed the needs of the organization. Moreover, the PWR job was intended to be the secondary chemistry expert. The BWR job, for which Fiser did not apply, was intended to be the primary chemistry expert.

- Harvey was not preselected for the job that Fiser sought. His comments regarding whether he would be selected displayed his confidence in his abilities and the fact that Fiser had indicated he was not interested in the job—nothing more.

- McGrath did not block Harvey's transfer to Sequoyah in order to keep him in the corporate organization and force Fiser to compete with him. Harvey was not transferred to Sequoyah because a transfer could not be undertaken consistent with TVA's policies, a decision made by HR and communicated to McGrath. If Sequoyah

had wanted to fill a vacancy, it was required to advertise the position and follow a competitive selection process.

- Kent's comment the day of the SRB regarding Fiser's DOL complaint did not constitute unlawful blacklisting. Blacklisting requires a discriminatory intent. It is undisputed that he intended to and did communicate a need to be sensitive to the fact that Fiser had engaged in protected activity by filing a DOL complaint.
- In sum, the Staff has attempted to make a case against TVA—and in particular against McGrath and McArthur—that is based on a potpourri of inferences and allegations that strains reasonable credulity. The Staff did not show by a preponderance of reliable and credible evidence that these two longstanding nuclear managers discriminated against Fiser. The facts are that Fiser's nonselection in 1996 was based solely on legitimate reasons.

2. BACKGROUND

a. TVA

2.0 TVA is a federal agency, it is a "wholly-owned corporate agency and instrumentality of the United States" (*Hill v. United States Dep't of Labor*, 65 F.3d 1331, 1333 (6th Cir. 1995)), created by and existing pursuant to the TVA Act of 1993, *as amended*, 16 U.S.C. §§ 831-831ee (2000). *Stevens v. TVA*, 712 F.2d 1047, 1053 n.5 (6th Cir. 1983); *TVA v. Kinzer*, 142 F.2d 833 (6th Cir. 1944). As a federal agency, TVA is in the executive branch (5 U.S.C. § 105 (2000)). It is specifically exempted by section 3 of the TVA Act, 16 U.S.C. § 831b (2000), from the competitive or classified civil service. As a result, "TVA employees are in the excepted service, not the competitive service" (*Dodd v. TVA*, 770 F.2d 1038, 1040 (Fed. Cir. 1985)). "As a government corporation, TVA is considered an agency of the executive branch. Thus, TVA employees are regarded as federal employees in the excepted service under [the Civil Service Reform Act]." (*Hill v. TVA*, 842 F. Supp. 1413, 1416 n.2 (N.D. Ala. 1993), *citing Dodd v. TVA*, 770 F. 2d 1038, 1040 (Fed. Cir. 1985), and Fiser was a federal government employee in the excepted service while he worked for TVA. *Jones v. TVA*, 948 F. 2d 258, 262 (6th Cir. 1991); *McNabb v. TVA*, 754 F. Supp. 118,

120 (E.D. Tenn. 1990). As a consequence of being in the excepted service, TVA its employees are classified to schedules unique to TVA. At the time, management and specialist positions at TVA were classified from PG-1 to PG-11, as Senior Managers, or as executives.

2.1 As a federal agency, TVA has federal responsibilities and functions. Although TVA is a federal agency with six licensed nuclear units at three sites, Browns Ferry, Sequoyah, and Watts Bar Nuclear Plants, it does more than operate nuclear plants. Its responsibilities are focused generally at generating "prosperity to improve the quality of life for nearly eight million people in the Tennessee Valley region. As the nation's largest wholesale producer of electricity and the operator of the nation's largest public power system, TVA strengthens the regional economy by promoting economic development, supplying low-cost reliable power, and supporting a thriving river system" (TVA's 1999 Annual Report, at 2; copy attached).[4] TVA operates more than 220 electric generating units, which include nuclear, fossil, gas turbine, pumped storage, and hydro. TVA delivers that power on its more than 17,000 miles of transmission lines, which it maintains. In addition, TVA manages the Tennessee River for flood control, navigation, water quality, and recreation, through a series of more than 24 dams. It manages some 480,000 acres of recreational lakes, 277,000 acres of reservoir land, and 11,000 miles of public shoreline. In addition, it provides economic development loan commitments to bring businesses into the area and to improve prosperity (1999 Annual Report at 2-3; McGrath p. 681, *l.* 21—p. 682, *l.* 13).

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4 Section 9(a) of the TVA Act, 16 U.S.C. § 831h(a) (2000), requires the TVA Board to "file with the President and with the Congress, in March of each year, a financial statement and a complete report as to the business of the Corporation covering the preceding governmental fiscal year." The NRC may, of course, take judicial notice of TVA's annual reports. *Illinois Cent. R.R. v. TVA*, 445 F.2d 308, 310 n. 4 (6th Cir. 1971); *Mobil Oil Corp. v. TVA*, 387 F. Supp. 498, 500 n.1 (1974).

2.2 Although TVA has numerous responsibilities, the TVA nuclear program is organizationally separate from other programs within TVA. It currently reports to a Chief Operating Officer through TVA's Chief Nuclear Officer (McGrath p. 682, *ll.* 18-25).

b. TVA Is Committed to Nuclear Safety and Ensures That Employees Feel Free to Raise Nuclear Safety Concerns.

2.3 TVA's commitment to nuclear safety includes an assurance that employees feel free to raise nuclear safety concerns. TVA puts a very high level of importance on nuclear safety and to that end TVA has adopted, as one of its basic Principles and Practices, a Commitment to Nuclear Safety (McGrath p. 881, *ll.* 2-24; TVAX65). That principle, adopted by the TVA Board of Directors, recognizes that public health and safety and the protection of TVA employees and the environment are paramount considerations in TVA's carrying out of its nuclear power activities. McGrath was an author of the principle and was instrumental in having it adopted by the TVA Board of Directors (McGrath p. 587, *ll.* 13-22; p. 589, *ll.* 10-24). One of the core precepts of the principle to ensure nuclear safety is the expectation that TVA employees will identify problems and be protected against reprisal for raising nuclear safety concerns (McGrath p. 586, *l.* 14—p. 587, *l.* 10).[5] Thus, the principle includes express language that "TVA provides protective measures to ensure that employees may express concerns [and] differing [views] without fear of recrimination or reprisal. This protection extends to any employee providing information to regulatory officials either voluntarily or as part of their official duty" (McGrath p. 882, *ll.* 10-15).

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5 TVA recognizes that, both by statute and regulation (section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 (2000), 29 C.F.R. pt. 24 (2002), and 10 C.F.R. § 50.7 (2002)), TVA employees are entitled to raise nuclear safety concerns without the fear of retaliation.

2.4 The TVA Board also adopted as a lower-tier document, a policy entitled TVA Communications Practice 5, *Expressing Concerns and Differing Views* (TVAX66; McGrath p. 590, *ll.* 2-14). That policy makes it clear that employees are encouraged to express concerns and differing views through their management chain, through TVA Nuclear's Concerns Resolution Staff, the TVA OIG, or the NRC. That policy protects employees from any sort of retaliation and provides for the investigation of allegations of reprisal by the TVA OIG. It expressly states that employees " found guilty of acts of reprisal, such as acts of intimidation, harassment or discrimination, against an employee because the employee expressed a differing view is subject to disciplinary action, up to and including termination" (TVAX66 at CA000253; McGrath p. 590, *l.* 15—p. 591, *l.* 3). Thus, it would not be reasonable to conclude that someone such as McGrath who was responsible for implementing the ERA and DOL' s and NRC's regulations by authorizing TVA's policy would arbitrarily retaliate against an employee.

2.5 TVAN's establishment of NSRBs is inconsistent with retaliating against an employee for raising nuclear safety concerns. TVA has committed to the establishment of a separate NSRB at Sequoyah, Watts Bar, and Browns Ferry. Generally, an NSRB reviews identified categories of documents, such as audit reports and Licensee Event Reports (LER), evaluations by the Institute of Nuclear Power Operations (INPO), and self-assessments, and reports of problems found elsewhere in the industry. The NSRBs review the various functional areas of each plant, including operations, engineering, radiation protection, chemistry control, and quality assurance, for potential safety problems (McGrath p. 383, *ll.* 2-17; p. 385, *ll.* 2-18; p. 386, *ll.* 18-23). There is also an effort made to have at least one NSRB member with expertise in each of the areas to be reviewed (McGrath p. 379, *l.* 24—p. 380, *l.* 4; p. 592, *l.* 6—p. 593, *l.* 10). The NSRB for each plant meets at least quarterly although if there are problems, more often. The NSRB would normally adjourn to its subcommittees, each

of which would pursue issues in its own functional area (McGrath p. 389, *ll.* 8-19). Minutes are issued for each meeting (McGrath p. 387, *l.* 22—p. 388, *l.* 5). Each NSRB looks at the big picture and how the various aspects of the plant are interacting to anticipate the development of any problems. The boards focus on safety issues and try to determine if there is an attitude promoting critical self-assessment (McGrath p. 593, *l.* 20—p. 594, *l.* 14).

2.6 Because each plant's NSRB meets only quarterly and has only a few members relative to the number of plant employees, it cannot review everything at the plant. Although there are a number of safety review measures at the plant, the NSRB is the highest level of TVA review and is intended to bring in more management and upper tier persons with expertise to provide advice and recommendations (McGrath p. 594, *l.* 15—p. 595, *l.* 15). Although NSRBs have the authority to look at any information available on site, there is usually such a large volume of information, they rarely look at specific corrective actions or open items (McGrath p. 595, *ll.* 16-24).

2.7 Although the NSRBs are comprised of members of upper management and industry experts, they are not in the plant chain of command and neither issue orders about plant operations nor do they make personnel decisions. If an NSRB concluded that an issue was important enough to know how the plant responded, and recognizing that the NSRB does not have the authority to issue directions, the NSRB could designate an action item to which the plant would respond (McGrath p. 387, *ll.* 11-20). When the boards see performance problems, they focus on the organization's performance, for example, operations issues. The NSRBs do not make recommendations to management about personnel changes that may need to be done and they specifically avoid discussing the performance of specific individuals (McGrath p. 596, *ll.* 11-25). NSRBs do not have the authority to hire and fire or to issue performance appraisals, nor do they look at those types of issues (McGrath p. 595,

l. 25—p. 596, *l.* 10). They do not raise performance issues to plant management relative to specific individuals (McGrath p. 596, *l.* 25—p. 597, *l.* 1).

c. McGrath Supports Employees' Right to Raise Safety Concerns.

2.8 A focus of McGrath's career has been nuclear safety, and he supports employees' rights to raise nuclear safety concerns. During the time of the reorganization of Nuclear Operations Support and the issues surrounding Fiser, McGrath was well aware of 10 C.F.R. § 50.7, section 211 of the ERA, and TVA's policies on nuclear safety and the procedures and rights of employees to express nuclear safety concerns without the fear of reprisal (McGrath p. 372, *ll.* 10-18; p. 591, *ll.* 4-12). He was also aware that both the NRC and TVA could take punitive action against managers responsible for retaliating against employees who raised safety concerns (McGrath p. 591, *l.* 23—p. 592, *l.* 5).

2.9 McGrath was the Chairman or Vice Chairman of all three TVA NSRBs from about 1989 or 1990 until 1997 (McGrath p. 376, *ll.* 5-10; p. 380, *ll.* 5-21). Since successful execution of the NSRBs' duties depends on the willingness of employees to talk to the boards and to raise issues, McGrath knows that it is important to have an understanding in the organization that it is permissible and expected for employees to raise issues (McGrath p. 585, *l.* 22—p. 586, *l.* 13).

2.10 The focus of McGrath's career, while in nuclear power, was in the area of reactor safety. He has a degree in Chemical Engineering and is a graduate of the former Atomic Energy Commission's Bettis Reactor Engineering School. He then worked in the Naval Reactor Program for over 16 years, where he eventually worked directly for Admiral Rickover from 1978-82 (McGrath p. 365, *ll.* 12-14; p. 366, *ll.* 22-23; p. 367, *ll.* 3-10). His responsibilities while working for Admiral Rickover included performing assessments, inspections, and evaluations in nuclear power. Later, he was assigned to evaluate operating ships to determine if there were potential

problems with reactor safety. At TVA, he was given special assignments that included reviews of Sequoyah, Browns Ferry, and Watts Bar related to nuclear safety and the performance of the plants. In addition, in 1989-1990, he became the Chairman of the NSRB for all three plants. He has personally raised many hundreds of nuclear safety concerns. In short, he understands the necessity of identifying problems in order to address them and get them fixed early before they can affect safety (McGrath p. 376, *ll.* 5-10; p. 584, *l.* 5—p. 585, *l.* 25). He understands that TVA employees have the right to raise issues both through the corrective action process and outside the agency and he does not have a problem with that (McGrath p. 881, *ll.* 2-9). He was very familiar with the requirements of both section 211 and 10 C.F.R. § 50.7 (McGrath p. 372, *ll.* 10-18).

2.11 Not only does McGrath understand the need for employees to be able to express concerns without the fear of retaliation, but, as mentioned above, he was involved in writing and having TVA adopt the Principle, Commitment to Nuclear Safety (TVAX65) in which he included a provision insuring an employee's right to go outside of TVA to raise issues (McGrath p. 881, *ll.* 11-24). McGrath knew from the time he helped author the TVA policy that managers who discriminate against an individual could be removed from their positions (McGrath p. 883, *ll.* 10-15). McGrath was also aware that TVA employees who reprise against employees for raising nuclear safety concerns are subject to punitive action by the NRC (McGrath p. 883, *l.* 20—p. 884, *l.* 1).[6] Thus, McGrath's extensive nuclear career and his own

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6 Staff counsel elicited testimony from McGrath that he was aware that the NRC had issued a violation and sanctions against TVA employee Joe Bynum for allegedly reprising against an employee who raised nuclear safety concerns (McGrath p. 883, *l.* 20—p. 884, *l.* 1). Although Staff counsel asked additional questions with the apparent intent to show that TVA did not in fact discipline managers who were found guilty of discrimination, McGrath was not aware whether Bynum or any other managers had been disciplined by TVA since TVA does not publicize disciplinary actions taken against individuals (McGrath p. 883, *ll.* 16-19; p. 884, *ll.* 5-6).

personal belief in fostering nuclear safety are inconsistent with a conclusion that his actions were motivated by a retaliatory animus as opposed to legitimate nondiscriminatory business reasons.

d. TVAN Needed to Reduce the Size of Its Work Force.

2.12 From about 1990-1996, TVAN conducted a number of reorganizations and reductions in force (RIF), going from 11,000 to 3,500 employees (Reynolds p. 3532, *l.* 12—p. 3533, *l.* 23; p. 3580, *ll.* 14-20). Some employees were selected for new positions, many other TVA employees involuntarily lost their positions and employment with TVA. There were at least two reasons for the reductions.

2.13 TVAN was changing the nature of its business. When TVA was building its nuclear facilities, at one point there were over 50,000 employees in TVA (Fogleman p. 5383, *l.* 20—p. 5384, *l.* 5). Plant construction and startup requires employees with different skill sets than the operation of completed plants (Fogleman p. 5382, *ll.* 6-16). TVA needed a large number of employees in order to restart Sequoyah and Browns Ferry, and to complete Watts Bar. After the plants were started, large numbers of employees were no longer necessary. As the plants were started, TVA conducted several reorganizations of its nuclear work force to reflect the changes from a construction and modifications organization to a much smaller operations organization (McGrath p. 431, *l.* 4—p. 432, *l.* 5; Fogleman p. 5382, *l.* 2—p. 5383, *l.* 7).

2.14 The nuclear industry was becoming increasingly competitive. TVA is attempting to become more competitive with other electric utilities and is making an effort to improve reliability and productivity and to reduce costs. TVA compares its workforce to other nuclear utilities and uses NEI staffing numbers as a benchmark to help determine how good performing nuclear utilities are structured and staffed (McGrath p. 433, *ll.* 1-16).

e. TVA's RIF and Surplus Processes

i. TVA's RIF procedures

2.15 As a federal agency, RIFs from TVA employment are governed by regulations promulgated by the Office of Personnel Management (OPM), 5 C.F.R. pt. 351 (2002). However, TVA has adopted its own policies and procedures to implement the OPM regulations within TVA (Fogleman p. 5374, *l.* 8—p. 5376, *l.* 7; JX65). Those procedures are what TVA uses to conduct RIFs (Fogleman p. 5374, *ll.* 8-18; p. 5375, *ll.* 17-25). Over the years, as the Merit System Protection Board (MSPB) decides appeals in TVA cases, TVA may find a need to adjust its processes (Fogleman p. 5373, *l.* 16—p. 5374, *l.* 3; p. 5376, *l.* 8—p. 5377, *l.* 10. The RIF process at TVA is "owne[d]" by the human resources (HR) organization, i.e., HR is accountable for the procedure and the application of the process (Fogleman p. 5358, *ll.* 10-23). Rather than receive formal training from OPM on how to apply its regulations to conduct a RIF, TVA HR personnel are guided by lawyers from TVA's Office of General Counsel (OGC) and receive on-the-job training in applying TVA's procedures to TVA employees (Foglemam p. 6372, *l.* 15—p. 6373, *l.* 15; p. 5374, *ll.* 4-7; Reynolds p. 3348, *ll.* 17-25).

2.16 Under TVA's RIF process, when conducting a reorganization which involves the establishment of positions with new job descriptions, it is an HR responsibility to determine the appropriate competitive levels and whether any such position should be placed in the same competitive level as existing positions (Fogleman p. 5393, *l.* 20—p. 5394, *l.* 12). *See, e.g.*, 5 C.F.R. § 351.403 (2002). If the new position is in the same competitive level as an existing position, an incumbent could have retention standing with respect to the new position. Conversely, if a new position is not in the same competitive level as an existing position, an incumbent would not have retention standing for the new position.

2.17 TVA's procedures implementing the OPM regulations provide the standard that TVA uses to determine which positions should be included in a competitive level. TVA uses a test for inclusion in the same competitive level whether the positions are "mutually interchangeable" and the focus is on the official position description (PD) not personal qualifications, performance levels or the individuals occupying the positions (Fogleman p. 5395, *l.* 14—p. 5398, *l.* 16; p. 5398, *l.* 22—p. 5399, *l.* 23; JX65 at 14-15; TVAX125 at FG000048). Although Ben Easley testified that he used a percentage difference between PDs to determine if jobs were similar enough to be in the same competitive level (Easley p. 1352, *ll.* 6-25; p. 1287, *ll.* 8-22), the only test set forth in TVA's written procedure is whether "the jobs [are] mutually interchangeable" (Fogleman p. 5397, *ll.* 8-21; JX65 at 14-15). TVA's use of official PDs to determine competitive levels is consistent with OPM's requirement that competitive levels be "based on each employee's official position, not the employee's personal qualifications" (5 C.F.R. § 351.403(a)(1) & (2)). *Kline v. TVA*, 805 F. Supp. 545, 548 (E.D. Tenn. 1992), *aff'g*, 46 M.S.P.R. 193 (1990) ("Whether two jobs are similar enough, in the respects specified by the regulation, to be in the same competitive level is determined by the position descriptions (PDs) which state the qualifications and duties required by those jobs."); *Estrin v. Social Security Admin.*, 24 M.S.P.R. 303, 307 (1984) ("[A]ppellant's ability to perform the duties of a specific position does not establish that the position is interchangeable, since it is the qualifications set forth in the official position description, not the qualifications of an employee, which determine the composition of the competitive level."); *Holliday v. Dep't of Army*, 12 M.S.P.R. 358, 362 (1982) ("The fact that appellant may have been able to perform the duties of both positions adequately does not establish mutual interchangeability for it is the qualifications required by the duties of the position as set forth in the official position description, and not the personal qualifications possessed by a specific incumbent, that determine the composition of a competitive level. *See* FPM Chapter 351, subchapter 2-

3a(2). Therefore, as noted by the presiding official, while the two positions may function almost identically, the fact that one of them requires different and greater skills and training justifies separate competitive levels.").

2.18 Based on its interpretation of MSPB cases, it is TVA's practice as set forth in its procedures (JX65 at 14-15) to use the last official PD of record to determine an employee's competitive level. (Fogleman p. 5397, *l.* 22—p. 5399, *l.* 25; JX65 at 14-15; TVAX125 at FG000048). TVA's interpretation is consistent with OPM requirements and TVA has applied that standard in cases before the MSPB. In *Townsel v. TVA*, 36 M.S.P.R. 356, 360 (1988), the employee, who had been reduced in force as an M-3 General Foreman, argued that he was actually "performing the duties of a Planner, M-3, a position not affected by the reduction in force, and that his competitive level should have been determined by his actual duties rather than his official position description." The MSPB upheld TVA's RIF of the employee, stating:

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

See generally Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice* 1928-33 (1999) (copies of the cited pages are attached.). As discussed below, even if TVA's interpretation was in error, what is important here is that TVA consistently and in good faith applied that interpretation.

ii. The establishment of ETP and TVAS

2.19 In the past, since TVA is a federal agency, when employees positions were eliminated and they were not selected for other positions, their employment was terminated in a RIF (McGrath p. 771, *ll.* 1-11). However, in recent years, with the large-scale reductions in TVA's work force, TVA adopted an interim step so that employees whose jobs were eliminated were not subject to an immediate RIF. There have been a number of programs, beginning with the Employee Transition

Program (ETP), followed by the TVA Services organization, Synterprise, Career Transition Services, and most recently Reinvestment. The key elements have remained the same, employees whose jobs are eliminated or declared "surplus" are given the option on one hand of resigning or taking a voluntary RIF and receiving enhanced severance benefits or, on the other hand of being assigned to ETP, or one of its successors, where they remain a TVA employee and continue to draw their salary at their previous rate. While in ETP, employees retain their original job description and their original organization for official record purposes, but, their day-to-day assignments are different. While in ETP, they may seek other jobs inside or outside of TVA, develop other skills, or even be assigned to tasks for other TVA organizations (McGrath p. 771, *l.* 15—p. 772, *l.* 25; Fogleman p. 5446, *l.* 9—p. 5447, *l.* 15). Generally, TVA notified employees who were being assigned to ETP that TVA might make them a "reasonable" offer, which, if they declined, could subject them to a RIF. There is no evidence in the record that TVA exercised that option as to any employee assigned to ETP and none of the witnesses who testified about ETP were aware of any employee in ETP who was offered a job at a lower salary or who was RIFed after refusing an offer. There was generally a time limit an employee could remain in ETP without being selected for a different TVA job. At the end of that time limit, employees who were still in ETP were subject to being RIFed.

2.20 Employees were assigned to ETP in accordance with RIF regulations since they were subject to being RIFed at a later time. Since TVA followed RIF procedures in surplusing employees, an employee who was selected for a new position would move out of his or previous competitive level and not be subject to being surplused or RIFed.

2.21 In 1996, employees whose positions were eliminated and who were not selected for a new position, had two options—they could resign and receive severance pay plus the remainder of their salary for fiscal year 1997 or they could

remain employed by TVA, assigned to Services, with their previous job title, drawing their full salary and with the opportunity to find another TVA job. TVA warranted that, absent a financial emergency in the power system, those individuals who were assigned to Services would remain employed in Services through at least fiscal year 1997. Thus, in 1996 when Fiser's job was eliminated and he was not selected for a new job, he could have remained employed by TVA drawing his previous salary with his previous job title and with the opportunity to find another TVA job.

3. FISER'S PREVIOUS POSITIONS WITH TVA

a. Fiser's Job at Sequoyah

3.0 Fiser was hired by TVA in 1987 and became the Chemistry Superintendent at Sequoyah in April 1998 (TVAX24 at HH000030; Fiser p. 991, *l.* 20—p. 993 *l.* 14). From 1988 until 1993, Fiser's official position was Chemistry Superintendent at Sequoyah in Soddy-Daisy, Tennessee, and his management reporting chain was through plant operations.[7] During 1991-93, Fiser's position was classified as a grade PG-9 on TVA's management and specialist schedule. From April 1991 until about January 1992, Fiser was given a temporary assignment in the Outage Management group at Sequoyah for the Unit 1 Cycle 5 outage. He was returned to his Chemistry Superintendent position in January 1992.

3.1 Throughout Fiser's tenure at Sequoyah his performance and the Chemistry program were repeatedly criticized by various managers. During the hearing Fiser variously claimed that he was not responsible for the problems with Sequoyah Chemistry, that the ratings he received were unfair, and that his supervisors never communicated their dissatisfaction to him. Regardless of Fiser's excuses,

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7 Although at some point during Fiscal Year 1990, Fiser's job title became Chemistry and Environmental Superintendent (compare SX44 with JX31; Fiser p. 1005, *ll.* 8-24), we will refer to his position at Sequoyah as Chemistry Superintendent.

management came to the conclusion that he was not effective as the Sequoyah Chemistry Superintendent. Fiser's performance evaluation dated January 1989 (JX30) reflected that his overall performance was in the second from the bottom of five possible grades and was merely "adequate," "similar to break-in period on new job," with "certain limitations," and "improvements needed" (JX30 at 8).

3.2 The supervisor's comments included statements that the "overall performance of the Chemistry Group is not acceptable," that "Fiser must become more aggressive in the performance of his duties," that many discrepancies "should have been corrected in a more timely manner," and that "Fiser has a tendency to wait for corporate assistance in many areas where assistance is either not required or forthcoming." (Fiser p. 2432 *l.* 11—p. 2434 *l.* 9; JX30 at 7, 8). Fiser simply disagreed with his ratings (Fiser p. 2434, *ll.* 8-9). Fiser also claimed he was being unfairly held personally responsible for INPO findings (Fiser p. 2437 *l.* 23—p. 2439, *l.* 17; p. 2440, *l.* 22—p. 2441, *l.* 5).

3.3 Fiser's performance appraisal dated September 1989 (JX31) continued to note the same sorts of criticisms. Fiser's performance "demonstrated" continued "weaknesses in aggressiveness and communication skills"; that improvements were "not to the degree I would have expected," that "[p]ersonnel-related action is not taken spontaneously," the "weaknesses noted last year persist," and that "[m]aterial condition improvements of chemistry equipment is not being pushed adequately" (JX31 at 1; Fiser p. 2434, *ll.* 10—p. 2435, *l.* 22). Fiser's supervisor continued his criticism, stating that Fiser:

> Tends to follow rather than lead.
>
> I feel that I have to have prompt decision making.
>
> . . . .
>
> Is not assertive and tends to talk around subject;
>
> . . . .

> Does not get message over clearly. Tends not to answer questions directly;
>
> . . . .
>
> Aggressiveness and hands-on management of personnel problems is still not where it should be for a superintendent; . . . I need to see a more can-do attitude and active decision making in the future [JX31 at 5, 6, 8].

Fiser tried to explain away those criticisms by asserting that his new supervisors gave him a low evaluation at the outset because they did not know his capabilities or his performance (Fiser p. 2436, *l.* 7—p. 2437, *l.* 4).

3.4 Fiser was given a rotational assignment from April 1991 to December 1991 in Outage Management (Fiser p. 2272, *l.* 8—p. 2273, *l.* 18). His performance appraisal for Fiscal Year 1991 again reflected his weaknesses as an effective manager:

> Is having difficulty operating independently outside the Chemistry area.
>
> Is not using the authority of his position as an Outage Manager effectively.
>
> . . . .
>
> Is having great difficulty influencing various plant support personnel to get pre-outage work done.
>
> Needs to refine interpersonal skills some more.
>
> Does not appear to be comfortable in laying out and executing pre-outage management tasks.
>
> . . . .
>
> Fiser is having trouble operating independently.
>
> Was given several major activities to manage and was unable to effectively bring any to completion [JX32 at 1, 6, 7, 9; Fiser p. 2454, *l.* 14—p. 2455, *l.* 25].

Fiser admitted that his lack of aggressiveness and difficulty in using his authority were legitimate criticisms (Fiser p. 2456, *ll.* 1-25; p. 2458, *ll.* 10-18). However, he claimed that after his 1991 performance appraisal (JX32), he became very aggressive and began talking to the people he needed to talk to, in order to turn problems around (Fiser p. 2458, *l.* 24—p. 2460, *l.* 9).

3.5 The reports issued by INPO in 1989 and 1991 showed that " [s]ome significant system problems that impact the chemistry program have not received sufficient management emphasis" (TVAX48 at AJ000299). In fact, Fiser later incorrectly claimed credit for identifying some of the problems actually identified by INPO. For example, INPO identified problems in 1989 with reliability of the post-accident sampling system (PASS) due to deficiencies in procedures, equipment, and technician knowledge (*id.* at AJ000303-04). INPO's report also showed longstanding problems with and delays in fixing equipment, such as main condenser air in-leakage chlorination of essential raw cooling water system, and oxygenation of summary water storage, frequent additions of concentrated chemicals, auxiliary boiler pH, conductivity, and hydrazine levels out of specification (*id.* at AJ000300-01). The 1991 INPO report showed problems with chemical traffic control, which TVA's response categorized as "a potential programmatic problem" (*id.* at AJ000308-09). The 1991 INPO report further showed that Sequoyah Chemistry was still struggling to resolve the problems identified in the 1989 INPO report (*id.* at AJ000310-11).

3.8 The minutes of the Sequoyah NSRB also showed that the Sequoyah Chemistry organization suffered longstanding problems. For example, the minutes of the May 1991 NSRB meeting show that time constraints in PASS training was still a problem despite having been identified in the 1989 INPO report (JX1 at CC000087-88). The minutes of the August 1991 NSRB meeting show that the site had not yet addressed the NSRB's earlier concerns about PASS (JX2 at CC000089). The NSRB also requested the Sequoyah Chemistry organization "to review the impact of any unmonitored radioactive release paths" (TVAX2 at CC000090). These two issues, PASS and unmonitored radioactive release paths, were significant in that the NSRB felt that they were important enough to label as action items in order to track to closure. Matters which they reviewed but did not deem significant were not action items.

3.7 An overall assessment of Fiser's performance at Sequoyah, including evidence arising while he was assigned to Corporate Chemistry, does not support the Staff's theory that Fiser was engaging in protected activity by identifying safety issues. Rather, the evidence suggests significant performance problems on the part of Fiser and Sequoyah Chemistry. These were problems well-documented by others. The picture is not one, as the Staff would now have it, of Fiser identifying concerns to a management unwilling to address those concerns. Rather, it is one of Fiser's own responsibility for failing to identify and/or resolve many of those problems. Nothing in this history supports a view that McGrath or McArthur would harbor animus for several years to later retaliate against Fiser for raising issues.

3.8 In November 1991, the NSRB concluded that one of the "key items" at Sequoyah was that "[r]ecent findings by Site Quality Assurance and Corporate Chemistry indicated that significant problems existed in the Sequoyah Chemistry Program which, if not promptly corrected, could impact plant chemistry control. For example, required data trend analyses were not being performed, chemicals were purchased to incorrect specifications, some training was delinquent, and several procedure preparation and use deficiencies were identified" (JX3 at CC000093). The NSRB's Chemistry Subcommittee reviewed a number of "recent weaknesses identified in Chemistry by QA and Corporate Chemistry," including "poor data trending." Based on the number of QA findings, it was concluded that there were "programmatic deficiencies that need prompt attention" (*id.* at CC000098). Although the NSRB and its subcommittee listed a number of deficiencies, including poor data trending (*id.* at CC000093-94, 98), the NSRB only deemed three chemistry issues significant enough to be designated as "action items"—PASS training, unmonitored radioactive release paths, and the Chemistry Improvement Program (*id.* at CC000094, 95-96, 99). Both of the first two items had been previously identified by the NSRB; the PASS issue was identified at the May 22-23, 1991, NSRB meeting (JX1

at CC000087-88), and the unmonitored-radiation-release-paths issue was identified at the August 21-22, 1991, NSRB meeting (JX2 at CC000092). At the time of the November 20-21, 1991, NSRB meeting, both issues were still unresolved and the NSRB minutes show that Sequoyah and Corporate Chemistry disagreed on both issues (JX3 at CC000095-96).

3.9 It is significant that the NSRB relied on reports of other organizations, such as QA and Corporate Chemistry as well as basing their conclusions on their own observations. Fiser claimed at the hearing that Sequoyah Chemistry was the subject of unfair criticism by William Jocher, the Corporate Chemistry Manager. Fiser admitted that Jocher was a vocal critic and that Fiser and Jocher had public disagreements about the seriousness of problems in Sequoyah Chemistry (Fiser p. 2611, *l.* 22; p. 2616, *ll.* 1-9; p. 2623, *l.* 14—p. 2629, *l.* 25; JX4 at 4). Those disagreements even came to the attention of the NSRB (Fiser p. 2611, *l.* 22—p. 2612, *l.* 12). Indeed, Fiser admitted that based on the issues raised by Jocher (Fiser p. 2529, *l.* 23—p. 2632, *l.* 1), the plant manager, Beecken, and Jack Wilson, the Site Vice President, had the impression that Sequoyah Chemistry was out of control (Fiser p. 2529, *l.* 23—p. 2632, *l.* 1).

3.10 The NSRB continued to find the same types of problems with Sequoyah Chemistry in the February 19-20, 1992, NSRB meeting. The "key items" from that meeting included the same problems with Sequoyah Chemistry noted in the November 1991 NSRB meeting (JX4 at CC000101, 02). In order to correct the problems, the Plant Manager had to step in with a plan to improve chemistry (JX4 at CC000101, 02). However, when the NSRB's Chemistry Subcommittee reviewed the corrective action plan, Fiser and Jocher still had "a difference of opinion . . . regarding the seriousness of chemistry problems at [Sequoyah]" (JX4 at CC000104). Once again, although the NSRB mentioned a number of deficiencies in chemistry, including trending, the only chemistry action items continued to be PASS, radiation

release paths, and the Chemistry Improvement Program. In addition, the NSRB expressed some frustration over the length of time the PASS and unmonitored-radiation-release-path issues had been open (McGrath p. 393, *l.* 2-6, p. 677, *l.* 6—p. 678, *l.* 14; JX4 at CC000103, 05).

3.11 Although the Site Vice President, Jack Wilson, saw all the various reports of problems with Sequoyah Chemistry, he did not understand the depth of the problems until he had to come to the plant on a weekend to handle some problems. At that time, he had to personally take charge and he encountered a number of other chemistry problems (McGrath p. 412, *l.* 12—p. 413, *l.* 8).

b. Fiser's Temporary Assignment to Corporate

3.12 Regardless of how aggressive Fiser thought he became in response to his 1991 performance appraisal (see ¶ 3.4), his next supervisor, Pat Lydon, disagreed. Lydon described the Sequoyah "[C]hemistry program as unbelievably bad . . ." [with] "all kinds of long-standing problems with [Sequoyah's] [C]hemistry program." (TVAX122 at 3). Lydon went on to say that "due to the problems at [Sequoyah], Joseph R. Bynum, Vice President, Nuclear Operations, and Robert J. Beecken, Plant Manager, SQN, directed Jocher to replace Gary L. Fiser, former Manager, Chemistry, SQN, in February 1992" (*id.*).

3.13 After Beecken became the Sequoyah Plant Manager in March 1991 (Beecken, p. 4796, *l.* 23—p. 4797, *l.* 4), he became increasingly aware of the problems in Sequoyah Chemistry through corrective action documents, and INPO and NSRB reports (Beecken p. 4799, *l.* 14—p. 4800, *l.* 24). As a result of the widespread criticism of Sequoyah Chemistry and as a "way to solve the problem," Beecken asked for a temporary rotation between Fiser and Jocher, in which Jocher would be assigned to work as the Acting Sequoyah Chemistry Superintendent and Fiser would serve as the Acting Corporate Chemistry Manager (McArthur p. 1410, *l.* 2-13; Beecken p. 4800,

ll. 4-24). It was Beecken's assessment that Fiser did not have the "personal makeup to take on [the] challenges" of managing the Sequoyah Chemistry organization (Beecken p. 4802, *ll.* 16-17) and was "not the driver[ ] that [was] needed to manage a 24/7 operation" (Beecken p. 4801, *ll.* 12-13). Beecken explained that to be a "driver,"

> [Y]ou've got to be able to articulate your issue. You're competing with the other plant organizations for limited resources. You've got to get in there, be able to articulate what it is that you need, why you need it, why [it] takes a priority. You can't back down. You need a drive. You need to be able to defend your position. You need to stand your ground. And I was concerned that Fiser didn't have that chemistry makeup, especially in this time when a lot of improvement was needed, to take that type of challenge on. . . . You know, it takes an individual that's really going to go toe-to-toe where necessary, and be able to articulate. Put their arguments together and stand their ground, and help make sure the right priorities come to the right surface. If a person's ready to acquiesce, you know, then they will acquiesce and the program will suffer. [Beecken p. 4802, *l.* 1—p. 4803, *l.* 4].

3.14 In Beecken's opinion, Fiser "better fit" the "technical specialist role, versus that driver role" (Beecken p. 4801, *ll.* 14-16) and "Jocher was better suited for that" (Beecken p. 4802, *ll.* 11-12). Beecken felt that "a swap of these two individuals could help the program" and "was a real win-win situation," since "[i]t looked like the fellow downtown [Jocher] had real strong supervisory skills, communication skills, could articulate well. And Fiser appeared to me to be a good chemist, a good technician, and would fit well within the Corporate staff" (Beecken p. 4800, *ll.* 16-17, 17-22).[8]

3.15 At the time he agreed to the rotation, Beecken was not aware that Fiser had raised any nuclear safety concerns (Beecken p. 4804, *ll.* 2-5). Further, no

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8 Counsel for Staff showed Beecken's notes of an interview with Pat Lydon. Contrary to counsel's implication, Beecken did not recall telling Lydon to fire Fiser. He also testified that he did not know the basis for Lydon's statement that he would "fire people for effect," and he recalled that while he was Sequoyah Plant Manager he terminated only one person – for inappropriate behavior (Beecken p. 4835, *ll.* 3-13, TVAX122).

one directed Beecken to remove Fiser as Sequoyah Chemistry Superintendent for refusing to do daily trending plots. Beecken expressly denied that McGrath or anyone else on the NSRB told him to remove Fiser for any reason whatsoever (Beecken p. 4829, *ll.* 17-21). In fact, Beecken pointed out that the NSRB does not provide information about individuals and does not tell plant management how to manage people or make personnel recommendations. The NSRB does not identify individuals who may be at fault, but instead focuses on identifying technical issues and trends in programs (Beecken p. 4816, *l.* 25—p. 4817, *l.* 25; p. 4818, *l.* 5—p. 4819, *l.* 9). As McArthur testified, it "was not a function of the NSRB" to tell management[9] that a manager should be removed (McArthur p. 1408, *ll.* 6-14) and that " we [NSRB members] were told explicitly not to judge the individuals who were looking at the programs" (McArthur p. 1409, *ll.* 23-25).

3.16 Because of the weaknesses in the Sequoyah Chemistry program, beginning in March 1992, Fiser was given a one-year rotational assignment to the Corporate Chemistry organization, a constituent organization of Nuclear Operations Support, in Chattanooga, Tennessee. At the same time, Jocher, the Corporate Chemistry Manager, was assigned to act as the Acting Sequoyah Chemistry

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9 Counsel for the Staff asked McArthur whether he ever told Fiser that McGrath said "we can't have this guy in the Sequoyah chemistry position" (Fiser p. 1406, *l.* 25—p. 1407, *l.* 3; JX27 at 22). Whether McGrath shared that observation with McArthur is irrelevant. There is no evidence that anyone on the NSRB told the plant manager to remove Fiser; McArthur and Beecken deny such a conversation happened. McArthur denied recalling that McGrath said that Fiser ought to be removed from his position (McArthur p. 1404, *ll.* 1-18; p. 1408, *ll.* 6-11; p. 1409, *ll.* 10-18). Further, both Beecken and McGrath denied that McGrath ever suggested to Beecken that Fiser should be removed. Whether McArthur told Fiser that McGrath made a comment to him that "we can't have this guy in the Sequoyah Chemistry position" (JX27 at 22), is not evidence that McGrath had the authority to and did direct Fiser's removal from Sequoyah Chemistry. Nor is it evidence that the Sequoyah Plant Manager, Beecken, removed Fiser on McGrath's direction, particularly in light of the denial by Beecken and McGrath that such a conversation occurred.

Superintendent. During his rotational assignment, Fiser's official position was still the Sequoyah Chemistry Superintendent (JX43). While on rotation, Fiser was initially assigned as the Acting Corporate Chemistry Manager and his immediate supervisor was McArthur (Fiser p. 1025, *ll.* 5-18; JX33). In November 1992, Fiser was removed as Acting Corporate Chemistry Manager and was assigned as a Chemistry Program Manager within Corporate Chemistry, and McArthur was his second-level supervisor.[10] Fiser's assignment as Corporate Chemistry Manager upset Jocher who complained to McArthur's boss, Dan Keuter, Vice President of Nuclear Operations Support, that Fiser "ought [not] to come into this position" because he "was not performing very well" and "might do injury to a position in corporate." Despite Jocher's efforts, Keuter allowed Fiser to be assigned as Acting Corporate Chemistry Manager (McArthur p. 1410, *l.* 17—p. 1411, *l.* 2; p. 1449, *ll.* 3-13).

3.17 In the fall of 1992, McArthur gave Fiser a performance appraisal – the worst performance appraisal McArthur had ever written (McArthur p. 1412, *l.* 4—p. 1413, *l.* 15; JX33). Although Fiser's overall rating was "adequate," McArthur explained that "a corporate chemistry manager or a site chemistry manager" "need to be high performers" and "if anybody was evaluated as adequate, I would consider that as unacceptable" (McArthur p. 1412, *l.* 25—p. 1413, *l.* 5). In addition to personally observing Fiser's performance, McArthur received input from Fiser's previous supervisors at Sequoyah, Lagegren, the Operations Manager, and Beecken, the Plant

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10 Somewhere in this timeframe, Fiser began surreptitiously tape recording various TVA employees. He later made those tape recordings available to both the Staff and TVA OIG. Fiser also provided to OI an 85-page document entitled " Sequence of Events," purportedly compiled from his notes, memory, and the tape recordings (JX27). A comparison of the Sequence of Events with the recordings that were introduced into evidence shows that it is at best, in places, a guess as to what was actually said since there are so many inaudible segments. The recordings themselves, made on a small dictating recorder secreted in Fiser's pocket, are in large part indecipherable.

Manager, both of whom "didn't think that he [sh]ould be at Sequoyah" and "didn't feel he was performing very well" (McArthur p. 1412, *ll.* 12-19; p. 1413, *ll.* 16-23).

3.18 In November 1992, McArthur made the decision to take Fiser out of the Acting Corporate Chemistry Manager position and to reassign him as Acting Chemistry Program Manager in the Corporate Chemistry organization (McArthur p. 1420, *ll.* 16-22). McArthur made the decision because in his view Fiser was not performing well and was an "ineffective manager," he was not meeting deadlines, and was not getting the cooperation of his subordinates (McArthur p. 1419, *ll.* 14-24; p. 1424, *l.* 22—p. 1425, *l.* 2). McArthur made the decision after discussing Fiser's performances with Bynum, the Vice President of Nuclear Operations, and Keuter, the Vice President of Nuclear Operations Support (McArthur p. 1423, *ll.* 3-15; JX27 at 15).

3.19 While Fiser was assigned downtown, additional issues in Sequoyah Chemistry came to the attention of Beecken, the Plant Manager. As a result of learning of the depth of the problems in Sequoyah Chemistry, Beecken formed the opinion that Fiser should not return to the Sequoyah Chemistry Superintendent position (Beecken p. 4804, *l.* 6—p. 4805, *l.* 9). According to Beecken, there was a mixture of problems that had risen both before and after Fiser left Sequoyah but should have been addressed when he was there (Beecken p. 4805, *ll.* 12-21). McArthur apparently told Fiser on November 11, 1992, that Beecken did not want Fiser to return to Sequoyah and "that the problems in the chemistry program are being blamed on Gary Fiser" (JX27 at 7).

3.20 After learning that he was not welcome back at Sequoyah, Fiser talked first with Jack Wilson, the Sequoyah Site Vice President, and then with Beecken, the Sequoyah Plant Manager. Fiser tape recorded his conversation with Jack Wilson on November 21, 1992 (JX27 at 35). In response to Fiser's comments that

"Obviously I've done something to offend [Rob Beecken] or you," that "McArthur told me that [Rob Beecken] didn't want me back . . . [and] I don't know what I've done" (JX27 at 36), Jack Wilson explained that:

> [T]he consensus was that you were not effective. Now was that you, or was the problem bigger than that? Who knows? Who knows at all? We had not gone where we wanted to in terms of chemistry, in terms of performance, in terms of pounding on the table. . . .
>
> . . . .
>
> [M]y assessment would be that you were not aggressive enough.

3.21 Fiser later made an appointment to talk to Beecken, the Sequoyah Plant Manager on December 9, 1992. Fiser also tape recorded that conversation (JX27 at 50). Fiser began the conversation by saying "I just wanted to find out what is going on. Obviously, I feel like you are upset with me for something, because you don' t want me back" (JX27 at 50). The best guess as to the thrust of Beecken' s response is contained in Fiser's "transcript" of the tape recorded conversation (JX27 at 50-56). Beecken proceeded to discuss a number of problems which he perceived to be Fiser' s responsibility for failing to resolve:

> I wanted a perfect INPO evaluation, that's how come . . . you start looking at this training thing, general lack of knowledge, chemistry data . . . analysis. And then get into some of the other personnel issues, see that's where you could have done better.
>
> . . . .
>
> The thing that pisses, that tees me off on that one is, the systems engineer called the chemistry shift supervisor and said that he was going to remove the bags, watch for DO. Did he effectively do that? [JX27 at 49.]
>
> . . . .
>
> . . . but I'm real upset, I'll tell you where I'm coming from Gary, right now . . . a year, two years ago was fire the guy. Every time you turned around, it was, "Oh, my God, what are you guys doing, this is terrible," and now, I'm starting to get it from . . ."
>
> . . . .
>
> But the problem . . . I didn't like . . . Peterson and those guys . . . [JX27 at 51-52; omissions in original as unintelligible].

The issue is, were you aware, were you aware, and it is not good enough to find something after the fact . . . but when I look into this thing . . . like the chemistry knowledge thing, you may have been able to pump it up, or at least make sure that INPO thought it was, but I tried looking at things . . . this is not overnight stuff, . . . how effective has their training been, how critical have they been of their manpower, this has just been going on for a long time . . . .

What I am concerned about, I don't want chemistry to be an issue. There are some of those guys that you can send them to the training and they don't even pass. How are we dealing with that?

Some practices, like that filter change-out scenario, where the guy . . .

. . . .

The radmonitor effluent calculations not accounting for the vacuum. [JX27 at 52-55].

. . . .

Well, the reason you are in trouble is, and I'm not looking at the big dollar thing. Fundamentally, you have got payroll, you have these people, O.K? You've got training assets, you've got all sorts of stuff, and you've got some allegiance groups, but what we look at is the performance on training issue, God Damn, that is not a budget issue.

. . . .

[M]y issue is, is the training cyclic? When I look at this training, now I got to go look at the retesting for fundamental knowledge, and they fail that stuff . . .

. . . .

You don't forget that, that's what I mean. I'll tell you the program has been less than effective for a long time, you were there, and something that I am looking at is not the big dollar thing, not the laser lightshows and all that other stuff . . . [JX27 at 53-54].

. . . .

Well, yeah, I'm upset with you. I said O.K., if I bring Gary back, the same old routine. I guess I want to get somebody in my mind very very sharp in chemistry, a guy that is real effective, and is going to hold his people to standards, and I am not talking about, I just want to control the assets that we've got . . . we've got to do it right. And I don't think we are there yet [JX27 at 54].

. . . .

The perception I've got is that chemistry is broken, in my mind, but it is not one of these things that happens . . . Jocher didn't come in and break it. It was broken, weak, struggling and now I want it to get fixed. How am I going to get it fixed? Make the same guy that was here when I said it was weak, broken, in trouble, getting by, and let him back.

. . . .

> Here's the fundamental question, that Gary had to have known about it, or it wasn't fixed. Now that training issue, that's not an overnight, unless you are saying that it's malicious [JX27 at 56].
>
> Well, no, you know where it's coming from, it's hay, this shit didn't transpire overnight. A lot of inherent weaknesses that were here, that weren't properly dealt with [JX27 at 57].

3.22 At the hearing, Beecken testified that during their conversation, he had tried to explain to Fiser the problems in Chemistry and why Fiser was not the right person to manage Sequoyah Chemistry (Beecken p. 4808, *ll.* 3-13; JX27 at 53, 55). One of the topics they discussed was Fiser's "pumping up the technicians immediately prior to an [INPO] evaluation" instead of "ensur[ing] the qualifications and fundamentals were embedded in the analysts so they didn't have to take temporary pumping-up to answer questions" (Beecken p. 4808, *l.* 23—p. 4809, *l.* 12). "That's that immediate 'pump-up' training" (JX27 at 53). "Training is not something you can take a week beforehand, or a month beforehand, and make sure that he can pass in front of INPO" (*id.* at 55).

3.23 Another issue Beecken was critical of was the "filter change-out scenario." The root cause of that problem was the failure of the technicians to follow procedures and the lack of oversight to ensure that management expectations are understood and executed (Beecken p. 4809, *l.* 13—p. 4810, *l.* 10; JX27 at 52-53).

3.24 Beecken also discussed a problem which was discovered after Fiser was assigned to Corporate Chemistry, but which he felt should have been discovered while Fiser was Sequoyah Chemistry Superintendent--set points on a radiation monitor not set correctly due to the failure to make a correction for vacuum. As a result of the failure to resolve the problem earlier, TVA was required to file an LER with the NRC. During their December 9, 1992, conversation, Fiser told Beecken that he had tried to ensure that the settings were correct and that he had talked to the Engineering

Department. However, Beecken explained to Fiser that he should have escalated the issue to get an appropriate response (Beecken p. 4809, *l.* 5—p. 4811, *l.* 16; JX27 at 52).

3.25 Throughout their conversation, Fiser was not willing to accept responsibility for any of the problems in Chemistry. Instead, as to some of the issues he gave "excuses back as to why they were elements outside of his control," as to some he said "they're not on my watch," and as to others, he claimed "I didn't have the assets to do things I wanted to do" (Beecken p. 4811, *l.* 18—p. 4512, *l.* 5). Beecken testified that he would expect an effective chemistry manager to escalate the issues so that they could be resolved—to write a corrective action document (Beecken p. 4812, *l.* 6-17).

3.26 Beecken testified that after Fiser was rotated to Corporate Chemistry, he concluded that Fiser was not the right person for Sequoyah Chemistry based on chemistry issues that came from a number of sources, such as INPO, NSRB, and LERs. Counsel for Staff attempted to impeach Beecken's statement that INPO raised issues about chemistry by pointing out that Fiser's 1992 service review (JX33) said something about the absence of INPO findings (Beecken p. 4827, *l.* 15—p. 4828, *l.* 20). However, Beecken pointed out that Fiser's service review was referring to the "INPO assist visit" and not an INPO "evaluation" (Beecken p. 4827, *l.* 15—p. 4828, *l.* 20). Beecken also noted that in their conversation, which Fiser tape recorded on December 9, 1992, Fiser specifically referenced the INPO findings. Indeed Fiser claimed he could have avoided the recent INPO findings by "pump[ing] up the technicians, [to] have them ready to answer questions" (Beecken p. 4827, *ll.* 6-14).

> Rob, I honestly believe that if I had been here, you may have had one finding, not three [JX27 at 50].
>
> [E]very time that they came in, I would set the guys down, and I would give them mock interviews . . . [a]nd this time, we got some sample questions that INPO was asking" [JX27 at 50].

3.27 There is absolutely no question that INPO made findings against Sequoyah Chemistry in 1992. Excerpts from INPO's 1992 report of Sequoyah's Chemistry Program are in the record (TVAX48). The 1992 report clearly shows that INPO made three broad findings against the Sequoyah Chemistry Program (TVAX48, at AJ000323, 328, 332). Furthermore, the three findings in the 1992 INPO report correspond to the findings discussed by Beecken and Fiser on December 9, 1992:[11]

(1) INPO made a finding regarding "long-standing chemistry equipment and instrumentation problem" (TVAX48 at AJ000323). Fiser on the other hand tried to convince Beecken he might have avoided that finding:

> Fiser: I may have been able to get you out of the equipment problem again.
>
> . . . .
>
> If I had been here, I honestly believe that you would have had one finding. . .
>
> Beecken: Which would have been the material condition?
>
> Fiser: Yeah, I can't sit here and tell you Rob that I could have got you out of that one. . . [JX22 at 49-50].

(2) INPO made a finding that some "Chemistry data review and evaluation frequently do not identify and resolve some chemistry problems and data anomalies" (TVAX48 at AJ000328). Fiser argued he would have avoided the finding because "every time I sent data to INPO I reviewed it myself" (JX27 at 51).

(3) INPO made a third finding - that "knowledge weaknesses exist in several areas among technicians responsible for chemistry sampling and analysis" (TVAX48 at AJ000332). Fiser claimed that because he had sample questions that INPO was asking at other plants, he would have avoided that finding as well [JX27 at 50].

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[11] Given that Beecken initiated the request to rotate Jocher and Fiser, that he later concluded that Fiser should not return as Sequoyah Chemistry Superintendent, that his conversation with Fiser about why he should not return was tape recorded (JX27), and that INPO's 1992 findings are in the record (TVAX48 at AJ000323, 328, 332), the implication by counsel for Staff that Beecken was lying about relying upon a 1992 INPO report, appears to be an attempt to mislead the Board.

3.28 An overall assessment of Fiser's performance at Sequoyah, including evidence arising while he was assigned to Corporate Chemistry, does not support the Staff's theory that Fiser was engaging in protected activity by identifying safety issues. Rather, the evidence suggests significant performance problems on the part of Fiser and Sequoyah Chemistry. These were problems well-documented by others. The picture is not one, as the Staff would now have it, of Fiser identifying concerns to a management unwilling to address those concerns. Rather, it is one of Fiser's own responsibility for failing to identify and/or resolve many of those problems. Nothing in this history supports a view that McGrath or McArthur would harbor animus for several years to later retaliate against Fiser for raising issues.

c. The Elimination of Fiser's Job at Sequoyah and His Assignment to Services

3.29 In about February 1993, there was a reorganization at Sequoyah in which the Chemistry and Environmental organization was taken out of plant operations and combined with the Radiological Control organization to form the current Radiological and Chemistry Control (RadChem) organization. Kent became the RadChem Manager at that time (Kent p. 2999, *ll.* 7-23). When he took over as RadChem Manager, Kent proposed to improve the performance of the Sequoyah Chemistry Program (Kent p. 3005, *ll.* 17-25). In the reorganization, the RadCon Manager position that Kent had held and the Chemistry Superintendent position that Fiser had occupied were eliminated and, at the outset, the Sequoyah Chemistry organization was supervised directly by Kent without a Chemistry Superintendent position (Kent p. 3005, *l.* 17—p. 3006, *l.* 20; p. 3009, *ll.* 9-16). In fact, Kent issued a February 25, 1993, memorandum setting out an interim organization for the RadChem department which shows no Chemistry Superintendent or RadCon Manager (JX58).

- **3.30** While Fiser was on assignment in Corporate Chemistry, his official position as Sequoyah Chemistry Superintendent was eliminated (Kent p. 3009, *ll.* 9-16; JX58). As discussed above, during the year he was in Corporate, Sequoyah Plant management had determined that Fiser was a weak manager and did not want him to return to Sequoyah Chemistry. Accordingly, he simply continued to work in Corporate Chemistry in a vacant position under McArthur (McArthur p. 1427, *ll.* 3-15).

- **3.31** Eventually, there was a headcount reduction and a decision to eliminate the vacant position under McArthur in which Fiser had been working. Although McArthur pleaded to keep the position in order to save Fiser's job, the reduction was made, and a decision was made to surplus Fiser (McArthur p. 1429, *l.* 104; p. 1430, *l.* 1—p. 1431, *l.* 1)

- **3.32** Although his position had been eliminated, Fiser was not RIFed at that time. Instead, he was initially assigned to the ETP. The notice assigning him to ETP stated that his position of Sequoyah Chemistry Superintendent had been determined to be surplus (JX59). Several months later when he had not found another TVA job, Fiser received a notice RIFing him from the Sequoyah Chemistry position (JX60). The RIF notice was issued from TVAN's Corporate HR office and Kent did not know that Fiser had been declared surplus or that Fiser was later RIFed from that job. At the time Fiser was working as a part of the Corporate Chemistry staff, Kent did not realize that Fiser was still a part of his RadChem organization on paper (Kent p. 3011, *ll.* 2-19).

- **3.33** Later, TVA settled Fiser's 1993 DOL complaint, cancelled his RIF, and gave him a Chemistry Program Manager job in Corporate Chemistry, the same position McArthur had pleaded to keep in order to save Fiser's job. Phillip L. Reynolds, who was the General Manager of TVAN's HR organization in 1994 (Reynolds p. 3345, *ll.* 21-24), testified that he recommended settling the complaint and

canceling the RIF. Reynolds acknowledged that they (HR) "made an administrative error" in giving Fiser a RIF notice from a Sequoyah job for which he had a job description when they "weren't actually going to reduce the Chemistry Superintendent position" and when Fiser had worked for more than a year in a Corporate Chemistry job (Reynolds p. 3431, *l.* 25—p. 3432, *l.* 17; p. 3362, *ll.* 11-23; p. 3360, *ll.* 11-21; p. 3357, *l.* 5—p. 3358, *l.* 2).

d. Kent's Consideration of Fiser for Sequoyah Chemistry Jobs

3.34 Kent's consideration of Fiser for two Sequoyah Chemistry jobs shows his lack of animosity toward Fiser. After being assigned to ETP in April 1993, Fiser kept in touch with McArthur who advised him of potential openings in Sequoyah Chemistry. In May of 1993, Kent discussed a job as the Technical Support Manager in Chemistry with Fiser (Fiser p. 2520, *l.* 19—p. 2521, *l.* 25), who turned it down. Instead of tape recording the conversation, Fiser made a note of the conversation in his planner stating that Kent told him that Beecken "did not have the opinion that [he] was . . . not aggressive enough." The second "not" was inserted after the note was written (Fiser p. 2525, *l.* 1—p. 2526, *l.* 5; TVAX123). The note is inconsistent with Fiser's earlier tape recorded conversation in which Beecken made it clear that Fiser was not aggressive enough (Fiser p. 2523, *l.* 17—p. 2524, l. 7; JX27 at 50-58).

3.35 Later in 1993, TVAN determined that each nuclear plant site should have a Chemistry Manager, grade PG-10, reporting to the site RadChem Manager. Kent then entered into discussions with Fiser about whether he would be interested in that position. Fiser claimed that Kent offered him the job. Although Fiser was tape recording numerous conversations in that timeframe in his attempt to get a job, he claimed he did not tape that conversation in which, according to him, Kent offered him a job. The TVA OIG concluded that while Kent discussed the position with Fiser, an offer was not made (TVAX11 at EE000048). Since Kent went through

the process of advertising the job, his testimony that he was merely trying to determine Fiser's interest is more credible. During their conversation, Fiser told Kent that upper management did not think highly of him based on his previous stint as Chemistry Superintendent and suggested that Kent check with others. When Kent discussed the matter with McArthur, he learned that management felt that Fiser had not been an effective manager. Kent subsequently told Fiser that management did not have confidence in his abilities. However, Kent did not refuse to select or even consider Fiser for the job; Fiser simply did not apply (TVAX11 at EE000046-48).

4. FISER'S 1993 DOL COMPLAINT

a. The Filing and Settlement of the Complaint

4.0 After receiving a RIF notice, but before its effective date (JX60), Fiser filed the September 23, 1993, DOL complaint under Section 211 of the Energy Reorganization Act of 1978, 42 U.S.C. § 5851 (2000) (ERA), alleging discrimination in his being surplused from the Sequoyah Chemistry Superintendent position (The complaint is SX34; a copy of the complaint with its attachments is Exhibit 2 to SX177). TVA entered into an April 7, 1994, settlement with Fiser of his DOL complaint by officially placing him in the lower level, nonsupervisory Chemistry Program Manager staff position in the Corporate Chemistry organization located in Chattanooga, to which he had previously been assigned (SX177, Ex. 3). After the settlement, McArthur continued to be Fiser's second-level supervisor until an August 1994 reorganization.

4.1 Somewhere in this timeframe, McArthur was informed that Fiser had surreptitiously tape recorded him and various other employees. Various of the recordings admitted into the record and the "transcript" prepared by Fiser (JX27) do not show any attempt by Fiser to pursue any nuclear safety-related concerns. Nevertheless, McArthur was counseled that he should not take any action against Fiser

for having conducted surreptitious tape recording, but that he should assume that any future conversations with Fiser were also being recorded. Although McArthur may have related this cautionary note to a few other managers, there is no evidence that McArthur or anyone else ever undertook any adverse action against Fiser for having made surreptitious tape recordings.

b. The Investigations of Fiser's 1993 DOL Complaint

4.2 As a result of the settlement, there was no decision in that case at any administrative level by the DOL, and DOL did not investigate the complaint (McGrath p. 726, *l.* 10—p. 727, *l.* 6; p. 723, *l.* 10—p. 724, *l.* 19). The Staff's reliance in the NOV on the number of employees interviewed in the nonexistent DOL investigation is even more puzzling in light of the summary of the OI report which acknowledged that Fiser "settled his 1993 DOL action with TVA prior to completion of a DOL fact finding investigation" (JX44 at AB000007).[12]

4.3 Both the TVA OIG and OI investigated the allegations of Fiser's 1993 DOL complaint. After investigation, OI concluded that Fiser's claim of discrimination could not be substantiated (SX177 at 8) and relied upon the opinion of the NRC's Regional Counsel who "opined that Fiser had not engaged in protected activity and concluded 'that there were performance-based issues with Fiser nothing more'" (JX67 at 1, 3). Thus, OI's conclusion as to the allegation of discrimination in Fiser's 1993 DOL complaint is consistent with the record in this proceeding. TVA OIG did not substantiate that Fiser was subjected to any adverse action due to his

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12 In 1993, the administrative process for ERA complaints was initiated by the filing of a complaint with DOL's Wage and Hour Division (Wage and Hour) followed by an investigation and a decision by Wage and Hour. If either party was dissatisfied, they could then appeal for an evidentiary hearing before a DOL administrative law judge, who was responsible for issuing a recommended decision. The final DOL decision would be issued by the Secretary of Labor. 29 C.F.R. pt. 24 (1993).

having raised any nuclear safety-related concerns. The findings of the TVA OIG further support TVA's position in this proceeding that Fiser was removed from Sequoyah Chemistry because he was perceived to be a weak manager, not because of any safety concern he raised to plant management, McGrath or McArthur. The TVA OIG found:

- The evidence does not support Fiser's assertion that actions were taken against him due to his raising concerns. To the contrary, management concluded Fiser was a weak manager because there were problems falling under his management responsibilities which he did not identify and/or correct. Based on management's evaluation of Fiser's management skills, he was transferred from SQN to the Corporate Chemistry Group Manager for a one-year assignment, moved to a position of lesser responsibility in Corporate Chemistry during that year, not allowed to return to SQN at the end of the year, and not considered for the SQN Chemistry Manager position.
- Fiser's RIF was due primarily to miscommunication and misunderstanding among managers regarding what position was being RIFd; specifically, whether Fiser's position as a Program Manager in the Corporate Chemistry Group or as SQN Chemistry Manager was being RIFed.
- The SQN Chemistry Control Manager position was discussed with Fiser while he was in the Employee Transition Program, but he was ultimately told management felt he could not perform adequately in that position. (In fact, Fiser did not apply on the posted vacancy for that position.) [TVAX11 at 1].

c. Fiser's Only "Protected Activity" was the Filing of his 1993 DOL Complaint.

i. What constitutes a "protected activity" under 10 C.F.R. § 50.7 (2001).

4.4 The NRC's employee protection rule, 10 C.F.R. § 50.7, adopts the meaning of protected activities as "established in section 211 of the Energy Reorganization Act." The ERA includes as a protected activity commencing or causing to be commenced a proceeding "under this chapter or the Atomic Energy Act of 1954" (42 U.S.C. § 5851(a)(1)(D) (2000)). Thus, the filing of a complaint under section 211 of the ERA, commencing a proceeding under that chapter, constitutes

protected activity, and Fiser's 1993 DOL complaint was by definition protected activity.

4.5 The ERA also defines other protected activities, as pertinent here:

> notif[ying] his employer of an alleged violation of this chapter in the Atomic Energy Act of 1954;
>
> refus[ing] to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer [42 U.S.C. § 5851(a)(1)(A) & (B)].

See also 10 C.F.R. § 50.7(a)(1)(i) & (ii) (2001).

4.6 In Fiser's 1993 DOL complaint, he makes claims which, if true, would show that he engaged in protected activities under section 5851(1)(A) & (B). He alleges that he was surplused from his job "because of the fact that I or people under my direction had found and/or documented and/or reported and/or corrected problems which affected plant safety at Sequoyah" (SX34 at AJ000134). His complaint also states, "I am suffering reprisals for finding, documenting, reporting and fixing a preexisting problem associated with a radiation monitor." It further states "Bill Jocher and I determined that Sequoyah chemistry personnel could not meet NRC's three-hour requirement for conducting post-accident sampling analyses" (SX34 at AJ000136).

d. The "Protected Activities" Claimed in Fiser's 1993 DOL Complaint.

4.7 While TVA does not dispute that Fiser's filing of his 1993 DOL complaint constitutes protected activity by itself, TVA strongly disputes that his complaint describes any protected activities in which he engaged. The matters described in that 1993 DOL complaint were not nuclear safety concerns raised by him. In fact, they were examples of performance issues for which Sequoyah plant management held him accountable as a manager. Fiser's complaint admitted that to be the situation. For example, he stated "that one of the reasons that he [the plant manager] did not want me back at Sequoyah . . . was because of '[t]he radmonitor effluent calculations not accounting for the vacuum'" (SX34 at AJ000135), i.e., the

plant manager was holding him accountable for failing to identify and correct the problem.

4.8 There are three specific chemistry issues discussed in Fiser's 1993 DOL complaint:

(1) "'[T]he radmonitor effluent calculations not accounting for the vacuum'";

(2) "'The filter change-out scenario,'" i.e., a containment radiation monitor which was improperly aligned after sampling activities; and

(3) "Sequoyah Chemistry personnel could not meet NRC's three-hour requirement for conducting post-accident sampling analyses" (SX34 at AJ000135-36).

4.9 The evidence in the record shows that Fiser did not discover, raise, report, or document any of the issues discussed in his 1993 DOL complaint. In truth, the thrust of Fiser's complaint was that he did not think it fair that TVA considered him responsible for the underlying problem. Thus, he claimed "I was not directly responsible for either of the underlying conditions leading to those situations," but "I was charged with them by Beecken," the Sequoyah Plant Manager (SX34 at AJ000136). While Fiser argued that it was not fair to hold him responsible for failing to identify and correct those problems, that was not the issue. His failure to identify and correct a problem does not somehow become protected activity; he must identify, document, or otherwise raise the issue. Fairness is not a basis for liability under the ERA or Section 50.7. An employer is entitled to be wrong, unfair, or unjust in its decisions so long as it does not discriminate. DOL recently rejected just such an argument in *Gale v. Ocean Imaging, Inc.*, No. 97-ERA 38 at 9 (July 31, 2002). In that case, the complainant argued her discharge was unfair in light of her previous exemplary employment history. DOL rejected that as a basis to find discrimination, holding that:

> [I]t is not enough for the plaintiff to show that a reason for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a "phony reason" [citations omitted]. Thus, even if

> Complainant's contention were correct, that would be insufficient to establish pretext.

4.10 When TVA OIG investigated Fiser's allegations of discrimination, it found that "Beecken was not holding Fiser responsible for raising concerns in these three areas, but for not fixing them as the responsible manager" (TVAX11 at EE000039). The TVA OIG further found:

> In his DOL complaint, Fiser alleged Beecken was upset because he (Fiser) "reported" these concerns. We found no evidence to support Fiser's assertion. Management consistently testified that Fiser was held responsible for not identifying and fixing the problems [TVAX11 at EE000039 at fn.9].

4.11 Fiser claimed that his 85-page "Sequence of Events" (JX27), which he wrote, allegedly based on his notes and purported transcripts of his tape recordings, supported his 1993 DOL complaint. Far from showing discrimination, the "Sequence of Events" shows that Sequoyah plant management did not want Fiser back as the Chemistry Superintendent because of longstanding problems in Sequoyah Chemistry for which they believed Fiser was accountable. Furthermore, the "Sequence of Events" does not show that Fiser identified or raised any nuclear safety concerns. On the contrary, it shows that he was arguing about the fairness of blaming him for not fixing the problems. Indeed, NRC's Regional Counsel "could not conclude that Fiser was pursuing an underlying safety issue" and that it "seem[s] to reflect that there were performance based issues with Fiser nothing more" (JX67 at 3).

i. Fiser did not identify, document, or otherwise raise the issue about the radmonitor set points.

4.12 The issue was identified to TVA in 1982 when the NRC sent an IE bulletin indicating that TVA should account for vacuum in a noble gas chamber (Fiser p. 1129, *ll.* 10-16; p. 2641, *ll.* 4-7). However, when TVA performed the evaluation at that time, it was inadequate because it failed to consider negative pressure in a noble gas chamber (Fiser p. 2641, *l.* 13—p. 2642, *l.* 3). Fiser claimed that after

he came to TVA in 1987, he asked whether someone had taken the bulletin into account. When he was told that it was not a problem, he accepted that conclusion and that was the end of his inquiry (Fiser p. 2642, *l.* 9—p. 2643, *l.* 4; p. 1137, *l.* 14—p. 1138, *l.* 6; p. 2654, *l.* 25—p. 2655, *l.* 22). After Fiser was assigned to Corporate Chemistry and Jocher went to Sequoyah in the Spring of 1992, the issue of the radmonitor set points was identified and a SCAR (significant corrective action report) was written (Fiser p. 2643, *ll.* 5-14). Thus, the issue was identified after Fiser was gone from Sequoyah and he did not recall ever seeing the SCAR (Fiser p. 2643, *l.* 5—p. 2644, *l.* 1; p. 2647, *ll.* 2-4). In fact, Fiser admitted that in his 1993 DOL complaint he was saying that the mistake was made before he came to TVA, that the problem was identified after he left Sequoyah and was sent to Corporate Chemistry, and that it was unfair to hold him responsible for it (Fiser p. 2644, *ll.* 4-10). Finally, Fiser testified that he is not now claiming responsibility for finding or documenting the problem in the SCAR (Fiser p. 2659, *l.* 22—p. 2661, *l.* 10).

4.13 Fiser was very evasive on the issue of whether he identified the problem. On direct examination by Staff counsel, he testified so as to give the impression that he was involved in discovering and identifying the issue:

> Also the fact that we had found and documented a problem with a radiation monitor set point . . . And we'd discovered that personnel at TVA had not properly accounted for the vacuum [Fiser p. 1129, *ll.* 10-15].
>
> And instead of being rewarded for finding it, it was listed as one of the contributing factors for his displeasure with me [Fiser p. 1129, *l.* 24—p. 1130, *l.* 2].
>
> JUDGE YOUNG: [W]ere you actually saying that you issued a corrective action with regard to this particular problem?
>
> THE WITNESS: We issued a SCAR, or actually it was my people who issued a SCAR, documented the fact that we had found this problem [Fiser p. 1132, *ll.* 1-6].
>
> Q: Fiser, were you directly involved in identifying this problem?
>
> A: I certainly had a part to play in it, yes [Fiser p. 1136, *ll.* 15-17].

In fact, contrary to Fiser's claim that "we found and documented" the problem (Fiser p. 1129, *ll.* 10-11), the problem was identified by someone who was not even in Chemistry. The problem was identified on November 6, 1992, seven months after Fiser left Sequoyah, by an employee in the operations organization (TVAX129 at FI000112; Ritchie p. 4692, *ll.* 10-22).

ii. Fiser did not identify, document, or otherwise raise the issue about "the filter change-out scenario."

4.14 This issue arose when someone in Sequoyah Chemistry discovered that he had misaligned a monitor and reported his mistake on a corrective action document. At the hearing, Fiser sought to take credit for the issues when he testified that the individual reported the error.

> As I had previously instructed them . . . I had made it very clear if – if we make a mistake, we document it. We don't just—it would have been very easy for him to have ignored it and gone on . . . . But I did not feel like that was the way to do business, and I wanted us to be honest, forthright, and just if we make a mistake, go ahead and admit it and get the problem fixed [Fiser p. 1140, *l.* 2; p. 1141, *ll.* 5-13].

4.15 Fiser neither identified nor documented the problem (Fiser p. 2672, *ll.* 18-20). In fact, he admitted he had never seen the corrective action document (Fiser p. 2686, *ll.* 4-8). Further, the evidence is crystal clear that Fiser did not instruct anyone to report this particular issue (Fiser p. 2671, *l.* 20—p. 2672, *l.* 15). He did not even know when it happened, except he speculated that it occurred sometime when he was assigned to either Outage Management (April-December 1991) or Corporate Chemistry (March 1992—March 1993) (Fiser p. 1139, *ll.* 19-21; p. 2669, *ll.* 2-5). Fiser admitted that the instructions he claimed to have given were generic instructions given to everyone at the plant (Fiser p. 2682, *l.* 21—p. 2683, *l.* 8). In fact, the problem occurred and was documented in July 1991 while Fiser was assigned to Outage Management (Fiser p. 2678, *ll.* 1-10; TVAX130).

iii. Fiser did not identify, document, or otherwise raise the issue that "Sequoyah Chemistry personnel could not meet the NRC's three-hour requirement for conducting post-accident sampling analysis" (PASS).

4.16 It was the NSRB, not Fiser, that raised the question whether Sequoyah Chemistry personnel could meet the PASS requirements (McGrath p. 890, *ll.* 10-14). At the May 22-23, 1991, meeting, the NSRB questioned whether PASS training recognized time/exposure constraints and recommended more realistic training (JX1 at CC000087-88). When the NSRB met on February 19-20, 1992, that issue had still not been resolved by Sequoyah Chemistry. At that time, the NSRB expressed some frustration that the issue had been open for some nine months and questioned whether the three-hour requirement for taking and analyzing samples could be met. Accordingly, the NSRB set up an action item which would remain open until all shifts could demonstrate that they could meet the requirement (McGrath p. 677, *l.* 6—p. 678, *l.* 14; Fiser p. 2708, *l.* 21—p. 2709, *l.* 8; JX4 at CC000105).

4.17 Shortly after the February 19-20, 1992, NSRB meeting, Fiser was assigned to Corporate Chemistry (Fiser p. 2709, *ll.* 9-13). Afterwards, Sequoyah Chemistry under Jocher tested the technicians and determined that they could not perform the PASS tests within the three-hour constraints (Fiser p. 2709, *ll.* 9-23; TVAX73 at CG000005). The tests were conducted in response to the issue raised by the NSRB (Fiser p. 2737, *ll.* 1-6). As a result of the tests, a SC AR was generated (TVAX73; Fiser p. 2718, *l.* 16—p. 2719, *l.* 3). At the time, Fiser was in downtown Chattanooga in Corporate Chemistry.

4.18 The SCAR was initiated by Greg Taylor under Jocher's supervision and there is no indication on the document that Fiser discovered or documented the problem (Fiser p. 2719, *l.* 4—p. 2720, *l.* 9). Indeed, Robert Ritchie, one of the persons who approved the SCAR, testified that Fiser did not do anything that resulted in the issuance of the SCAR or that contributed to the discovery of the problem since

"Fiser had gone back downtown in – in May" (Ritchie p. 4710, *ll.* 4-23). Fiser admitted that he was trying to take credit in his 1993 DOL complaint for the SCAR which Taylor wrote (Fiser p. 2729, *ll.* 18-24; SX34 at AJ000136). At the hearing, Fiser even tried to take credit for the PASS testing, claiming "it was a joint effort." However, he was finally forced to admit that he "was not out there doing the tests." He was involved only "conceptually," which consisted of his "complete agreement with [Jocher for him] to go ahead and to do that testing based on the new guidance I think it was that we had from INPO" (Fiser p. 2755, *l.* 15—p. 2756, *l.* 16).

4.19 When Fiser was in charge of Sequoyah Chemistry he was responsible for PASS training, but he neither conducted timed tests nor did he initiate a SCAR over the inability to meet the PASS requirements (Fiser p. 2720, *ll.* 10-20). Fiser testified that, while certain equipment was inoperable, they could only simulate a test to determine if the PASS requirements could be met (Fiser p. 2722, *ll.* 10-22). He was unable to answer why he did not initiate a SCAR over the inability to determine if PASS requirements could be met (Fiser p. 2723, *l.* 21—p. 2724, *l.* 7; p. 2725, *l.* 7—p. 2726, *l.* 9).

e. Fiser's 1996 "Recharacterization" of The Protected Activities in His 1993 DOL Complaint.

4.20 Fiser's 1996 DOL complaint (SX37) suggested that the cause of the problems that led to his 1993 DOL case were different than the ones actually articulated in his 1993 DOL complaint (SX34). Attached to Fiser's 1996 DOL complaint is a document entitled "Sequence of Events" (SX37 at 2). That document describes the events Fiser alleged in 1996 led up to his removal from Sequoyah Chemistry in 1993. However, it alleges totally different protected activity, different events, and the involvement of a different alleged discriminating official than Fiser alleged in his 1993 DOL complaint (SX34). Moreover, Fiser's 1996 "Sequence of

Events" (SX37 at 2) tells a different story about his removal from Sequoyah than does the "Sequence of Events" he submitted in support of his 1993 DOL complaint (JX27).

4.21 The "Sequence of Events" attached to Fiser's 1996 DOL complaint tells how he attended a meeting with the NSRB in January 1992 during which Tom Peterson, an outside consultant, was critical of the Sequoyah Chemistry's program's failure to provide daily trending analysis. Fiser claimed that Peterson pressed to have the requirement of daily trends placed into Chemistry procedures. Fiser allegedly refused to make daily trends a procedural requirement since if he failed to generate trends, he would be in noncompliance with procedures. Fiser claims that Peterson left the meeting and, after returning with McGrath, continued to press Fiser to make trending a procedural requirement (SX37 at 2).

4.22 Fiser's 1996 "Sequence of Events" further claims that after the meeting with NSRB, Jocher told Fiser he had made a "big mistake" that "could cost [Fiser his] job." He also claims that Beecken, the Plant Manager, told him that McGrath was upset with him, and said that Fiser "was a problem and that they needed to get rid of [him]" (SX37 at 3). The "Sequence of Events" goes on to state that Fiser became concerned when McGrath was made the General Manager of Nuclear Operations Support since he was "one of the people directly responsible for my demise," and he was "the very person who had earlier reported to the top management at TVA that they should get rid of me" (SX37 at 4). Further on in his "Sequence of Events," Fiser expressed misgivings about applying for the new PWR Chemistry Program Manager position since "I was not sure it would be wise for me to work for two of the guys [McGrath and McArthur] who shot me in the back just three years ago" (SX37 at 5). Thus, Fiser's 1996 DOL complaint claimed he engaged in a different purported protected activity and alleged that different alleged discriminating officials were at the bottom of his removal from Sequoyah than he had alleged in his 1993 DOL complaint.

4.23 Fiser's after-the-fact revised version of his problems as Sequoyah Chemistry Superintendent is significant for a number of reasons. Principally, however, it reflects on his credibility. Fiser's testimony was at times evasive, at other times he was subject to exaggeration and broad generalizations, while at other times he projected his speculations or suppositions as though they were fact.

4.24 First, in contrast to Fiser's version, the actual reasons why Fiser was removed as Sequoyah Chemistry Superintendent are well understood. Beecken, the Plant Manager, initiated the exchange of Fiser and Jocher because of the known weaknesses in the Sequoyah Chemistry program. He later concluded that Fiser should not return to Sequoyah because of additional problems that came to light. Both Beecken and McGrath denied that McGrath or the NSRB had ever recommended Fiser's removal.

4.25 Second, the Sequoyah Chemistry issues that were of major importance to NSRB were well documented in the NSRB minutes as action items, which do not include trending (JX1-5, 7, 9: TVAX70). McGrath's detailed testimony that the issues of significance to him, whether PASS sampling could be done in three hours and the potential for unmonitored release paths, is entirely consistent with the contemporaneous minutes of the NSRB (JX3).

4.26 Third, the fact that Fiser's 1996 version was written at least four years after the fact without the aid of any contemporaneous notes casts doubt on its accuracy. Indeed, his assertion that the NSRB meeting occurred in January 1992 (SX37 at 2) is demonstrably wrong, since the dates of the NSRB meetings are documented (JX1-5).

4.27 Fourth, Fiser's version is inconsistent with the testimonies of McGrath, McArthur, and Ritchie. In this case, Ritchie, who was neither an accused nor an accuser, testified about the meeting in Fiser's office with the NSRB. He testified that as Peterson and Jocher asked questions, Fiser became visibly upset

(Ritchie p. 4703, *l.* 5—p. 4705, *l.* 5). As Fiser got more upset, Jocher, who was not a member of the NSRB, directed more questions at Fiser (Ritchie p. 4705, *ll.* 6-11). "The more upset Fiser got, the more questions, the more line of questioning, the more bantering back and forth" (Ritchie p. 4708, *ll.* 6-8). Fiser visibly manifested his anger by pointing his finger (Ritchie p. 4708, *ll.* 9-16) and "he got louder and he got more argumentative with Jocher and Peterson" (Ritchie p. 4708, *ll.* 17-22). Although McGrath and McArthur were present (Ritchie p. 4704, *ll.* 5-17), they did not say much, and, if they were upset with Fiser, it did not make an impression on Ritchie (Ritchie p. 4706, *l.* 22—p. 4707, *l.* 13; p. 4721, *l.* 18—p. 4722, *l.* 2). Further, Ritchie denied that anyone left the room in anger (Ritchie p. 4708, *l.* 23—p. 4709, *l.* 5).

4.28 Finally, Fiser's inability to provide data trending is not protected activity. As Fiser admitted in his complaint (SX37 at 2-3), Sequoyah Chemistry discontinued providing daily information to the Sequoyah plant operators which the NSRB felt would contribute to safe operation. Fiser refused to resume providing that information, not because he felt it would cause a safety problem, but because of the perceived difficulty of the task and the administrative inconvenience to him. According to the Secretary of Labor, management is entitled to establish job responsibilities and work schedules, and an employee's lack of performance to meet those responsibilities is not protected by simply claiming an inability to meet those expectations. *Skelly v. TVA*, No. 87-ERA-8, slip op. at 10 (ALJ Feb. 22, 1989), *adopted* (Sec'y Mar. 21, 1994) ("[T]he complaints Skelly voiced to his co-workers and supervisors related to the quantity of work Skelly was required to produce," "was not at the expense of safety and thus no safety issue is involved," and "cannot conceivably be perceived as being protected by Section 5851.").

4.29 Fiser was not entitled to refuse to provide the requested data simply because he felt it was inconvenient or difficult. The Secretary of Labor has held time and again that an employee's refusal to work loses any protected quality it may have had

once it has been determined that no *work* hazard exists. *Sutherland v. Spray Sys. Envt'l*, No. 95-CAA-1, slip op. at 3 (Sec'y Feb. 26, 1996) ("Management has the prerogative to determine which means it deems to be most effective provided such means comport with requisite safety and health standards. There is no requirement for management to engage in a dialog with the refusing workers as to which procedure would be most efficacious.") In this case, of course, Fiser never even told the NSRB that there was any nuclear safety hazard in providing the requested data. *See Crosby v. United States Dep't of Labor*, 53 F.3d 338 (table), 1995 U.S. App. LEXIS 9164 (9th Cir. Apr. 20, 1995), *aff'g*, *Crosby v. Hughes Aircraft Corp.*, No. 85-TSC-2 (Sec'y Aug. 17, 1993), in which the court affirmed the Secretary's determination that the complainant was discharged for proper reasons when he refused to work on a project because he did not like the protocol. In this case, it would indeed be anomalous if an employee such as Fiser could excuse his poor performance in refusing to provide information helpful to safely operate a nuclear plant and then claim that his refusal to fulfill his job responsibilities entitled him to immunity under the ERA.

i. Sasser Letter

4.30 Staff also claims as one of Fiser's alleged protected activity an August 16, 1993, letter from Fiser and two other TVAN employees—Jocher and David Matthews—to Senator James Sasser, claiming the existence "of a repressive management structure within the TVA's Nuclear Power Agency" (SX29 at 1). This is another example of Staff's constantly changing shell game of protected activity. The Sasser letter is not mentioned in Fiser's 1993 DOL complaint (SX34) or his 1996 DOL complaint (SX37) or in the September 1999 letter notifying TVA of an apparent violation (JX44) or the February 2000 NOV (JX47). Even after the appeal in this proceeding, the Staff's September 2001 responses to TVA's first set of interrogatories do not mention the letter as a protected activity (TVAX113 at 1-4). Staff asserted for

the first time ever in a January 24, 2002, supplemental response to interrogatories Nos. 1, 2, and 3 of TVA's First Set of Interrogatories that the Sasser letter was one of Fiser's alleged protected activities which allegedly resulted in his being retaliated against in 1996 (TVAX113, Jan. 24, 2002, letter at 1).

4.31 Staff put on no evidence addressing how this letter allegedly played a part in this case. In fact, the evidence is undisputed that both McGrath and McArthur were unaware of, and never saw, the Sasser letter before preparing for their depositions in this proceeding (McGrath p. 415, *l.* 8—p. 416, *l.* 2; McArthur p. 1445, *l.* 23—p. 1446, *l.* 10). Nor did Staff put on any evidence that any member of the SRB or the HR personnel who made the determination to post the PWR Chemistry Manager position and the decision not to post the Corporate RadChem Manager position was aware of the Sasser letter or ever saw it before Staff asserted it in January 2002 as one of Fiser's alleged protected activities. Thus, the letter to Sasser could not have been the basis of any of the acts alleged in this proceeding.

ii. Seven-day diesel fuel tanks

4.32 This alleged protected activity is yet another example of the Staff's shell game of protected activity. It was not mentioned in Fiser's 1993 DOL complaint (SX34) or his 1996 DOL complaint (SX37). It was not identified as a purported protected activity in the September 1999 letter notifying TVA of an apparent violation (JX44), it was not mentioned in the Staff's February 2000 NOV to TVA (JX47), and it was not identified in the Staff's September 2001 response to TVA's first set of interrogatories. In fact it was not identified until the Staff's January 24, 2002, supplemental responses to interrogatories (TVAX113 at 2, Jan. 24, 2002, letter).

4.33 At the hearing, Fiser testified that "[o]ne of the things that I found when I was at Sequoyah was the fact that their diesel generator's seven-day tanks . . . there was an inadequate recirculation. I found this, . . . I reported it, filled out the

SCAR" (Fiser p. 1146, *ll.* 4-13). Fiser claimed the handling of this issue showed that when Beecken spoke to him in December 1992, he was expressing displeasure with Fiser's reporting of issues (Fiser p. 1145, *l.* 14—p. 1146, *l.* 20). Fiser then asserted that when management had reviewed the SCAR, he was told that there had been a discussion about taking disciplinary action against him (Fiser p. 1146, *l.* 19—p. 1147, *l.* 12).

4.34 Fiser's version of this issue demonstrates how much his testimony was exaggerated. The evidence shows that Fiser did not discover the problem, did not report it, and did not fill out the SCAR. Further, the issue arose in 1989 and was not discussed in his December 1992 conversation with Beecken (JX27 at 50-58; TVAX 126; Burzynski p. 4879, *l.* 21—p. 4881, *l.* 5). The issue came to TVA as an operating experience that had happened at another utility (TVAX145; Burzynski p. 4867, *l.* 3—4868, *l.* 11). It was sent from the Sequoyah licensing organization to Sequoyah Chemistry to review (TVAX128; Burzynski p. 4870, *l.* 5—p. 4872, *l.* 13). Licensing determined it was a problem and recommended that Chemistry write a SCAR (Burzynski p. 4872, *ll.* 22-24). Licensing also requested Chemistry to be prepared to explain how it had missed the problem during the recent review of the surveillance instructions (Burzynski p. 4872, *ll.* 4-13; p. 4874, *ll.* 11-20). Fiser did not initiate or approve the SCAR, and there is no indication on the document that he had any responsibility for issuing or approving it (TVAX146; Burzynski p. 4879, *l.* 21—p. 4881, *l.* 5).

4.35 As a result of the problem, Sequoyah was required to enter an action statement that required TVA to shut down both Sequoyah units if the problem was not immediately addressed. Mark Burzynski, who was the Sequoyah licensing manager at the time, testified that it was the only time in his memory in 25 years that TVA had done something wrong that put the generation of two units in immediate jeopardy. He said what had been done wrong was the failure of Chemistry to identify

the problem during the earlier surveillance review (Burzynski p. 4884, *ll.* 15-23; p. 4890, *l.* 14—p. 4891, *l.* 6). The failure to identify the issue was a major concern to plant management (Burzynski p. 4892, *l.* 5—p. 4893, *l.* 7).

4.36 Neither Beecken nor anyone else from TVA cited this issue as a reason for Fiser's 1992-93 removal from Sequoyah. However, the testimony shows why Sequoyah management may have discussed disciplinary action against Fiser for failing to timely identify the issue. According to Fiser's resume (JX22 at 417) he became the Chemistry Superintendent at Sequoyah in April 1988 (Burzynski p. 4907, *l.* 18—p. 4908, *l.* 9). Thus, he was in charge of Sequoyah Chemistry when the incorrect procedure was revised (revisions 12 and 13) without discovering the problem (Burzynski p. 4908, *l.* 11—p. 4909, *l.* 10; p. 4903, *l.* 18—p. 4904, *l.* 12; TVAX128 at FI000082-83). Burzynski testified that if management discussed taking disciplinary action against Fiser, it likely would have been for failing to identify the issue during the surveillance review (Burzynski p. 4909, *l.* 11—p. 4910, *l.* 16).

4.37 Thus, the issue of the problem with the seven-day diesel fuel tanks was not identified, raised, or documented by Fiser and does not constitute protected activity on his part. It further shows the extent to which he engaged in hyperbole and exaggeration both in claiming that he was involved in protected activity and when he alleged that individuals retaliated against him for such activity. There is also no link with respect to this issue to McGrath or McArthur to explain how it would provide any motivation for them to retaliate against Fiser.

iii. Fiser's tape recording

4.38 Staff further claims that Fiser's surreptitious tape recording of his coworkers is a protected activity (TVAX113 at 3). To the contrary, Fiser's 1993 Sequence of Events shows that his tape recording was not conducted in pursuit of, or in any effort to raise, any nuclear safety concerns (JX27). Fiser also conceded that his

nonconsensual tape recording was not in pursuit of, or in any effort to raise, any nuclear safety concerns (Fiser p. 2504, *l.* 4—p. 2508, *l.* 3). He testified that he surreptitiously recorded his fellow employees out of concern for his future employment at TVA and how TVA management perceived his performance (*id.*).

4.39 In any event, while McArthur was informed by the Office of General Counsel (OGC) of Fiser's secretly tape recording TVA employees, Staff presented no evidence that McArthur took any action against Fiser because of the tape recording. Moreover, OGC specifically counseled and advised McArthur that he should be aware of and sensitive to the fact of Fiser's tape recording but not to take any action against Fiser because of his surreptitious tape recording (McArthur p. 1586, *l.* 4—p. 1587, *l.* 13). Staff put on no evidence that McGrath was even aware of Fiser' s tape recording and McArthur testified that he did not tell him (McArthur p. 1625, *ll.* 2-17.

f. McGrath Had No Prior Knowledge of Fiser's 1993 DOL Complaint, and McArthur Was Not Critical of Fiser's Chemistry-Related Safety Concerns.

4.40 The evidence in the record shows that McGrath had no prior knowledge of Fiser's 1993 DOL complaint (SX133 at 41, 47, 93) and that he was not motivated in any way by Fiser's alleged chemistry-related concerns (SX133 at 85). Similarly, while McArthur was aware of the 1993 DOL complaint, there is no evidence that McArthur was critical of any chemistry-related concerns raised by Fiser in 1991-1993, or that he was motivated in any way to retaliate against Fiser for raising those concerns.

4.41 The record shows that in issuing the NOV, the Staff failed to critically evaluate the evidence or even gather all of the pertinent evidence. The summary of OI's Report states that Fiser's protected activity was the "filing of a discrimination complaint" in 1993 (JX44 at 5). Apparently OI and the Staff did not

review that complaint in OI's investigation, since it was first provided to the Staff in the context of this proceeding at TVA's and McArthur's preenforcement conference (SX134 at 15; SX135 at 24). Instead, it seems that the Staff and OI were misled by Fiser's 1996 complaint which recounts his tale of a meeting with the NSRB which he implies was at the root of his claim of discrimination in his 1993 DOL complaint. As discussed in paragraphs 4.20-4.22, these matters are in fact foreign to his 1993 DOL complaint.

4.42 The Staff's failure to review Fiser's 1993 DOL complaint or the investigation of that complaint is particularly egregious since Fiser's 1996 DOL complaint inaccurately recharacterized his 1993 DOL complaint. In the 1993 complaint, Fiser identified a number of persons by name, none of whom were McGrath. And at that time, he named McArthur, not as a culpable party, but as an ally. Based on the compounded failures to review the 1993 DOL complaint, the summary of the OI Report provided by NRC concluded that McGrath and McArthur "were named as culpable parties in [Fiser's] 1993 DOL complaint" (JX44 at AB000007). Only after TVA provided a copy of the 1993 DOL complaint to the Staff did the Staff acknowledge that error (JX47 at AB000022).

4.43 The Staff's failure to review Fiser's 1993 DOL complaint also led it to its theory in this case that McGrath recommended to Sequoyah plant management that Fiser should be terminated because of his refusal to implement new Chemistry procedures. To the contrary, Fiser's 1993 DOL complaint does not implicate McGrath or McArthur and does not involve new Chemistry procedures or trending plots; instead, it alleged he was being unfairly held accountable for the three problems in Sequoyah Chemistry discussed above: (1) radiation monitor setpoints that did not account for vacuum and or negative pressure; (2) a containment radiation monitor that was improperly aligned; and (3) the inability of Sequoyah Chemistry personnel to properly conduct post-accident sampling analyses. Since OI apparently did not review Fiser's

1993 DOL complaint, the Staff could not have known that in 1996 Fiser had misstated the protected activity which he claimed as the basis for his 1993 complaint and identified different managers who were allegedly responsible.[13] Of course, all this bears directly on the credibility of Fiser, OI's report, and the Staff's theory of the NOVS which it feels it must continue to pursue.

4.44 We agree that the act of filing a DOL complaint in 1993 is protected activity. However, when a claim of retaliation based upon the filing of an earlier DOL complaint is made, it is important to look at the motives of the managers who are alleged to have retaliated. It is clear that different inferences can be drawn depending on whether the managers who are alleged to have engaged in retaliation were identified as responsible for the previous discrimination and whether those managers were identified as being adversely affected by the protected activity identified in the first complaint. While it is undisputed that Fiser filed a 1993 DOL complaint, the Staff made an erroneous finding that implies that McGrath and McArthur had an additional motive to retaliate against Fiser—the finding that "these individuals *were knowledgeable and critical of Fiser's 1991-1993 protected activity* involving chemistry—related safety concerns and *their actions in this regard were part of the information developed associated with the 1993 DOL case*" (JX47 at AB000022). The Staff further reasons that "given his position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews, the Staff also considers it more likely than not that [McGrath] was aware

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13 Under the Administrative Procedures Act, 5 U.S.C. § 706(2) (2000), a reviewing court must set aside an administrative decision which is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] unsupported by substantial evidence." We think a reviewing court would find that OI's failure to obtain a copy of Fiser's 1993 DOL complaint and the Staff's misreading of that complaint would warrant setting aside the NOV.

that Fiser filed a 1993 DOL complaint prior to 1996" (*id.*). Those conclusions are in error.

4.45 First, Fiser's 1993 DOL complaint, which TVA provided to the Staff, did not accuse either McGrath or McArthur of any discriminatory act, and it did not claim that he had raised any issues for which they were responsible.

4.46 Second, DOL's investigation of the 1993 DOL complaint did not develop any information with respect to Fiser's protected activity because there was no investigation. As stated in the summary of OI's Report (JX44 at AB000007), Fiser "settled his 1993 DOL action with TVA prior to completion of a DOL fact finding investigation." Consequently, there was no decision in that case at any administrative level by DOL, and the Staff has stipulated that DOL did not conduct any interviews (McGrath p. 726, *l.* 10—p. 727, *l.* 6; p. 723, *l.* 10—p. 24, *l.* 19). Since DOL did not investigate the 1993 complaint, the Staff is simply wrong when it concludes that McGrath's or McArthur's knowledge and criticism of Fiser's protected activity "were part of the information developed associated with the 1993 DOL case" (JX47 at AB000022). Given OI's apparent failure to review either DOL's or the TVA OIG's file on the 1993 complaint, we do not understand how the Staff could arrive at such a conclusion.

4.47 Third, given McGrath's position in the organization, he had no reason to learn of Fiser's 1993 DOL complaint. During the pendency of that complaint, McGrath was not in TVAN's Nuclear Operations, which included both Sequoyah and Corporate Chemistry. As a result, he was not informed and had no reason to learn of Fiser's 1993 DOL complaint. Further, as McGrath testified, it is not TVAN's practice to inform managers of pending DOL cases if they are in different organizations and have no involvement in the issues in the case.

4.48 Fourth, given the number of TVA employees who were actually interviewed by DOL and TVA OIG, there was no reason for McGrath to learn of

Fiser's 1993 DOL complaint. As stated above, the Staff stipulated that DOL did not conduct a single interview in connection with the 1993 complaint. Furthermore, neither McGrath nor anyone in his chain of supervision above or below him was interviewed by the TVA OIG in connection with its investigation of the allegations in that case. Obviously OI and the Staff did not review the TVA OIG's investigation of that complaint. If they had done so, they would have learned that nowhere in that file, including Fiser's interview, is McGrath even mentioned as being involved in the alleged discrimination. The United States Supreme Court rejected suspicion and surmise as a basis for an agency decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 484 (1951). Thus, in the context of a section 211 case, DOL may not simply assume that the responsible manager was told of the complainant's protected activity, there must be substantial evidence in the record to support a finding of such knowledge. *Bartlik v. TVA*, No. 88-ERA-15 (Sec'y Dec. 6, 1991, Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996). Under those circumstances, there is every reason to credit McGrath's testimony that he had no prior knowledge of Fiser's 1993 DOL complaint and no reason to make an unsupported assumption to the contrary.

4.49 The Staff theory that McGrath recommended to the Sequoyah plant management that Fiser should be removed from Sequoyah Chemistry is contrary to all of the testimony and disregards McGrath's categorical denial (McGrath p. 918, *l.* 23—p. 919, *l.* 19). The Staff is required to explain why it chose to credit Fiser's version, which is clearly hearsay, over McGrath's unequivocal denial.[14] That error is doubly compounded. First, if OI and the Staff had reviewed the 1993 DOL complaint, they would have had to make an adverse credibility finding against Fiser based on his mischaracterization of his 1993 claims. Not only is the claim against McGrath absent

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14 An agency determination based on "selective analysis" must be set aside. *N.L.R.B. v. Cutting, Inc.*, 701 F.2d 659, 665 (7th Cir. 1983).

from Fiser's 1993 DOL complaint, but Fiser also failed to mention it when he was interviewed by the TVA OIG in connection with that complaint and had an opportunity to expound. Second, Fiser claimed he was informed of McGrath's recommendation by Beecken, the Sequoyah Plant Manager. There is nothing in the record of investigation to show that the Staff made any attempt to interview Beecken to ask him to confirm or deny Fiser's version. Furthermore, there is no mention of McGrath's purported recommendation to Beecken in the TVA OIG's 1993 interview of Beecken. However, the Staff failed to review anything associated with Fiser's 1993 DOL complaint, including the TVA OIG's record of interview for either Fiser or Beecken.

4.50 The Staff, citing to Ronald Grover, argues that McGrath and McArthur made negative comments about Fiser. However, Grover did not state in fact what the comments related to, only his assumption. The Staff also fails to take into consideration that Grover did not work for TVA until well after Fiser had filed his 1993 DOL complaint and the fact that Grover was disgruntled over the same TVAN reorganization and the elimination of his position. Findings of discrimination may not be based upon gossip and talk of discrimination in the workplace. *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 n.2 (6th Cir. 1986); *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156-57 (6th Cir. 1988). The Board should not assume a discriminatory motive based on the speculation by a coemployee who not only has a bias, but an open hostility to TVA.

4.51 The Staff's finding that McArthur was "critical of Fiser's 1991-1993 protected activity" and that his "actions in this regard were part of the information developed associated with the 1993 DOL case" is even more farfetched (SX47 at AB000022). Rather than criticize Fiser for his protected activity, McArthur was viewed by Fiser himself as an ally. Thus, in his 1993 DOL complaint, Fiser states that McArthur was "very dismayed about the decision" to surplus him, expressed his "disagreement with this decision publicly" (SX34 at AJ000134), and "had me rated

very high" (*id.* at AJ000138). As with McGrath, DOL did not develop any information regarding McArthur in connection with the 1993 DOL case. Similarly, there is nothing in the TVA OIG's investigative file that suggests that McArthur was involved in any alleged discrimination.

4.52 In contrast, McArthur maintains (and his TVA OIG interview from 1994 is consistent) that NSRB had raised performance problems in the Sequoyah Chemistry and that Fiser was looked upon as part of the problem, not that Fiser had raised safety concerns. The Staff's conclusion that McArthur's criticism of Fiser's protected activity was part of the information developed associated with the 1993 DOL case is just wrong. There is no evidence at all to support the conclusion that McArthur was so incensed by these events that he would wait literally years to retaliate against Fiser.

5. THE 1994 REORGANIZATION

5.0 When Fiser's 1993 ERA complaint was settled on April 7, 1994 (JX34), he returned to Corporate Chemistry where he was in McArthur's chain of command. At that time, McArthur was the Manager of Technical Programs and, among others, the chemistry, environmental, and radiological control functions reported to him (SX100). Although TVA and Fiser had agreed that he would be placed in a Chemistry Program Manager position (Fiser p. 2755, *ll.* 3-14), the settlement agreement did not guarantee the continued existence of that position, did not guarantee him continued employment, and did not guarantee that his position or organization would never be subject to a reorganization. Indeed, it is well-established law that no position in the government has any guaranteed tenure.

5.1 In the summer of 1994, as a result of a reorganization, a decision was made to combine the corporate Chemistry and Environmental organizations into one organization under one manager. By combining the two organizations, the Chemistry

Manager and the Environmental Manager positions were replaced with a single Chemistry and Environmental Manager position. In addition, the Chemistry Program Manager positions and the Environmental Protection Program Manager positions were eliminated. In their place, Chemistry and Environmental Protection Program Manager positions were created.

5.2 Because the new positions were significantly different than the existing Chemistry Program Manager and Environmental Protection Program Manager positions, they were not deemed to be on the same competitive level. Therefore, the incumbents of the existing positions did not have a right to the new positions by virtue of TVA's interpretation (JX65) of the federal RIF regulations.[15] As a result of the elimination of his job in 1994, Fiser received a notice that his job was surplus and that if he was not selected for a new position, he would be sent to the TVA Services organization (Fiser p. 2759, *ll.* 11-22; TVAX149 at BF001490). This was the same process which had been followed in 1992 when Fiser's Chemistry Superintendent position was eliminated and he was assigned to ETP (JX59) and later RIFed (JX60).

5.3 Accordingly, TVA posted a vacant position announcement (VPA) for the four new positions (TVAX24 at HH000007) and held a competitive bidding process. Fiser was one of nineteen applicants for the job (TVAX149 at HH000151-52) and was selected for one of those new positions. As a result, he was issued an official position description as the Chemistry and Environmental Protection Senior Program Manager (SX43; Fiser p. 2303, *l.* 1—p. 2304, *l.* 3). Thus, in the fall of 1994, Fiser voluntarily left the position designated in the settlement (which was then eliminated) and entered into a new position.

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15 The effect of regulations promulgated by the Office of Personnel Management on TVA reorganizations is discussed above in paragraphs 2.15-2.18.

5.4 Fiser had told Ron Grover, Fiser's supervisor, and the manager who Fiser knew would be the selecting official for the new Chemistry and Environmental Protection Manager jobs, about his 1993 DOL complaint (Fiser p. 2762, *ll.* 16-23). While the reorganization was under discussion, Fiser was participating in interviews with a reporter about his 1993 DOL complaint. On June 16, 1994, after one of Fiser's interviews, Grover advised Fiser that if he continued to "participate in the interviews that someone may tell [Grover] not to keep [Fiser] in the reorg." Grover admitted that in fact no one had given him such directions, "but it could happen" (TVAX117). Fiser admitted that the conversation with Grover could have been a suggestion to not talk to the press and to "keep [his] mouth shut" or "not be selected for this new job." Fiser testified that he followed Grover's advice and discontinued talking with the reporter (Fiser p. 2765, *ll.* 1-11; p. 4291, *l.* 20—p. 4292, *l.* 3).

5.5 Although Grover made his thinly-veiled threat about speaking to the press, McArthur encouraged Fiser to exercise his right to discuss his earlier DOL complaint. Fiser asked McArthur what he thought about Fiser talking with a reporter. Far from telling Fiser to keep his mouth shut or threatening his nonselection, McArthur told Fiser "that he still felt that [he] should continue talking with the reporter and stick with the truth" (TVAX135; Fiser p. 4292, *l.* 7—p. 4293, *l.* 15).

5.6 Despite the similarities between 1993 and the 1994 and 1996 reorganizations, Fiser did not file a DOL complaint in 1994. In all three years he knew his job was being eliminated and that his continued employment was dependent on being chosen for a new TVA position. His explanation that the people involved in his 1993 DOL complaint were not involved in the 1994 selection process (Fiser p. 2304, *ll.* 19-23) does not hold water given Grover's veiled threat of nonselection, and the fact that he could not have known until at least September 14, 1994, who would actually be on the selection board (TVAX24 at HH000004-6).

5.7 As a result of the 1994 reorganization, McArthur was assigned to serve as the Manager of Radiological Control. However, he was never officially appointed to that position nor was an approved position description ever placed in his official personal history record (Sewell p. 4474, *ll.* 6-15; TVAX39 at AF000590-740).

6. THE 1996 REORGANIZATION OF CORPORATE TVA NUCLEAR

6.0 In October 1995, the General Manager of Nuclear Operations Support, the organization in which the Corporate Chemistry function was located, became too ill to fulfill his responsibilities and McGrath was designated as the Acting General Manager (McGrath p. 429, *l.* 19—p. 430, *l.* 6). During the time that Fiser had worked at Sequoyah and in Corporate Chemistry, McGrath served as the Chairman of the NSRB and various Corporate positions, but had not been a part of the Nuclear Operations Support organization. This was the first time that McGrath was a part of Fiser's management chain.

6.1 The planning for the 1996 reorganization of TVAN began in the summer of 1995. By that time, both units at Sequoyah and two units at Browns Ferry had been restarted. In addition, the initial startup of Watts Bar was imminent. Thus, TVA was moving away from being an organization focused on construction and restart to an organization operating five nuclear reactors. In addition, there was an effort to improve efficiency and to use information from NEI as a benchmark to achieve an effective and competitive organization. Oliver Kingsley, TVA's Chief Nuclear Officer, requested a review of TVAN's corporate organization in order to determine how it could best support five operating units, to decide what functions it should be performing, and to eliminate duplication of effort (McGrath p. 431, *l.* 4—p. 433, *l.* 7; p. 752, *l.* 14—p. 753, *l.* 14). When McGrath assumed the reins as Acting General Manager of Nuclear Operations Support, Kingsley told him he was dissatisfied with the corporate review that had been done and asked him to look at it (McGrath p. 754, *ll.* 7-

17). McGrath began comparing the functions and staffing of Nuclear Operations Support with information from NEI at how other good performing utilities were organized (McGrath p. 433, *ll.* 10-16).

6.2 The next step that affected the reorganization planning process was the budget planning process for fiscal year 1997 and the budget planning guidelines issued the second week of March 1996. The planning process was for a five-year cycle through fiscal year 2001. Although the minimum target for fiscal year 1997 was a minimum budget reduction of 17 percent, the ultimate goal was a 40 percent reduction by fiscal year 2001. The budget reduction target for fiscal year 2001 dovetailed into McGrath's first assignment to restructure Nuclear Operations Support so that the organization could efficiently support the operating plants (McGrath p. 433, *l.* 17—p. 434, *l.* 22; p. 755, *ll.* 4-14).

6.3 As part of the planning for the 1997 budget and the 1996 reorganization, McGrath met with the managers who worked directly for him and asked for their input. He gave them criteria for the corporate organization that included taking the first logical step to achieving the desired organization (McGrath p. 436, *l.* 3—p. 438, *l.* 25). McGrath felt that in a reorganization it was better for management to be clear to employees about what was going to happen and to then proceed, instead of stretching out reductions over several years (McGrath p. 439, *l.* 10—p. 440, *l.* 8). McGrath's opinion on this matter was shared by Phillip L. Reynolds, who at the time was the General Manager of TVAN's Human Resource organization (Reynolds p. 3532, *l.* 12—p. 3534, *l.* 3).

6.4 The Staff has taken the position that McGrath did not have to reduce Corporate Chemistry by 40 percent in the first year, and could have eliminated only one position and still achieved the goal for 1997 of a 17 percent reduction (TVAX103, at 6). However, the Staff's contention misunderstands the purpose of the reorganization. Kingsley's primary directive to McGrath was to reorganize his

organization so as best to support five operating reactors and to do so as soon as possible. Further, the budget reductions goals were to be applied across the entire Nuclear Operations Support organization, not for each individual department (McGrath p. 822, *l.* 22—p. 824, *l.* 9).

6.5 McGrath requested his subordinates to propose an organization supporting the year 2001 goal, including specific functional activities, and a fiscal year 1997 budget and organization which was a logical step in achieving the 2001 goals. McGrath also requested that the Radiological Control and Chemistry Services organizations be combined into a single organization, like the sites, under the existing but then vacant RadChem Manager position (McArthur p. 1475, *ll.* 5-14). McGrath's instructions to McArthur and Grover were that they needed to achieve a 40 percent reduction as quickly as possible (McArthur p. 1476, *ll.* 1-5).

6.6 There is no basis on which to infer that McGrath's approach to meeting Kingsley's goals was unreasonable or a pretext for some other motive. McArthur had known since he first came to TVA that top management thought that ultimately the RadChem organization would be reduced to two Radiation Control and two Chemistry Program Managers. In addition, McArthur had himself looked at how other utilities were staffed and felt that TVA's Corporate Chemistry organization was overstaffed (McArthur p. 1475, *ll.* 15-25).

6.7 It was ultimately determined that there would be two Chemistry Program Managers and there was a consensus among McGrath, McArthur, and Grover that one would be for Boiling Water Reactor (BWR) and one for Pressurized Water Reactor (PWR) (McArthur p. 1477, *ll.* 9-22). The final organizational structure for Nuclear Operations Support had fewer positions and there were similar reorganizations going on throughout TVAN (McGrath p. 769, *l.* 14—p. 770, *l.* 21; TVAX62 at BI000066). The notes of the reorganization of Nuclear Operations Support show that the same process was applied throughout the organization and that Chemistry and Fiser

were therefore treated the same as the rest of the organization (McGrath p. 820, *ll.* 9-20; TVAX62).

6.8 From the outset of the reorganization planning process, Grover was working at cross purposes to the directions he had received. When asked for input by McGrath, Grover proposed a staffing plan that included a supervisor for Corporate Chemistry, a slot presumably intended to save his job (McArthur p. 1477, *ll.* 9-24). Grover's proposal did not attempt to consider the functions that Corporate Chemistry needed to perform as McGrath had requested. Instead, the proposal included a number of generic positions as opposed to the specific accountable functions assigned to positions. It proposed a 17 percent reduction based on no more than what McGrath reasonably viewed to be an unrealistic proposition of cutting out training and travel (McGrath p. 757, *l.* 5—p. 758, *l.* 9). In addition, Grover was trying to undermine the efforts to reduce the Corporate Chemistry organization. On March 29, 1996, Grover met with his subordinates, including Fiser, and expressed concern about the possibility of reductions. Grover urged his subordinates to lobby the site organizations to express their support for Corporate Chemistry to keep it from being reduced (Fiser p. 2325, *l.* 24—p. 2326, *l.* 24; p. 2328, *ll.* 4-21; TVAX116).

6.9 In the end, in place of the three existing Chemistry and Environmental Protection Program Manager generalist positions, which were occupied by Fiser, Harvey, and Dr. E. S. Chandrasekaran ("Chandra"), the reorganization included the creation of two Chemistry Program Manager specialist positions. Those positions were separate BWR and PWR Chemistry Program Manager positions which would enable Corporate Chemistry to provide the sites with in-depth expertise to the plants. The idea was to have a chemistry specialist for issues particular to TVA's BWR reactors and a chemistry specialist for issues particular to TVA's PWR reactors. Fiser admitted at the hearing that defining the work as between BWR and PWR

Chemistry Specialists was not only a reasonable way to cover the work but may have been the best way to do it (Fiser p. 2402, *l.* 13—p. 2403, *l.* 9).

6.10 There is no evidence from which a reasonable person could infer that discrimination against Fiser was a motivating factor in the reorganization of Nuclear Operations Support, the elimination of the Chemistry and Environmental Protection Program Manager positions, or the creation of the two new Chemistry Program Manager positions. Any inference otherwise, based on alleged knowledge of past protected activity or on any other factor, is simply unsupportable. These were ongoing organizational decisions clearly made in furtherance of legitimate TVAN-wide objectives to downsize the organization. The elimination of existing positions and the creation of new positions was the norm in Nuclear Operations Support as a result of the 1996 reorganization. TVA Exhibit 56 consists of more than 30 position descriptions of jobs that were eliminated in Nuclear Operations Support during the reorganization (Boyles p. 4009, *ll.* 1-22). TVA Exhibit 55 consists of 20 position descriptions of new jobs that were created in Nuclear Operations Support in the reorganization. The exhibit also contains VPAs for those positions since TVAN HR decided that all of those new positions were on different competitive levels from any existing jobs and therefore needed to be posted for competition (Boyles p. 4010, *l.* 11—p. 4012, *l.* 12). Furthermore, the 1996 reorganization eliminated literally hundreds of positions in TVAN, and many employees in those jobs were surplused or RIFed (TVAX83-96, 109, 110). It is not tenable to conclude that Fiser was discriminated against simply because his job was eliminated when he was treated just like other TVAN employees. It would also be presumptuous to conclude that Fiser was discriminated against because the new organization or job descriptions could have been done differently.

6.11 There is simply no evidence that the manner in which the reorganization was undertaken or the way the PDs were written was done with an eye toward discriminating against Fiser. McGrath directed his subordinates to draft

position descriptions that supported the functions that the corporate organization should be performing and to write the PDs to specifically reflect what the job was responsible for accomplishing (McGrath p. 471, *l.* 20—p. 472, *l.* 4). Other than that, McGrath did not get involved in the preparation of the PDs. He did discuss with McArthur how the Chemistry Program Manager PDs would be written but he did not review or even see them (McGrath, p. 474, *ll.* 11-17). In fact, Fiser helped draft the PD for the new PWR Chemistry Program Manager position. Therefore, it is clear that the PD was not drafted so as to specifically handicap Fiser (Fiser p. 2767, *ll.* 9-15; p. 2332, *ll.* 7-19). To the contrary, Harvey complained to TVAN HR that the PD had been written in such a way as to favor Fiser for the job. Given Fiser's involvement in drafting the PD and his admission that splitting the work between PWR and BWR Chemistry Program Managers was reasonable, there can be no claim that the manner in which the position PDs were written was intended to discriminate against Fiser.

7. THE DECISION TO POST THE NEW PWR CHEMISTRY PROGRAM MANAGER POSITION

a. HR Made the Decision to Post the Position.

7.0 TVAN HR evaluated the new PWR and BWR Chemistry Program Manager positions and determined that, as written, the new positions were significantly different from the existing positions. The process and criteria for evaluating these position descriptions was the same as that used for all other positions in Nuclear Operations Support and the rest of TVAN which was impacted by the reorganization. That determination meant that under federal regulations, as applied by TVA, the incumbents of the existing positions did not have retention standing for the new positions and that under TVA practice, the new positions would be advertised to allow employees to apply and compete for the jobs.

7.1 In this case, TVAN HR compared the position descriptions for the new PWR and BWR Chemistry Program Manager positions with the PDs for the existing Chemistry and Environmental Protection Program Manager positions. Ben Easley, the HR Consultant with responsibility for the Radiological Control and Chemistry and Environmental organizations, made the initial determination that the new PDs were significantly different than the old positions and were not on the same competitive level and that the incumbents did not have retention standing for the new positions, i.e., they did not have the right to the new jobs. He communicated the results of his evaluation to James E. Boyles, the TVAN Corporate HR Manager, who concurred. The consequence of HR's determination that the new positions were not on the same competitive level as the old positions was that the new positions would be advertised for competitive selection on a VPA. The determination that the new positions were not on the same competitive level as the existing positions and that they should be posted for competitive selection was made solely by TVAN HR, and neither McGrath nor McArthur was responsible for making that decision.

b. The Basis for HR's Decision to Post the Position

7.2 At the December 10, 1999, predecisional enforcement conference, the Staff asked whether the PWR Chemistry Program Manager position should be in the same competitive level as the previous Chemistry and Environmental Protection Program Manager position since the qualifications and responsibilities of the new position appeared to be a subset of the previous position. TVA pointed out that in order to be on the same competitive level, the OPM standard as applied by TVA requires that the two positions must be mutually interchangeable. The fact that one position may include fewer responsibilities but more specialized qualifications defeats that interchangeability. The TVA Instruction on reductions defines competitive level and states:

> "Interchangeability" is a two-way street. The incumbent of one job must be able to perform satisfactorily the duties of the interchangeable job and vice versa. . . .
>
> This determination is made by comparing for each position the qualifications as stated in the official job description, the principal duties, and the standards for fully adequate performance of these elements. . . .
>
> In setting competitive levels, determinations are not based on the personal qualifications or performance levels of individual employees. The determinations must be based solely on the content of accurate, up-to-date job descriptions [JX65 at 14-15].

7.3 TVA's application of the test of mutual interchangeability in determining competitive levels has been upheld by the MSPB, the agency with responsibility for reviewing the correct application of OPM's RIF regulations. For example, in *Trahan v. TVA*, 31 M.S.P.R. 391 (1986), a TVA employee with the position description of Civil Engineer, SC-4, argued that his position should have been placed in the same competitive level as the position of Civil Engineer (Hanger), SC-4. The MSPB noted that the two positions were similar but that the latter position required additional specialized training. Based on its review of the position descriptions, the MSPB held that TVA had properly established the employee's competitive level (*id.* at 393). *See also Holliday v. Dep't of Army*, 12 M.S.P.R. at 362 holding that "mutual interchangeability" is required for positions to occupy the same competitive level.

7.4 Thus, while an individual who possessed the qualifications required in the Chemistry and Environmental Protection Program Manager PD might meet the qualifications set forth in the PWR Chemistry Program Manager PD the converse is not true. The fact that an individual met the qualifications in the PWR Chemistry Program Manager PD would not necessarily mean that individual had all of the qualifications required by the Chemistry and Environmental Protection Program Manager PD. That lack of mutual interchangeability between the two PDs precludes a finding that the positions were sufficiently similar to be on the same competitive level.

7.5 Further, the Staff is precluded by its own actions from arguing that the PWR Chemistry Program Manager PD was interchangeable with the Chemistry and Environmental Protection Program Manager position held by Fiser. In this case, TVA served interrogatories which inquired, among other things, whether the Staff contends that the two positions here are interchangeable under OPM regulations. The Staff's response stated that it "made no contentions regarding the interchangeability of these two positions" (TVAX113 at 7).

7.6 The lack of mutual interchangeability between the PWR Chemistry Program Manager position and Chemistry and Environmental Protection Program Manager position is further demonstrated by the history of those job functions. During a 1994 reorganization, the functions of the existing Chemistry Program Manager and Environmental Protection Program Manager positions were combined to create a new Chemistry and Environmental Protection Program Manager position. That new position was determined to be on a different competitive level than the existing positions and was advertised for competitive selection, *without objection by Fiser.* Therefore, the requirement of mutual interchangeability logically would require that the Chemistry and Environmental Protection Program Manager position be on a different competitive level then the new PWR and BWR Chemistry Program Manager positions to be created in 1996. This history graphically illustrated that the decision to post the PWR Chemistry Program manager position was made by TVAN HR in accordance with TVA practices for a nondiscriminatory reason (TVAX133).

c. Fiser's Threat to File a DOL Complaint

7.7 Prior to a VPA for the new positions being posted, Fiser talked with Easley and Boyles in TVAN HR and threatened to file an ERA complaint with DOL if a VPA was posted for the new PWR Chemistry Program Manager position. He told

them that the proposed position was the one he had been given as a result of the settlement of his 1993 DOL complaint and that he should not have to compete for the job.

7.8 As a result of Fiser's threat to file a DOL complaint, Boyles and Easley of TVAN Corporate HR again compared the new PWR Chemistry Program Manager PD with the PDs for the existing Chemistry and Environmental Program Manager position. That evaluation confirmed their earlier determination that the new job was not on the same competitive level as the existing positions and should be posted for competitive selection. In addition, Boyles consulted with TVAN Labor Relations staff member Katherine J. Welch as to whether the settlement agreement of Fiser's 1993 DOL complaint guaranteed him continued employment or gave him any right to the proposed new position (Welch p. 342, *ll.* 10-11; SX166 at 1). Welch in turn consulted with TVA's OGC as to whether the settlement agreement gave Fiser a legal right to the new position (Welch p. 342, *l.* 19—p. 343, *l.* 8; XS166 at 1). Both Welch and OGC advised that the settlement agreement did not guarantee Fiser that specific job or even continued employment (Welch p. 344, *l.* 2—p. 349, *l.* 22; p. 356, *l.* 9—p. 358, *l.* 22; SX166 at 1-2). Further, Fiser had voluntarily left the job awarded him by the settlement agreement when he applied for and was selected for a different job in 1994.

7.9 Based on the advice from Labor Relations and OGC and their own reevaluation of the new PD, TVAN HR posted a VPA for the PWR Chemistry Program Manager position. In addition to the VPA for that position, VPAs were posted for the other four Corporate RadChem staff positions on June 13, 1996, with a closing date of June 25, 1996. In accordance with TVA practice, they were physically posted on official bulletin boards and were electronically available on the TVA-wide network. Likewise, VPAs were posted for every new position created in the reorganization of Nuclear Operations Support which was on a different competitive level than the existing positions. Thus, Fiser was treated the same as every other

employee in Nuclear Operations Support whose position was not on the same competitive level as a new position. In fact, with the exception of McArthur's PD, every new PD was advertised on a VPA just as was the PWR Chemistry Program Manager (Boyles p. 4011, *l.* 21—p. 4012, *l.* 7; TVAX55).

8. MCARTHUR'S PLACEMENT INTO THE RADCHEM MANAGER POSITION WAS NOT DISPARATE TREATMENT

a. HR Decision

8.0 HR made the decision that McArthur had a right to the position. The NOV states that the rationale for placing McArthur in the RadChem Manager position without posting was inconsistent with requiring Fiser to compete for the PWR Chemistry Program Manager position. That is incorrect. HR applied the exact same interchangeability test. Even the Staff recognized that McArthur "had previously performed the functions of the new position[ ]" (JX47 at AB000022). Moreover, the fact that the test resulted in a different outcome for McArthur made his situation, not Fiser's, the exception.

8.1 HR first told McGrath that the RadChem Manager position, like the rest of the positions in the new organization, had to be posted (McGrath p. 481, *ll.* 9-17; 482, *ll.* 8-12). At some point after this initial decision, McArthur raised a concern to McGrath as to whether he should be required to compete for the new RadChem Manager position, in light of the fact that he previously held the position of Manager of Technical Programs which was a nearly identical position to the RadChem Manager position (McGrath p. 481, *ll.* 18-23). McGrath thought McArthur's concern might have some merit because it was analogous to a situation that he had confronted a few years back and in which he had been advised by an HR Manager—Naomi Lindsey—that an employee had a right to a newly created position in a reorganization that is similar to his old job that had been eliminated a short time before (McGrath p. 482,

l. 17—p. 483, *l.* 16). However, since the question was one which required HR expertise and was appropriately determined by HR, McGrath referred the matter to HR for review (McGrath p. 483, *ll.* 11-16; Boyles p. 3987, *l.* 19—p. 3988, *l.* 14).

8.2 HR made the decision that McArthur had a right to the RadChem Manager position (McGrath p. 744, *ll.* 3-12; Boyles p. 3987, *l.* 10—p. 3988, *l.* 14; p. 3848, *l.* 5—p. 3849, *l.* 9). Specifically, McGrath referred McArthur's question to Boyles—the TVAN Corporate HR Manager assigned to support McGrath's group—for review, and Boyles reported back to McGrath that HR had reviewed the matter and concluded that McArthur had a right to the RadChem Manager position (McGrath p. 483, *ll.* 11-16; p. 505, *ll.* 23-25). The evidence shows that Boyles, with the concurrence of his supervisor, made the decision that McArthur had a right to the RadChem Manager job (McGrath p. 736, *ll.* 16-22). Other than referring this matter to HR, McGrath did not play a role in the determination of whether any positions in the new organization had to be posted (McGrath p. 527, *ll.* 2-18; 744, *ll.* 3-12; Boyles p. 3987, *ll.* 16-24).

b. The Basis for HR's Decision

8.3 The basis of HR's decision that McArthur was entitled to the RadChem Manager position was the fact that TVA's official personnel records, called a personal history record (PHR), for McArthur showed that his last official PD of record was in fact a position interchangeable with the RadChem Manager position description (SX135 (Boyles) p. 42, *l.* 17—p. 43, *l.* 22; McGrath p. 732, *ll.* 8-18). HR applied the same factors and used the same process to make the competitive level determination here that it used to determine whether the PWR Chemistry Manager position should be posted (SX135 (Boyles) p. 42, *l.* 17—p. 43, *l.* 22; McGrath p. 505, *l.* 18 –p. 506, *l.* 24). McArthur was selected to the position of Manager of Technical Programs and was issued a PD on April 2, 1990 (SX100). He was later assigned to the position of

Manager of Radiological Control in 1994 (SX95 at 1). However, as Alex Sewell—Project Manager for TVA's Personnel Records—testified, McArthur's official PHR (TVAX39 at AF000590-740) reflects that a PD was never issued for the position of Manager of Radiological Control (Sewell p. 4474, *ll.* 6-15). Similarly, as further evidence that a PD for the position of Manager of Radiological Control was never in McArthur's official PHR, Sewell testified that such a PD was never removed from McArthur's official PHR and that if one had been removed, a record of its removal would exist (*id.* at 4474, *ll.* 16-23). As a result, McArthur's most recent official PD of record was the April 2, 1990, PD as Manager of Technical Programs (SX100).

8.4 Staff contends that McArthur's performance review (SX102) for the period of October 1, 1994, through September 30, 1995, shows he was performing the duties of Manager of Radiological Control (McGrath p. 736, *ll.* 5-13). That document, however, does not indicate that a PD was ever issued to McArthur for that job and placed in his PHR (McGrath p. 736, *ll.* 5-13). Similarly, Staff contends that the employee action sequence for personnel actions (SX99) reflects that he was placed in the Manager of Radiological Control position (McGrath p. 734, *l.* 9—p. 735, *l.* 22; Sewell p. 4490, *ll.* 5-8). But that document also does not indicate a PD was ever issued to McArthur for that job and placed in his PHR (McGrath p. 736, *ll.* 5-13). Regardless of whether other documents reflect that an employee is assigned, performing, or even paid in a different capacity, TVA relies upon the official PD to determine an employee's competitive level and thus whether they have a right to a newly created position.

8.5 During the 1996 reorganization, HR used McArthur's most recent PD of record, Manager of Technical Programs, to determine whether that position was interchangeable with the new RadChem Manager position (SX135 (Boyles) p. 42, *l.* 17—p. 43, *l.* 22). In his review, Boyles compared the two PDs and determined that they were similar and sufficiently interchangeable so that McArthur had a right to the

RadChem Manager position (*id.* McGrath p. 483, *ll.* 11-16; p. 527, *ll.* 2-8; p. 736, *ll.* 16-22). Once that decision was made, TVA's policy (JX63) requiring the posting of vacant management and specialist positions did not apply because the RadChem Manager position could not be considered vacant (McGrath p. 516, *ll.* 4-11).

8.6. Staff contends HR misinterprets OPM regulations by using the most recent official PD of record (SX135 (Damby) p. 54, *ll.* 6-9 & 20—p. 55, *l.* 4). Staff's contention misses the marks. The question is not whether TVA interprets the OPM regulations in accordance with the interpretation made by Staff's counsel. The issue is what is TVA's interpretation of OPM's regulations. Contrary to the Staff's position, TVA's practice of using the most recent official PD of record is consistent with TVA's reading of MSPB precedent interpreting the applicable OPM regulations. *Bjerke v. Dep't of Educ.*, 25 M.S.P.R. 310 (1994), is on point. In that case, the appellant Bjerke was reduced from a GS-15 to a GS-14 in a RIF. He argued that Kermoian, who had greater length of service, was improperly placed in his GS-15 competitive level. Prior to the RIF, a classification survey determined that Kermoian, who was officially assigned as a GS-15, should have been classified at the GS-14 level. Before he could be reclassified, a moratorium was placed on downgrades. Both Kermoian and Bjerke "were detailed to various positions with unclassified duties while remaining in their official position descriptions of record at the GS-15 grade level" (*id.* at 311-12). The MSPB found both employees were properly placed in the same competitive level since "[i]n the absence of some positive action by the proper authority to change his *official assignment of record*, Kermoian's position remained at the GS-15 level" (*id.* at 313). The MSPB also held that his assignment to other duties did not affect his competitive level since "*an employee, while detailed, as here, remains the official incumbent of his most recent position of record*" (*id.*). Accordingly, TVA's view was that if it had used any measure other than the PD of record, McArthur would have been treated improperly.

8.7 *Griffin v. Dep't of Navy*, 64 M.S.P.R. 561 (1994), is also directly on point. In that case the agency RIFed an employee it had placed in a competitive level based on the duties being performed by the employee while on a temporary promotion, rather than the duties of his permanent position. The MSPB held the RIF improper:

> An employee's competitive level in a RIF is based on his *official position of record* [citation omitted]. When an employee is detailed to or acting in a position, his competitive level is determined by his permanent position, and not the one to which he is detailed or in which he is acting [*id.* at 563].

See also Jicha v. Dep't of Navy, 65 M.S.P.R. 73, 77 (1994) ("Where an employee is detailed to or acting in a position, his competitive level is not determined by the position to which he is detailed or in which he is acting. . . . The competitive level in which an employee is placed is determined by the duties and qualifications required of the incumbent, as set forth in the official position description.").

8.8 TVA presented the undisputed testimony of Phillip L. Reynolds—currently the Vice President of Operations Support and former General Manager of TVAN HR—and Keith Fogleman—Senior Manager of HR Operations—that TVA has relied on, and continues to rely on, MSPB decisions approving of TVA's policy of using the most recent official PD of record in determining the interchangeability of newly created positions and old positions eliminated in reorganizations (Reynolds p. 3519, *l.* 24-p. 3520, *l.* 14; p. 3527, *l.* 9—p. 3528, *l.* 19; Fogleman, p. 5373, *l.* 16—p. 5374, *l.* 3; p. 5376, *l.* 8—p. 5377, *l.* 10; p. 5416, *ll.* 10-25; p. 5603, *l.* 22—p. 5606, *l.* 24). TVA's policy of using the most recent official PD of record, in reliance on MSPB law, was reasonable and justified in determining that McArthur was entitled to the RadChem Manager position. Moreover, whether right or wrong, there is no evidence on which to assume that TVA's explanation was a pretext to place

McArthur in a position so that he could conspire with McGrath to retaliate against Fiser.

8.9 Staff also contends that TVA could have issued a PD to McArthur for the Manager of Radiological Control job when it discovered during the 1996 reorganization that McArthur did not have a PD for that position (Reynolds p. 3432, *l.* 8—p. 3433, *l.* 5). TVA explained that it does not rewrite, update, or issue new PDs for anyone during a reorganization out of concern of the filing of MSPB appeals challenging such rewritten, updated, or newly issued PDs (Reynolds p. 3519, *l.* 24—p. 3520, *l.* 14; p. 3527, *l.* 9; p. 3528, *l.* 19; Fogleman p. 5416, *ll.* 10-25; p. 5603, *l.* 22—p. 5606, *l.* 24). Staff presented no evidence disputing TVA's explanation or that McArthur should have been the exception to TVA's policy on this matter. TVA handled McArthur's situation no differently than it would any other comparably situated employee.

c. No Disparate Treatment

8.10 The decision to place McArthur in the RadChem Manager position is not relevant to show that the decision to post the PWR Chemistry Program Manager position was a pretext for discrimination. Staff compares apples to oranges. In fact, Staff has specifically taken the position in response to interrogatory No. 7 to TVA's First Set of Interrogatories that it "has made no contentions regarding the interchangeability" of the PWR Chemistry Program Manager position with the Chemistry and Environmental Program Manager position that Fiser held prior to the 1996 reorganization (TVAX113 at 7). As shown and discussed above (¶¶ 7.0-7.6), HR determined that the position of PWR Chemistry Program Manager had to be posted under TVA's policies interpreting the applicable OPM regulations. How McArthur was treated says nothing regarding how Fiser was treated and does not create a logical inference of discrimination.

d. Posting of Most Jobs

8.11 In assessing the treatment of Fiser, the proper basis for comparison is not the exceptional case, but the rest of the cases. Against this benchmark, there was no disparate treatment. Fiser's right to a new job was determined in the same manner as every other employee in Nuclear Operations Support, even including McArthur, by determining if the employee's existing PD was on the same competitive level as the new PD. Initially, HR determined that all newly created positions in Nuclear Operations Support had to be posted (McGrath p. 732, *ll.* 8-18). The PD for the RadChem Manager position was later determined to be interchangeable with McArthur's most recent official PD of record (*id.* SX135 (Boyles) p. 42, *l.* 17—p. 43, *l.* 22). As a result, the RadChem Manager position was the only position in Nuclear Operations Support that was not posted (McGrath p. 732, *ll.* 8-18). As a result, the overwhelming majority of new jobs in Nuclear Operations Support were posted on VPAs (TVAX55). Fiser's right to a new job was determined in the same manner as every other employee in Nuclear Operations Support, including McArthur, by determining if the employee's existing PD was on the same competitive level as the new PD.

e. Grover's Position Is Irrelevant

8.12 Grover's position is irrelevant to HR's decision that McArthur had a right to the RadChem Manager position. Staff did not present any evidence that Grover and McArthur were similarly situated. The evidence is undisputed that Grover was selected to the position of Chemistry and Environmental Protection Manager and was issued a PD on July 24, 1995 (SX56). His most recent official PD of record was his 1995 PD for the Chemistry and Environmental Protection Manager position (*id.*) and McArthur's most recent PD of record was his PD for the position of Manager of Technical Programs which was issued when he was selected in 1990 (SX100). Staff did not present any evidence that Grover's most recent official PD of record was

interchangeable with the newly created RadChem Manager position and therefore should have been considered along with McArthur's most recent official PD of record.

8.13 Nor were the waiver procedures (SX153) applicable to Grover as a minority, because the RadChem Manager position was not a vacant position subject to the posting requirements (McGrath p. 523, *ll.* 11-15). Staff offered no evidence showing that the waiver procedures apply in those cases where there is an absence of a vacant position. In any event, this is not a Title VII race discrimination case. Rather, it is a proceeding to determine whether TVA discriminated against Fiser for engaging in protected activity in violation of 10 C.F.R. 50.7 (JX44, JX47).

9. THE COMPETITIVE SELECTION PROCESS FOR THE PWR PROGRAM CHEMISTRY MANAGER

a. TVAN's Selection Process

9.0 In September 1993, TVAN issued Business Practice (BP) 102 establishing a standardized selection process requiring all vacant permanent PG-1 through senior management and specialist positions to be posted and advertised for at least seven days prior to being filled (JX63 at 1; SX122 (Westbrook) p. 32, *ll.* 19 24).[16] Prior to the closing date, candidates submit applications to TVAN HR expressing their interest in the posted position (JX63 at 1; SX122 (Westbrook) p. 32, *l.* 19—p. 33, *l.* 3). After the closing date of the VPA, TVAN HR assembles a selection package, which includes the candidates' applications and other supporting materials submitted and the PHR for each of the applicants, that is sent to the selecting supervisor (JX63 at 1; SX 122 (Westbrook) p. 32, *l.* 24—p. 33, *l.* 3; p. 39, *ll.* 3-14).

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16 The deposition of Milissa Westbrook was offered and admitted into evidence in lieu of her live testimony (SX122).

9.1 After receipt of the selection package, the selecting supervisor prepares a spreadsheet of all the candidates identifying those candidates who meet minimum qualifications (SX122 (Westbrook) p. 32, *ll.* 19—p. 33, *l.* 4; p. 33, *l.* 21—p. 34, *l.* 2). In accordance with BP-102, the selecting supervisor further whittles down the number of minimally qualified applicants by identifying "the top candidates for interview" (JX63 at 1; SX122 (Westbrook) p. 33, *ll.* 3-4; Rogers p. 5256, *ll.* 4-8). At this juncture of the selection process, in choosing the top candidates, the evidence is undisputed that the selecting supervisor reviews, in addition to the application and resume of each of the candidates, the past performance and work history of the candidates contained in their PHRs in the form of performance reviews (SX122 (Westbrook) p. 39, *ll.* 3-11; Rogers p. 5255, *l.* 20—p. 5256, *l.* 3). As a rule of thumb, the selecting supervisor typically selects the three to five top candidates to be interviewed (Corey p. 2853, *ll.* 20-22; p. 2856, *ll.* 9-22; SX122 (Westbrook) p. 33, *ll.* 3-4).

9.2 Once the selecting supervisor performs his or her review and chooses "the top candidates for interview," he or she next empanels a selection review board (SRB) to conduct the interviews of the top candidates (JX63 at 1; Rogers p. 5256, *ll.* 8-10). The SRB typically is composed of three to four members chosen by the selecting supervisor from among those TVA employees with whom the incumbent of the position that the selecting supervisor is seeking to fill would have interactions, such as peers, customers, subordinates, or supervisors (Corey p. 2858, *ll.* 7-23; Cox p. 1752, *l.* 23—p. 1753, *l.* 1; Rogers p. 5256, *ll.* 11-14). The composition of an SRB usually is a combination of such persons (*id.*). If he or she chooses, the selecting supervisor also could serve as a member of the SRB and rate the candidates (Cox p. 1753, *l.* 25—p. 1754, *ll.* 3-6). Several TVA employees who have been selecting supervisors testified that they choose not to sit as a member of the SRB (*e.g.*, Corey p. 2857, *l.* 20—p. 2858, *l.* 6), electing instead to attend and observe the interviews

without participating in any manner. However, at least one TVA employee—Jack Cox, the former Watts Bar RadChem Manager—testified that he "[has] seen it done both ways" and that "personally [he] participate[s]" (Cox p. 1754, *ll.* 3-4).

9.3 Pursuant to BP-102, an SRB must conduct interviews "using structured job-related selection criteria developed by the [selecting] supervisor of the position being filled" (JX63 at 2). As the testimony shows, this simply means that the selecting supervisor drafts a list of job-related questions to rate the candidates' technical and management skills (Cox p. 1753, *ll.* 2-3; Corey p. 2859, *ll.* 7-23; Rogers p. 5256, *ll.* 15-17). The evidence is undisputed that it is common for at least one question to appear in some form or another on selecting supervisors' lists of questions: what strengths do you possess that will benefit this position (Cox p. 1778, *ll.* 1-8). Moreover, the selecting supervisor typically prepares a list containing more questions than can be asked during the interviews (Cox p. 1752, *l.* 11—p. 1753, *l.* 15; Corey p. 2852, *l.* 22—p. 2854, *l.* 16). Like in this case, due to the number of interviewees and time constraints, the SRB typically reduces the number of interview questions (*id.*).

9.4 Prior to the interviews, the SRB holds a preparatory session during which, among other things, the members review the list of questions provided by the selecting supervisor and select which questions will be asked in the interviews (SX122 (Westbrook) p. 41, *ll.* 17-23; Cox 1753, *ll.* 3-6). In addition, any member may propose to add a question (SX 122) (Westbrook) p. 41, *ll.* 17-23). If the proposed question is pertinent and job-related and all members agree, then it is added to the list of questions to be asked in the interviews (Corey p. 2860, *l.* 17—p. 2861, *l.* 1). Once the SRB chooses the interview questions, each SRB member is assigned specific questions that he or she will be responsible for asking during the interviews (SX122 (Westbrook) p. 41, *ll.* 14-42, *l.* 3; Cox 1753, *ll.* 3-6). All candidates are asked the same questions by the same SRB members in their interviews (SX122 (Westbrook) p. 41, *l.* 14—p. 42, *l.* 3).

9.5 After selecting the interview questions, the SRB interviews the candidates for the advertised position (SX122 (Westbrook) p. 41, *l.* 14—p. 42, *l.* 3). At the conclusion of each interview, the SRB members separately score the candidate's answers on "a 1 to 10 rating system, 10 being the highest" (SX135 (Westbrook) p. 79, *ll.* 13-14), without consulting the other members and then give their score sheets to the HR Consultant before the start of the next candidate's interview (Corey p. 2882, *l.* 25—p. 2883, *l.* 7). Other than the 1 to 10 rating scale, however, TVAN does not provide SRB members with any guidance, benchmarks, or checklists on scoring candidates' responses to the questions (JX63). Instead, SRB members score the candidates' responses on the 1 to 10 scale based on their knowledge, experience, expectation of what should be included in the answers, and how they would respond to the questions (Corey p. 2900, *l.* 18—p. 2901, *l.* 1). In short, SRB members rate the candidates based on their professional judgment (Corey p. 2923, *ll.* 6-19; Rogers p. 5209, *ll.* 1-16). The evidence shows that the candidates' presentation or demeanor, in addition to the technical content of their responses, also factors in the rating (Corey p. 2882, *ll.* 6-24).

9.6 At the conclusion of all the interviews, the SRB members return their notebooks to the HR Consultant who then totals the scores for all of the candidates (SX135 (Westbrook) p. 79, *l.* 17—p. 80, *l.* 4). The SRB recommends the candidate with the highest score to the selecting supervisor (Corey p. 2854, *ll.* 7-16). The selecting supervisor has the option of either accepting or rejecting the SRB's recommendation (*id.*). However, if the selecting supervisor rejects the SRB's recommendation and chooses a candidate with a lower rating, he or she would have to justify that decision to upper management (*id.*, p. 2962, *l.* 25—p. 2963, *l.* 14). The evidence is undisputed that selecting officials rarely, if ever, reject the recommendation of an SRB (Fogleman p. 5467, *ll.* 3-10).

b. The PWR Chemistry Program Manager Position

9.7 On June 13, 1996, based on the advice from Labor Relations and OGC and their own reevaluation of the new PD, TVAN HR posted a VPA No. 10703 advertising that TVA was requesting applications from its employees to fill the position of Program Manager, Chemistry (PWR), PG-8, in Nuclear Operations Support (JX21 at CG000234; SX166). The closing date was June 25, 1996 (JX21 at CG000234). McArthur was the selecting supervisor (JX21 at GG000212; McArthur p. 1493, *ll.* 13-20).

9.8 The PWR Chemistry Program Manager position was not the only Corporate RadChem position posted on June 13, 1996. TVAN HR also posted VPAs for the other four Corporate RadChem staff positions with a closing date of June 25, 1996 (JX21 at CG000356, 372, 380, 390). McArthur was the selecting supervisor for these positions as well (*id.* at GG000211-16). In accordance with TVA practice, the Corporate RadChem positions were physically posted on official bulletin boards and were electronically available on the TVA-wide network (JX21 at GG000234, 356, 372, 380, 390). Likewise, in addition to the Corporate RadChem positions, VPAs were posted for every new position created in the reorganization of Nuclear Operations Support which was on a different competitive level than the existing positions (McGrath p. 732, *ll.* 8-18). Thus, every employee in Nuclear Operations Support whose position was being eliminated and whose position was not on the same competitive level with one of the newly created positions and who wanted to remain employed at TVA had to compete for a new position (McGrath p. 731, *l.* 9—p. 732, *l.* 18).

9.9 The five Corporate RadChem positions, including the PWR Chemistry Program Manager position, were filled using the policy established in BP-102 for selecting candidates for management and specialist positions that involved

interviews of qualified candidates using structured job-related selection criteria (McArthur p. 1493, *l.* 13—p. 1496, *l.* 5). Accordingly, an SRB was used to make recommendations for the five Corporate RadChem positions (id. p. 1493, *l.* 13—p. 1494, *l.* 2).

c. Candidates for the PWR Chemistry Program Manager Position

9.10 Six employees, including Fiser, applied for the PWR Chemistry Program Manager position (JX21 at GG000212). After receiving the selection package from HR, McArthur determined that only three candidates—Chandra, Fiser, and Harvey—met the minimum qualifications for the job (*id.*; McArthur p. 1498, 1.17—p. 1499, 1.7). Chandra, Fiser, and Harvey were the incumbents of the Chemistry and Environmental Protection Program Manager, PG-8, positions that were eliminated in the reorganization (JX21 at GG000228, 237, 253, 366). In their former Program Manager positions, while all three were responsible for providing assistance as needed to all three sites, at the time, each of them was assigned to provide assistance to primarily one site: Chandra to Browns Ferry; Fiser to Watts Bar; and Harvey to Sequoyah (McGrath p. 531, *l.* 21—p. 532, *l.* 2).

9.11 In accordance with BP-102, McArthur chose the Program Managers as "the top candidates for interview" (JX63; JX21 at GG000212). Staff does not contend that McArthur was incorrect in selecting all three former Program Managers as the candidate to be interviewed by an SRB.

d. Composition of the SRB

9.12 Initially, McArthur proposed to use an SRB comprised of the three site RadChem Managers—Charles Kent from Sequoyah, Jack Cox from Watts Bar, and John Corey from Browns Ferry—to conduct interviews and make recommendations for the five Corporate RadChem Staff positions (McGrath p. 551, *l.* 16—p. 552, *l.* 16;

McArthur p. 1494, *ll.* 12-23). That proposal was concurred in by TVAN HR and McGrath (*id.*).

9.13 As to the PWR Chemistry Program Manager position, Staff suggests that the purpose for having the three site RadChem Managers serve as members of the SRB was to ensure that each of the three candidates would have a representative from each plant as an advocate on the SRB (McGrath p. 556, *l.* 18—p. 557, *l.* 25; McArthur p. 1497, *ll.* 1-15). The proposal that the site RadChem Managers serve on the SRB was made at the previous peer group meeting before the VPAs were even posted for the five Corporate RadChem positions (SX135 (Cox) p. 127, *l.* 24—p. 128, *l.* 10). Given that the proposal was made before the VPAs posted or closed, the selecting official, McArthur, was unaware of the identity of the candidates for any of the positions and could not have entertained the notion that the SRB would be composed in such a manner to ensure that each of the candidates for the PWR Chemist position would have a representative from each plant as a personal advocate on the SRB. In addition, Staff's theory fails to account for the fact that the same SRB was empanelled to interview numerous other candidates for the four other positions being considered by the SRB and fails to explain how those candidates could also all have personal advocates(McArthur p. 1493, *l.* 21—p. 1494, *l.* 2). The record contains no evidence that the candidates for the PWR Chemist position should have been accorded different and special privileges because Fiser was one of the candidates for that job.

9.14 Selecting supervisors empanel SRBs for the singular duty of rating candidates' responses to interview questions and recommending for selection that candidate with the highest cumulative score (Corey p. 2851, *l.* 16—p. 2852, *l.* 14). This responsibility is discharged by constituting an SRB that will fairly and impartially evaluate the candidates based on their answers to the questions. The testimony is undisputed that it would be contrary to the purpose of using an SRB if the members

advocated for a single candidate based on their previous knowledge of any given candidate.

9.15 Staff presented no evidence contradicting Corey's stated reason for proposing the site RadChem Managers. As Corey testified, his rationale for the proposal was that the site RadChem organizations would be the customers of the Corporate RadChem staff and that as the site RadChem Managers with responsibility for chemistry, radiological control, and radwaste functions at the plants, they would have the best insight as to the support needed by the site RadChem organizations from the corporate organization (Corey p. 2873, *l.* 23—p. 2874, *l.* 10; McArthur p. 1494, *ll.* 12-23). Other than Staff's speculation, McArthur's decision was not founded upon having a representative from each plant as an advocate for Fiser, Harvey, and Chandra (McArthur p. 1494, *ll.* 12-23).

e. Cox's Unavailability To Serve on SRB

9.16 McArthur scheduled the SRB to convene July 18, 1996, in Chattanooga, immediately following the monthly Peer Group meeting of the site and Corporate RadChem Managers (JX20 at GG000001-5). McArthur scheduled the SRB to coincide with the Peer Group meeting because of the difficulty in coordinating the schedules of the site RadChem managers (McArthur p. 1495, *l.* 23—p. 1496, *l.* 5). Moreover, having a single SRB to conduct the interviews for all five Corporate RadChem staff positions on the same day made sense in that McArthur could easily accommodate and coordinate the candidates' schedules, some of whom had applied on more than one of the RadChem staff positions (McGrath p. 552, *l.* 17—p. 556, *l.* 3).

9.17 Several days before the SRB was to convene, Cox, the Watts Bar RadChem Manager, informed McArthur that he could not serve on the SRB because he could not stay late to complete the interviews (McGrath p. 552, *l.* 22—p. 553, *l.* 1; Cox p. 1770, *l.* 20—p. 1771, *l.* 4). Although Cox inquired whether the SRB could be

rescheduled (Cox p. 1758, *ll.* 16-21), McArthur concluded that it was not feasible at that time to reschedule the SRB for all five Corporate RadChem positions because of the difficulties in coordinating the schedules of the site RadChem managers and all of the candidates (Cox p. 1758, *l.* 23—p. 1759, *l.* 1; p. 1769, *l.* 13—p. 1770, *l.* 4; McGrath p. 552, *l.* 22—p. 553, *l.* 12). In light of the evidence, this conclusion was reasonable. Cox himself agreed with McArthur's conclusion, conceding that "it'd be extremely difficult" to reschedule the SRB for the five Corporate RadChem positions (Cox p. 1769, *ll.* 18-19) due to the number of positions and candidates and the three site RadChem Managers (*id.* p. 1769, *l.* 13—p. 1770, *l.* 4). Similarly, TVA presented uncontested evidence that rescheduling an SRB empanelled to fill only a single position is a difficult undertaking because of commitments of the three to five candidates and three to four SRB members and an HR Consultant (McGrath p. 555, *l.* 17—p. 556, *l.* 3). Staff did not present any evidence disputing the difficulty of rescheduling the SRB for the five Corporate RadChem positions. Further, Staff did not present any evidence of bad faith in this decision.

9.18 Rescheduling the SRB to a different day would not have resolved Cox's conflict. Cox was unable to serve on the SRB scheduled for July 18, 1996, due to the fact that he had a farm near Watts Bar where he had to attend to daily chores after normal business hours (Cox p. 1758, *ll.* 8-15; p. 1771, *l.* 20—p. 1772, *l.* 2). In fact, having to attend to his farm, Cox testified that this commitment posed a standing conflict to his service on the SRB for the five Corporate RadChem positions (Cox p. 1770, *l.* 12—p. 1772, *l.* 2). He specifically testified, which was not contradicted by Staff, that it would have been difficult for him to serve on the SRB even if it was to start first thing in the morning on a rescheduled date (Cox p. 1770, *l.* 21—p. 1771, *l.* 9). Given that the SRB would conduct the interviews in Chattanooga which is an hour and a half away from his farm and that the interviews would take all day, Cox still would have been unable to attend to his daily farm chores because of the hour and

a half drive back to his home (Cox p. 1770, *l.* 21—p. 1771, *l.* 18). Under the circumstances, it was not unreasonable for McArthur to conclude that Cox could not serve on the SRB (Cox p. 1771, *l.* 10—p. 1772, *l.* 2) and that finding a replacement was appropriate.

9.19 As an alternative, Staff suggests that McArthur could have had the site RadChem Managers serve as the SRB for the PWR and BWR Chemistry Program Manager positions (McArthur p. 1495, *l.* 23—p. 1496, *l.* 5). However, Staff presented no evidence of a TVA policy or practice obligating McArthur to have the site RadChem Managers evaluate the performance of the three candidates for the PWR Chemistry Program Manager position. Nor was there a compelling reason that all three site RadChem Managers had to evaluate the candidates for the PWR Chemistry Program Manager position. Instead, it seems that Staff seeks preferential treatment for this position simply because Fiser was a candidate. Staff does not have a concern that Cox's conflict rendered him unavailable to serve on the SRB as to other four Corporate RadChem positions—on which Fiser did not apply.

9.20 Similarly, while other options might have been available to McArthur, such as splitting "up" the interviews "over two days" (Cox p. 1758, *l.* 20) or having separate SRBs for each of five positions, McArthur would been left with even a bigger task of rescheduling ten candidates, three SRB members, and an HR Consultant over a number of days. McArthur exercised prudent business judgment in deciding to replace Cox and proceeding with a single SRB for the five Corporate RadChem positions particularly in light of the need to complete the selections and get on with the reorganization (McGrath p. 552, *l.* 22—p. 553, *l.* 12; McArthur p. 1446, *ll.* 11-25).

9.21 Even if McArthur could have rescheduled the SRB to accommodate Cox's schedule, he would have been faced with a dilemma. Prior to telling McArthur that he had a conflict, Cox had indicated to McArthur his feeling that Fiser

should be selected as the PWR Chemistry Program Manager (McGrath p. 839, *l.* 24—p. 840, *l.* 11; McArthur, p. 1615, *ll.* 2-12). Cox's own testimony reflects that he had a clear preference for Fiser as the PWR Chemistry Program Manager. When he first learned that the site RadChem Managers would serve as the SRB for the five Corporate RadChem positions, Cox testified that he solicited the advice of David Voeller, the Watts Bar Chemistry Manager, as to the candidate—Harvey or Fiser—he thought would be more beneficial to Watts Bar, if selected (Cox p. 1773, *ll.* 1-23; Voeller p. 3330, *ll.* 8-15). Voeller expressed a preference for Fiser because he believed, in his opinion, that Fiser would better serve Watts Bar (Cox p. 1773, *ll.* 9-23; Voeller p. 3330, *ll.* 8-15). This was not a casual request for advice, but Cox and Voeller had "ongoing conversations" about Fiser and Harvey (Cox p. 1773, *l.* 6; Voeller p. 3330, *l.* 16—p. 3331, *l.* 6). Cox conceded that he agreed with Voeller's preference for Fiser (Cox p. 1773, *l.* 19—p. 1774, *l.* 2; Voeller p. 3331, *ll.* 7-16). These ongoing conversations occurred before the candidates had their interviews for the PWR Chemistry Program Manager position (Voeller p. 3331, *ll.* 13-16). Based on the undisputed testimony of Cox and Voeller and Cox's comment to McArthur, McArthur had a legitimate concern that Cox may had a preference in favor of Fiser.

9.22 McArthur informed McGrath of Cox's comment preferring Fiser's selection and of his inability to serve on the SRB (McGrath p. 839, *l.* 24—p. 840, *l.* 8; McArthur p. 1615, *ll.* 3-19). While McGrath thought that Cox's comment might have indicated a predisposition which could have precluded him from being unbiased if he had served on the SRB, it was unnecessary to pursue that issue given Cox's scheduling conflict and McArthur's decision to replace Cox on the SRB (McGrath p. 839, *ll.* 19-23; McArthur p. 1615, *ll.* 3-19).

f. Cox's Replacement

9.23 When it was determined that Cox was unavailable, Corporate RadChem wanted to "move to someone else at Watts Bar who would have a similar breadth of knowledge" (McGrath p. 557, *ll.* 6-8). McArthur initially "attempted to get the Watts Bar assistant plant manager," as well as the RadCon Manager, as a replacement for Cox (McGrath p. 557, *ll.* 8-9; McArthur p. 1495, *ll.* 2-10). However, both the Assistant Plant Manager and RadCon Manager were not available on July 18, 1996 (McGrath p. 557, *ll.* 8-9; McArthur p. 1495, *ll.* 2-10). McGrath suggested to McArthur that he should ask Heyward R. Rogers to serve on the SRB (McGrath p. 557, *ll.* 9-12; McArthur p. 1495, *ll.* 11- 22). At the time, Rogers was the Maintenance Support Manager in Nuclear Operations Support (Rogers p. 5166, *l.* 17— p. 5167, *l.* 2) and was McArthur's peer (*id.* p. 5165, *l.* 13). McArthur asked Rogers a few days before the interviews to serve on the SRB, and he agreed to do so (*id.* p. 5165, *ll.* 11-21).

9.24 Staff suggests that Rogers was not qualified to serve on the SRB because he has never worked as a chemist or supervised a chemistry department at TVA (Rogers p. 5204, *ll:* 1-7). However, as McGrath testified, the SRB " was not a chemistry review board" (McGrath p. 557, *l.* 17), but "was a review board to look at rad con, chemistry, rad waste, and environmental" (*id.* p. 557, *ll.* 17-18). Rogers had the breadth of knowledge to serve on the SRB for all five of the Corporate RadChem positions (McArthur p. 1495, *ll.* 11-22). McGrath testified persuasively that:

> Rogers has a broad technical background. This was not a chemistry review board. This was a review board to look at rad con, chemistry, rad waste, and environmental. He had a background as the technical support superintendent at Sequoyah where he supported all those areas technically. He was also a qualified shift technical adviser, which includes having to be knowledgeable about chemistry and radiological control managers. So he had the kind of broad technical background that we felt that was appropriate for being on a board for all five positions [McGrath p. 557, *ll.* 16-25].

9.25 As to the two Chemistry Program Manager positions, Staff did not dispute TVA's evidence showing that Rogers had a broad knowledge of nuclear plant chemistry. Rogers had at the time over 17 years of nuclear plant experience at Watts Bar, and Sequoyah (TVAX144; Rogers p. 5168, *ll.* 4-9). Specifically, Rogers has a background in Operations and Technical Support, holding the positions of Manager of Technical Support at Sequoyah and in Corporate and Technical Support Program Manager (TVAX144). As Corey testified, this background indicates that Rogers had a strong working knowledge of what chemistry is and how it works at nuclear plants (Corey p. 2918, *l.* 24—p. 2919, *l.* 14). Rogers also worked closely with TVA's Steam Generator Group at various times where knowledge of chemistry and its role at TVA's PWR plants are vital to the integrity of the PWR steam generators (Rogers p. 5168, *l.* 23—p. 5169, *l.* 3). In addition, Rogers held a number of engineering positions in his TVA career (TVAX144) in which he had a significant and close working relationship with chemistry personnel at all three sites (Rogers p. 5171, *l.* 21—p. 5172, *l.* 1). TVA presented further evidence that Rogers has certifications as a Shift Technical Advisor (STA) and Senior Reactor Operator (SRO) (TVAX 144; Rogers p. 5168, *ll.* 8-15). In obtaining his STA and SRO certifications, the evidence is undisputed that Rogers had significant classroom training in chemistry (Rogers p. 5168, *ll.* 11-15; p. 5240, *ll.* 7-20) and that training was focused specifically on power plant technology and what role chemistry plays in the operation of primary and secondary sides of TVA's nuclear plants (*id.* p. 5240, *l.* 21—p. 5241, *l.* 4).

9.26 Similarly, TVA presented unchallenged evidence that Roger's professional background and experience provided him with the breadth of knowledge necessary to fairly evaluate the other three positions (Corey p. 2918, *l.* 23—p. 2919, *l.* 12). As a result of his experience in operations, technical support, and engineering, along with his SRO and STA certifications, Rogers had significant contact and interactions with, as well as a solid working knowledge and understanding of, the site

and Corporate RadCon, Chemistry, and Environmental organizations (*id.* McGrath p. 557, *ll.* 16-25; Rogers p. 5171, *l.* 8—p. 5172, *l.* 1).

9.27 When the SRB convened, Rogers had no knowledge of Fiser's claimed protected activities in 1991-93, of Fiser's 1993 DOL complaint, or of Fiser's 1996 DOL complaint (Rogers p. 5176, *ll.* 16-25). Nor did he hear any references to Fiser's 1996 DOL complaint prior to the start of the interviews (*id.* p. 5177, *ll.* 1-15).

g. The SRB's Selection of Interview Questions

9.28 On July 18, 1996, after lunch and after the morning Peer Group meeting of the site and Corporate RadChem Managers, the SRB convened (JX20 at GG000002-4). Corey, Kent, and Rogers were each provided notebooks which included, among other things, the application of each candidate to be interviewed for the five RadChem staff positions and a list of proposed interview questions that were prepared in accordance with BP-102 (Corey p. 2875, *ll.* 7-10; Kent p. 3163, *l.* 10—p. 3164, *l.* 9; Rogers p. 5170, *ll.* 11-19). McArthur, as the selecting supervisor, and Easley, the responsible HR consultant, had assembled the notebooks, and McArthur had compiled questions he felt were pertinent to each of the new positions (McArthur p. 1499, *ll.* 10-18). Prior to the start of the interviews, the SRB members held a short preparatory session and selected the questions to use from those proposed by McArthur (Corey p. 2880, *ll.* 8-12). With respect to the PWR Chemistry Program Manager position, the SRB chose to ask eight of the sixteen questions proposed by McArthur (Rogers p. 5174, *ll.* 9-25), and added a ninth question proposed by Kent regarding molar ratio control (Corey p. 2880, *l.* 11-22; Rogers p. 5174, *ll.* 9-25; JX21 at GG000232-33). The SRB unanimously agreed to the additional question proposed by Kent (Rogers p. 5175, *l.* 3-7).

9.29 Staff contends that the questions were selected to unfairly weight the selection towards someone with expertise in secondary chemistry as opposed to

someone with expertise in primary chemistry (TVAX113 at 22 (resp. to interrog. No. 1 of TVA's Second Set of Interrogatories)). Staff claims this was done to favor Harvey who was an acknowledged expert in secondary chemistry and to discriminate against Fiser who claimed to be better qualified in primary chemistry (*id.*). The evidence is to the contrary. The obvious reason that no specific primary chemistry question was asked of the candidates for the PWR Chemistry Program Manager is that the incumbent of this position was not intended to be the primary chemistry expert for any of the sites (TVAX55, at BF001339-40). Instead, as set forth in the PWR Chemistry Program Manager PD (TVAX55), one of the incumbent's principal areas of responsibility is "Secondary Chemistry Program Support for TVAN PWRs" (*id.* at BF001339). While the PD reflects that the PWR Chemistry Program Manager serves "as the TVAN senior technical expert to the sites in the areas of PWR Secondary chemistry control" and performs "long-term data trending and assessment of key WBN and SQN Secondary chemistry data" (*id.*), the PD does not reflect or mention that the PWR Chemistry Program Manager has a primary responsibility for primary chemistry at Watts Bar and Sequoyah, TVA's two PWR plants (*id.* at BF001339-40).

9.30 Rather, the responsibility to act as the senior technical expert for primary chemistry at Watts Bar and Sequoyah (TVA's two PWR plants) and at Browns Ferry (TVA's BWR plant) is the responsibility, according to the PDs, of the BWR Chemistry Program Manager. The BWR Chemistry Program Manager's PD states unequivocally, among other things, that one of the areas of responsibilities for the position is the "Primary Chemistry Program & Count Room Support for ***all*** TVAN sites" (TVAX55 at BF001272). The PD reflects that the BWR Chemistry Program Manager serves "as the TVAN senior technical expert to the sites in the areas of . . . PWR Primary Chemistry . . ." (*id.*). The BWR Chemistry Program Manager is further responsible for performing "long-term data trending and assessment of key PWR (SQN and WBN) primary chemistry and radioactive effluents" (*id.*). And the

BWR Chemistry Program Manager acts "as a TVAN representative" on industry committees and panels and at industry seminars, workshops, and conferences for "PWR Primary Chemistry" matters (*id.*).

9.31 Had Fiser wanted to display his primary chemistry expertise, he should have applied for the BWR Chemistry Program Manager job. The evidence is undisputed that Fiser was aware that the BWR Chemistry Program Manager had the responsibility for primary chemistry at all the sites because he helped draft the PDs for both the PWR and BWR chemistry positions (Grover p. 1883, *ll.* 2-8), but chose not to apply for the job of BWR Chemistry Program Manager (Corey p. 2946, *ll.* 1-3; JX 21 at GG000224).

9.32 In light of the undisputed evidence that the BWR Chemistry Program Manager has the responsibility for primary chemistry, the questions asked during the interviews for the position of PWR Chemistry Program Manager were not unfairly weighted to the selection towards someone with expertise in secondary chemistry. The testimony is undisputed that the questions were fair and that it was reasonable to expect the selectee for the PWR Chemistry Program Manager to know the answers to the technical questions about secondary chemistry (Goetcheus p. 5108, *l.* 1—p. 5110, *l.* 2). In fact, Cox—a Fiser supporter—agreed that the nine interview questions were fair and reasonable (Cox p. 1778, *l.* 1—p. 1780, *l.* 6). In addition, to the extent management focused on technical secondary chemistry questions, it was reasonable and expected because secondary chemistry is the more difficult area to maintain properly and is currently receiving attention at TVA and throughout the industry due to its impact on steam generator integrity and longevity (Goetcheus p. 5108, *l.* 1—p. 5110, *l.* 2). The replacement costs for steam generators are in the hundreds of millions of dollars (Goetcheus p. 5079, *ll.* 19-22). Specifically, it was appropriate to ask secondary chemistry questions—regarding denting and molar ratio control—because TVA was facing these problems at the time of the interviews

(TVAX 105; Goetcheus p. 5079, *l.* 23—p. 5080, *l.* 7). Denting and molar ratio control have a direct impact on steam generator integrity (Goetcheus p. 5084, *l.* 20—p. 5085, *l.* 17; p. 5092, *l.* 23—p. 5094, *l.* 2). As to primary chemistry issues, TVA had a handle on such concerns at the time the interviews were held (Fiser p. 2400, *ll.* 16-22; Goetcheus p. 5079, *ll.* 5-7).

9.33 Finally, an examination of the questions posed by the SRB shows that they were not unfairly weighted towards secondary chemistry. Staff's and Fiser's claim that certain questions unfairly focused on Harvey's expertise in secondary chemistry only underscores the disparity between his qualifications and Harvey's (TVAX113 at 21-22 (Response to Interrogatory No. 1 of TVA's Second Set of Interrogatories); Fiser p. 4260, *l.* 13—p. 4261, *l.* 3). For example, Fiser identified the very first question—"What strengths do you have that will benefit this position?"—as favoring secondary chemistry and Harvey (Fiser p. 4261, *l.* 4—p. 4264, *l.* 3). His rationale was that such a question allowed Harvey to shine since he serves on industry groups and was involved in promulgating new standards and techniques for secondary chemistry that help protect steam generators (*id.*). Based on the evidence, this is a general question that is asked in almost every interview (Cox p. 1778, *ll.* 1-8), and has no special significance here. Fiser, like Harvey, had to convince the SRB that he was the best person to be PWR Chemistry Program Manager. Since Fiser does not dispute that he was primarily responsible for drafting the PD for PWR Chemistry Program Manager position (TVAX14; TVAX26 ¶ 3), his opinion regarding Harvey's strengths shows that Harvey was better qualified for the job.

h. The SRB's Scoring of the Candidates

9.34 After selecting the interview questions, the SRB interviewed the candidates for each of the RadChem staff positions (SX135 (Westbrook) p. 77, *l.* 16—p. 78, *l.* 3). Each of the candidates was asked the same questions by the SRB (*id.*). In

fact, the same question was posed to each candidate by the same SRB member (*id.* p. 79, *ll.* 6-16; Rogers p. 5174, *ll.* 9-25). The candidates' answers were scored separately by each SRB member without consulting the other members and turned in to the HR Consultant after each interview was completed (SX135 (Cox) p. 124, *ll.* 8-18). After the completion of all the interviews for the five Corporate RadChem positions, the HR Consultant totaled the scores for all of the candidates and submitted the scores to McArthur, the selecting supervisor (SX135 (Westbrook) p. 79, *l.* 17—p. 80, *l.* 4).

9.35 Based on the cumulative scores for the PWR Chemistry Program Manager position, the SRB ranked Harvey first with 235.7 points, Chandra second with 235.5 points, and Fiser third with 180.8 points (JX22 at GG000420, 439, 456).[17] In fact, each SRB member ranked Fiser lower than the other two candidates on every single answer (*id.* p. GG000420-21, 439-40, 456-57). Based on these rankings, on July 31, 1996, McArthur selected the two highest evaluated candidates, Harvey and Chandra, for the PWR and BWR Chemistry Program Manager positions, respectively (*id.* p. 398-99).

9.36 The SRB followed TVA's usual procedures in scoring Fiser's, Harvey's, and Chandra's responses to the interview questions. At the conclusion of each interview, the SRB members separately scored each candidate's answers on "a 1-to-10 rating system, 10 being the highest" (SX135 (Westbrook) at 79, *ll.* 13-14), without consulting the other members, and then handed their score sheets to Westbrook before the start of the next candidate's interview (Corey p. 2882, *l.* 25—p. 2883, *l.* 7). Other than the 1 to 10 rating scale, the SRB members were not provided with any guidance, benchmarks, or checklists on scoring Fiser's, Harvey, and Chandra's

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17 Harvey and Chandra also applied and were interviewed by the SRB for the BWR Chemistry Program Manager position (JX22 at 398-99). When the scores were totaled by the SRB, Chandra was the highest rated candidate closely followed by Harvey (*id.* at 399).

responses to the questions (Corey p. 2880, *l.* 24—p. 2881, *l.* 6; p. 2922, *l.* 25—p. 2923, *l.* 15; Kent p. 3144, *ll.* 10-25; Rogers p. 5210, *l.* 1—p. 5211, *l.* 10). Instead, the SRB members scored Fiser's, Harvey's, and Chandra's responses on the 1 to 10 scale based on their knowledge, experience, expectation of what should be included in the answers, and how they would respond to the questions (Corey p. 2900, *l.* 18—p. 2901, *l.* 1; Kent p. 3144, *ll.* 10-25; p. 3146, *l.* 16—p. 3147, *l.* 2; Rogers p. 5172, *ll.* 2-23; p. 5199, *l.* 22—p. 5200, *l.* 7). Simply stated, the SRB members used their professional judgment to rate Fiser, Harvey, and Chandra (Corey p. 2923, *ll.* 6-19; Rogers p. 5209, *ll.* 1-16). Staff's arguments that the scoring was tainted by a lack of objective scoring criteria is unreasonable and out of step with the realities of scoring interview performance. This is a matter that necessarily involves subjective professional judgment.

9.37 Fiser did not present well at his interview. The evidence reflects that Fiser was "so relaxed and so laid back" to the point of almost coming out of his chair (Corey p. 2941, *l.* 19) and that it appeared "that he wasn't putting himself into it" (*Id.* at *ll.* 22-23). The other SRB members and the HR Consultant observed the same demeanor (Kent p. 3258, *l.* 5—p. 3259, *l.* 12; Rogers p. 5182, *l.* 13—p. 5783, *l.* 2; SX135 (Westbrook) p. 90, *l.* 13—p. 92, *l.* 10). He was barely audible at times (SX122 (Westbrook) at p. 93, *ll.* 6-10), and he rambled in his responses (Rogers p. 5182, *l.* 13—p. 5183, *l.* 2). Further, Fiser's responses were not focused, which left the SRB "wondering if he was really paying that much attention to what was being asked" (Corey p. 2941, *ll.* 20-22). Staff put on no evidence disputing Fiser's performance in his interview. On the other hand, Harvey was focused and attentive and provided sharp and substantive responses to the management and technical questions (Rogers p. 5193, *ll.* 9-22). In further contrast to Fiser, Harvey was confident and appeared to want the job (*id.*). Staff put on no evidence disputing Harvey's performance in his interview.

9.38 Staff tacitly concedes that Fiser performed poorly in his interview, attributing that poor performance to Fiser's belief that the SRB was rigged (Corey p. 2962, *ll.* 9-13). This theory can be easily dispatched because of a lack of proof. Corey, Kent, and Rogers specifically testified that they did not discuss, much less agree on, how to score the candidates' responses or how a candidate should be ranked (Corey p. 2922, *l.* 22—p. 2923, *l.* 5; p. 2943, *ll.* 16-23; Kent p. 3146, *l.* 11—p. 3147, *l.* 2; Rogers p. 5172, *ll.* 2-23—p. 5184, *ll.* 2-7). Neither McGrath nor McArthur suggested, instructed, or directed Corey, Kent, or Rogers how to score the candidates or who should be ranked the highest in this process (*id.*). Other than speculation, Staff failed to present a single witness or a single exhibit refuting Corey's, Kent's, and Rogers' testimony that they did not collude to rig SRB in favor of Harvey and that they were not directed by McGrath and McArthur to do so.

9.39 Staff implies that Corey and Kent colluded to rate Harvey and Fiser in such a manner that Rogers' rating of Fiser would not affect the outcome, thus ensuring Harvey's selection (Peters p. 4587, *l.* 22—p. 4590, *l.* 9). Much like its theory that the three SRB members colluded, this theory suffers from the same lack of proof. Other than speculation, Staff failed to present any testimony or exhibit showing that Corey and Kent intentionally rated Harvey and Fiser in such a manner that Rogers' rating of Fiser could not affect the outcome and to ensure Harvey's selection. The only evidence on this point—the testimony of Corey, Kent, McGrath, and McArthur—is that they did not collude to rig the SRB in favor of Harvey and were not directed by McGrath and McArthur to do so (Corey p. 2906, *ll.* 19-24; Kent p. 3415, *l.* 21—p. 3146, *l.* 10; Rogers p. 5172, *ll.* 16-20).

i. Fiser's Low Scores Were Not Due to Any Protected Activity.

9.40 As previously discussed (¶¶ 9.37, 9.38), Fiser received low interview scores because of a less than stellar performance and not because of his

alleged protected activity. In addition, it is statistically significant that Rogers rated Fiser lower than the other two candidates (TVAX102; JX22 at GG000420, 439, 456), and his ratings of Fiser were lower relative to the other two SRB members (JX22 at GG000420, 439, 456). Since Rogers had no knowledge of Fiser's purported protected activity (and thus no reason to discriminate against Fiser) (Rogers p. 5176, *ll.* 16-25; p. 5177, *ll.*1-15), his ratings are compelling evidence that the other SRB members were not biased by Fiser's protected activity.

9.41 Dr. Carey Peters is an industrial organizational psychologist employed by TVA in its corporate HR office who works in the area of performance management. One of the major things he does in his job is to design or recommend assessment tools on which to make selections (Peters p. 4503, *ll.* 1-12; p. 4521, *ll.* 22-25; TVAX101). Based on his work experience and his academic background, which includes extensive training in statistical analysis, the Board found him to be an expert in the area of statistical analysis of selection processes (Peters p. 4526, *l.* 18—p. 4530, *l.* 13).

9.42 Peters analyzed the ratings of Fiser, Harvey, and Chandra by the SRB to determine if the ratings might indicate some sort of bias against Fiser based on the raters' awareness of his having engaged in protected activity (TVAX102). He was asked to assume that SRB members Corey and Kent knew of Fiser's protected activity and that SRB member Rogers did not (Peters p. 4517, *l.* 9—p. 4520, *l.* 17).

9.43 Peters explained in detail to the Board the various statistical tests he applied (Peters p. 4530—p. 4562; p. 4564—p. 4578). The results of Peters' analysis were statistically significant, were consistent, and strongly indicated that Fiser's low ratings by the SRB were likely not lower because Kent and Corey knew of his protected activity (TVAX102 at FB000009; Peters p. 4562, *l.* 12—p. 4564, *l.* 7; p. 4576, *l.* 25—p. 4579, *l.* 2). Peters' analysis provides strong support for the

conclusion that Corey and Kent's knowledge of Fiser's protected activity did not affect their ratings of the candidates.

j. Harvey Was Not Preselected for the Chemistry Program Manager position.

9.44 Staff contends that it was "likely that an individual was pre-selected" for the PWR Chemistry Program Manager position (JX47 at AB000022). That conclusion based on two unrelated events in the spring of 1996 is contrary to the evidence and is also contrary to the selection process that was actually employed.

9.45 In early June 1996, Harvey and Voeller, the Watts Bar Chemistry Manager, had a telephone conversation in which Harvey said he would be working a lot closer with him in the future (JX36). Voeller, who conceded that there was "tension" and "dislike . . . in [their] professional relationship" (Voeller p. 3336, *l.* 25; p. 3337, *ll.* 6-7) and favored Fiser over Harvey for the PWR Chemistry Program Manager position (*id.* p. 3330, *l.* 25—p. 3331, *l.* 12), had a face-to-face discussion with Fiser and informed him of the conversation (*id.* p. 3320, *ll.* 3-21). Voeller admits that Harvey did not indicate that someone had told him that he would be the person selected as the PWR Chemistry Program Manager (*id.* p. 3327, *ll.* 2-10). Voeller further concedes that Harvey was speculating that he would be selected for the position since the transfer to Sequoyah did not go through (*id.* p. 3327, *ll.* 2-21; JX36). Based on nothing more than his conversation with Voeller, Fiser assumed that Harvey had been assured that he would be selected (Harvey p. 4985, *ll.* 5-21; TVAX14).[18] Fiser

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18 In his conversation with Harvey, Fiser was upset and emotional and accused Harvey of being preselected (Harvey p. 4985, *ll.* 5-21). Fiser stated that McArthur had preselected Harvey because Harvey and McArthur are both Mormon (*id.* at 4997, *ll.* 2-18), not because of his alleged protected activity. Although the record contains no evidence to support this allegation, if it were true, it would disprove any allegation of discrimination based on protected activity.

complained of the matter to Grover who assured him that he knew of no preselection of Harvey (Grover p. 2011, *l.* 3—p. 2014, *l.* 6).

9.46 When the story got back to Harvey, he realized that a part of his conversation with Voeller had not been reported to Fiser (Harvey p. 4978, *l.* 25—p. 4979, *l.* 13). Harvey testified that he told Voeller that he would be working a lot closer with him in the future, or "not at all" (*id.* p. 4978, *ll.* 11-20; p. 5037, *ll.* 6-19). However, the "not at all" part of the conversation was being omitted (*id.* p. 4979, *ll.* 5-13). Based on this omission, Harvey called Voeller a second time and reiterated to him that he would be working a lot closer with him, if he got the job, or not at all, if he did not get the job, in which case he said he would be contacting him for employment references (*id.* p. 4979, *ll.* 5-13; JX39 at EE000131; TVAX26 at AB000940). Harvey explains that his earlier remark to Voeller was based on his assumption he was the best candidate and his confidence in his abilities (Harvey p. 4982, *ll.* 21-25) and possibly "[a]rrogance on [his] part" (TVAX26 at AB000940). Harvey denies that anyone ever assured him that he would be selected (Harvey p. 4985, *l.* 22—p. 4986, *l.* 9; JX39 at EE000131), and Staff presented no evidence that anyone advised Harvey that he would be selected for the PWR Chemistry Program Manager position.

9.47 Harvey's comments to Voeller were no different than the comments made by Grover to the Corporate Chemistry staff on March 16, 1996. As reflected in Fiser's notes, Grover advised his staff that Corporate would keep only two people in chemistry and the two "would be him & Chandra" (TVAX116). This was no indication that Grover and Chandra had been preselected, just like Harvey's comments did not reflect that he had been preselected. During this period of time, the Corporate staff employees were scrambling to keep a job and things were said and done to help or hinder the chances of some employees to retain their TVA employment. The reorganization spawned the alliance of Fiser and Voeller where Voeller agreed to do "a sales job" for Fiser (TVAX136) and where Voeller and Cox agreed to favor Fiser over

Harvey with Cox telling the SRB that Fiser was the best candidate for the PWR Chemistry Program Manager position (Cox p. 1773, *l.* 1—p. 1774, *l.* 23; Voeller p. 3329, *l.* 19—p. 3331, *l.* 12). Fiser and Grover allied themselves against Harvey and encouraged Tresha Landers to file false charges of sexual harassment against Harvey (Landers p. 2064, *l.* 24—p. 2072, *l.* 18). Landers, who testified at the hearing, believed that this encouragement was an attempt by Fiser and Grover to torpedo Harvey's chances of being selected (*id.* p. 2071, *ll.* 6-25). While these alliances did exist, as well as plenty of jockeying, during the reorganization, Staff did not present any proof that McArthur, McGrath, or anyone else engineered a preselection of Harvey for the PWR Chemistry Program Manager position (Harvey p. 4985, *l.* 22—p. 4986, *l.* 15).

9.48 The Staff further asserts that Sequoyah Chemistry sought to have Harvey transferred to Sequoyah, that there was a vacant position at Sequoyah, that if the transfer had taken place neither Harvey nor Fiser would have lost their jobs, and McGrath blocked Harvey's transfer to keep him in the corporate organization and to ensure that Fiser would have to compete against him (TVAX113 at 22-23, 25 (Resp. to Interrogatory Nos. 1 and 6 of TVA's Second Set of Interrogatories)). To the contrary, Staff's contention ignores the undisputed evidence. First, Grover, not Sequoyah management, was the impetus in attempting to get Harvey transferred to Sequoyah because a transfer would help in possibly saving someone's job in Corporate (Harvey p. 4977, *l.* 16—p. 4978, *l.* 5; McGrath p. 544, *l.* 22—p. 545, *l.* 13). Sequoyah's interest in the transfer was so low that no one from Sequoyah ever called McGrath to inquire about the possibility. Second, McGrath checked with TVAN HR and learned that neither Harvey nor his position could be transferred to Sequoyah consistent with TVA's HR procedures that implement OPM regulations (McGrath p. 830, *ll.* 8-16; p. 831, *ll.* 1-7). In fact, in order for such a transfer to work, the entire function—all three Program Manager positions—would have to be transferred from the corporate

organization to the sites (McGrath p. 828, *l.* 15—p. 829, *l.* 8; p. 833, *ll.* 2-13; SX135 (Boyles) p. 107, *l.* 20—p. 108, *l.* 14). Third, Sequoyah Chemistry did not have a vacancy which it had been approved to fill (SX135 (Kent) p. 107, *ll.* 3-11). Fourth, any vacancy would have been required to have been posted for competitive selection (McGrath p. 827, *l.* 22—p. 828, *l.* 14; p. 830, *ll.* 8-16). Fifth, McGrath did indicate that if Sequoyah had an approved vacancy, it could advertise the position and select Harvey, if he was the best qualified applicant (*id.*). Finally, McGrath was concerned that giving Harvey a job at Sequoyah shortly before the reorganization could have been viewed as preselection of Harvey since he would have been protected from the possible impact of the reorganization of Nuclear Operations Support (McGrath p. 542, *l.* 3—p. 544, *l.* 21). Moreover, even if Harvey had been transferred to a position at Sequoyah, the two new Chemistry Program Manager positions would still have been subject to competition, and were open to all qualified candidates in TVAN, including Harvey (JX21 at GG000234, GG000356). Thus, there was no guarantee that Fiser would have been selected for the PWR Chemistry Program Manager position.

k. Kent's Cautionary Comment Was Not Discriminatory.

9.49 In the NOV, the Staff indicated that two of the three individuals on the SRB—Corey and Kent—and the selecting official—McArthur—had knowledge of Fiser's 1993 DOL complaint (JX47 at AB000022). TVA does not deny this fact. However, Staff does not contend in this proceeding that this fact gives rise to an inference of discrimination (*id.*).

9.50 Rather, Staff contends in the NOV that "the fact that certain selection review board members discussed the existence of Fiser's prior protected activity just prior to conducting the interviews . . . casts further doubt on the impartiality of the selection process" (JX47 at AB000022). There was not a discussion

among "certain selection review board members." The facts regarding the conversation are not in dispute.

9.51 About a week before the SRB interviews, Fiser informed Kent of his 1996 DOL complaint and the basis of the complaint (SX135 (Kent) p. 115, *l.* 15—p. 116, *l.* 4). On the day of the SRB interviews, after the Peer Group meeting, Kent recommended to McArthur that, in order to ensure that there was not even the appearance of impropriety, that he should not participate in the SRB evaluations because Fiser had filed a DOL complaint implicating him (SX135 (Kent) p. 112, *l.* 20—p. 113, *l.* 25). While the comment was not directed at him, Corey—a member of the SRB—overheard Kent's recommendation to McArthur and thought it concerned Fiser's 1993 DOL complaint which was old news to him (Corey p. 2877, *l.* 13—p. 2878, *l.* 6). Cox—who could not serve on the SRB because of a conflict—also overheard the comment (Cox p. 1762, *l.* 15—p. 1763, *l.* 1). Rogers—the other SRB member—was not yet present and did not hear the comment (Rogers p. 5177, *ll.* 1-9).

9.52 Staff did not present any evidence disputing the content of Kent's comment. Cox, an ally of Fiser, gave an uncontested account that Kent "was recommending to McArthur that he not participate and not ask any of the questions and that sort of thing, and it was strictly from the standpoint of making sure that there was nothing even perceived to be inappropriate as part of the selection" (SX135 (Cox) p. 138, *l.* 24—p. 139, *l.* 4). This is consistent with Kent's version of the facts, and Staff offered no witness or exhibit disputing Kent's and Cox's stated meaning or intent of the comment. Kent's advice to McArthur was consistent with the *Supervisor's Handbook* in which supervisors are instructed to "avoid[] any appearance of reprisal" with respect to employees who have filed complaints (TVAX125 at 103). McArthur heeded the advice and did not participate in the SRB process (Corey p. 2881, *ll.* 23-24; Rogers p. 5178, *l.* 17—p. 5179, *l.* 8). It is clear that Kent did not have a discriminatory intent in voicing the comment and the comment did not adversely affect Fiser.

Moreover, a finding of discriminatory intent by Kent would be inconsistent with the theory of the NOV.

10. FISER WAS NOT SUBJECTED TO AN ADVERSE ACTION.

10.0 Although Fiser was not selected for one of the new positions and his previous position was to be eliminated effective the beginning of FY 1997, his TVA employment was not terminated. Instead, in accordance with TVA policy, he was given an August 30, 1996, memorandum notifying him that he would be reassigned to TVA Services organization (JX28). As discussed in paragraph 2.19, that organization was a relatively new organization within TVA intended to allow employees whose positions had been eliminated to continue their TVA employment, while providing job opportunities both within and outside TVA in a manner similar to a contractor. The same memorandum that notified him that he was being reassigned to the TVA Services organization also notified Fiser that he would continue to have a TVA job at least through the end of FY 1997, September 30, 1997.

10.1 Even though TVA had decided to downsize its Corporate Chemistry organization and even though Fiser was only the third-ranked candidate for the PWR Chemistry Program Manager position, TVA made an unconditional offer of that position to him on September 27, 1996 (TVAX4; Reynolds p. 2381, *l.* 17—p. 2382, *l.* 17). However, Fiser rejected that position and chose to resign his employment and by doing so became eligible to receive a lump-sum payment equal to his salary for the entire 1997 fiscal year ending September 30, 1997, severance pay, and lump-sum payment for annual leave, totaling more than $102,000 (TVAX9; Fiser p. 2369, *ll.* 6-7; p. 2384, *ll.* 7-12). If Fiser had accepted TVA's offer, he would have retained his employment in the position he sought and would not have lost even one day's salary. Thus, Fiser did not suffer any adverse action as a result of TVA's action, but instead chose to resign in order to receive large cash benefits.

10.2 The Sixth Circuit has firmly established that there is no adverse employment action and thus no claim for retaliation under Title VII where the employer reinstates a discharged plaintiff. *White v. Burlington Northern & S.F. Ry*, 310 F.3d 443, 455 (6th Cir. 2002). In that case, when the plaintiff was given a suspension, all pay and benefits stopped. However, the court held there was no adverse action where the plaintiff was reinstated with full backpay and overtime. Here TVA made an unconditional offer to Fiser which he rejected.

10.3 Fiser claims that it was reasonable for him to decline the job offer from Reynolds and to resign his TVA employment. According to Fiser, if he had accepted the job, he would have been working with the same people and under McArthur's and McGrath's supervision and he did not trust them not to eliminate his job, in which case he could have lost his right to severance pay (Fiser p. 2381, *l.* 7—p. 2384, *l.* 6.).

10.4 Fiser had established an outside business with TVA's assistance when he was assigned to ETP in 1993. He continued to run that business after he settled his 1993 DOL complaint and returned to work at TVA in 1994 (Fiser p. 2771, *l.* 11—p. 2772, *l.* 2.). In 1996, while the reorganization was being discussed and even before the PWR Chemistry Program Manager was posted in June 1996, Fiser discussed with his coworkers, including Harvey, that he thought he would resign his TVA employment, take the severance package, and work full time on his outside business (Fiser p. 2770, *l.* 4—p. 2772, *l.* 21).

10.5 In September 1996, when Reynolds offered Fiser a PWR Chemistry Program Manager job and when Fiser resigned his TVA employment, Fiser's 1996 DOL complaint was still under investigation by DOL and the TVA OIG. Given the visibility of the situation, it was not reasonable for Fiser to assume that McGrath or McArthur would have retaliated against him if he had accepted Reynolds' offer and returned to work under them. Nor is it now reasonable to assume that they

would have risked their careers by retaliating against him at some future point in time. Based on the circumstances at the time, it is clear that the real reason Fiser chose to resign was the financial incentive he had been offered coupled with his outside business opportunities. Under these circumstances, Fiser was not subject to an adverse employment action.

11. FISER'S 1996 DOL COMPLAINT

11.0 When Fiser learned that the new PWR Chemistry Program Manager position would be advertised for competition and even prior to the selection process, he filed a new DOL complaint (SX37). The thrust of that complaint was that the new PWR position is the same position which he then held and also is the position guaranteed to him by virtue of the agreement settling his 1993 DOL complaint. He was clearly wrong on both counts. First, as discussed above, TVAN HR had twice compared the new PWR Chemistry Manager position with the existing Chemistry and Environmental Protection Program Manager position and determined that they were significantly different. Second, there is no question that in 1994 TVA did place Fiser in a Chemistry Program Manager position as required by the settlement agreement. However, as discussed above, only months after being confirmed in that position, Fiser vacated the agreed-upon position when he applied on and was selected for a different position, Chemistry and Environmental Protection Program Manager. Thus, by his own actions, the position Fiser occupied when he filed his 1996 DOL complaint was clearly not the same position set forth in the settlement agreement. Moreover, the settlement agreement made no guarantees that the position would continue in existence nor are there any guarantees of job security in the federal employment sector.

11.1 Fiser also failed to take into account the role he played in designing the new organization. He was responsible for drafting the position description for the PWR Chemistry Program Manager position and did so with an eye

to his own qualifications. At the time that he did so, he was under the impression that Harvey, one of his principal competitors for the position, would be accepting a position to work at Sequoyah and therefore would not be applying for the corporate PWR Chemistry Program Manager position. Fiser did not object to the creation of the new position until after he learned that Harvey would not be going to Sequoyah and also would be competing for the corporate PWR Chemistry Program Manager position.

12. FISER WAS NOT SUBJECT TO DISPARATE TREATMENT IN THE POSTING OF THE CHEMISTRY PROGRAM MANAGER POSITION FOR COMPETITION.

12.0 The Staff states that "the disparate treatment" of Fiser was a reason that "led the NRC to conclude" that TVA's articulated reasons for Fiser's nonselection "were pretextual" (JX47 at AB000022). The Staff states that TVA's posting of the Chemistry Program Manager position for competition while filling the RadChem Manager position without posting "were inconsistent" since both "individuals had previously performed the functions of the new positions they were seeking" (*id.*). That is not the proper standard to determine if an employee has retention standing for a position.

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

12.2 In addition, both TVA's OGC and TVAN Labor Relations were consulted with respect to whether TVAN should proceed with posting the position. None of these crucial facts were mentioned or in any way dealt with by Staff in issuing the NOV in this case.[19] Furthermore, the evidence shows that no one in management prevailed on TVAN HR to write the position description so that posting and competition would be required. The fact that Fiser had *once* held a position similar to the new position is irrelevant since during the intervening years he was selected for and issued a position description for the noninterchangeable job.

12.3 The Staff asserts that Fiser was treated disparately than McArthur who was placed in the RadChem Manager position without competition. That claim is irrelevant and unavailing. First, as discussed above, TVAN HR evaluated the RadChem Manager position and determined it was substantially similar to McArthur's last official position description of record so as to give him retention standing. That determination was made using the same TVA practice based upon OPM regulations. The fact that McArthur's position was a senior management position meant that the comparison of management functions as opposed to technical qualifications was more important. The Staff's argument that Grover could have been placed in that position simply because he was a minority is nonsense. TVA policy allows a *qualified* minority to be selected for a vacant position without competition, it does not provide for *any* minority to be selected without regard to qualifications or without regard to whether someone else has a right to the job. Second, even if the RadChem Manager's position should have been advertised, that is not evidence that the PWR Chemistry Program Manager position should not have been advertised. And even if the RadChem

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

Manager's position should have been advertised, that does not establish that Fiser was subject to disparate treatment when more than twenty new jobs in Nuclear Operations Support were advertised and many more were eliminated. The nonadvertisement of the RadChem Manager job was the sole exception to the fact that the remaining new jobs were advertised. While it is possible that HR made a mistake in deciding not to advertise the RadChem manager position, it is not evidence that the new PWR Chemistry Program Manager job should not have been advertised.

ANALYSIS OF LEGAL ISSUES

13. THE GOVERNING LEGAL STANDARDS UNDER 10 C.F.R. § 50.7

a. This is a *De Novo* Proceeding in Which the Staff Has the Burden of Proof.

13.0 In an NRC hearing on an enforcement action, the Staff has the burden to establish by a preponderance of the evidence that the enforcement order (imposing the civil penalty) is justified. *See* 10 C.F.R. § 2.732 (2002). This is by its nature a *de novo* review. The process was explained by the NRC's Appeal Board in *Radiation Tech., Inc.*, ALAB-567, 10 NRC 533, 536-37 (1979):

> The Director [of Enforcement] is not the ultimate fact finder in civil penalty matters. Commission regulations afford one from whom a civil penalty is sought the right to a hearing on the charges against it. 10 CFR 2.205(d) and (e). At that hearing, the Director must prove his allegations by a preponderance of the reliable, probative, and substantial evidence [footnote omitted, citing 5 U.S.C.§ 556(d) and 10 C.F.R. § 2.732]. It is the presiding officer at that hearing, not the Director, who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties warranted. 10 CFR 2.205(f) [footnote omitted, explaining that the presiding officer's decision is also subject to review by the Commission]. *Cf.*, *Brennan v. Occupational Safety and Health Review Com'n*, 487 F.2d 438, 441-42 (8th Cir. 1973) (Secretary of Labor's proposed civil penalties under the Occupational Safety and Health Act final where accepted but subject to an administrative hearing and *de novo* review if contested).

13.1 In an enforcement case, the Staff is a party and carries the burden of persuasion to establish that the enforcement order is justified. *See Radiation Tech., Inc.*, ALAB-567, 10 NRC 533, 536-37. In the case of an order imposing a civil penalty, the Staff must establish that the violation cited occurred and that the civil penalty is consistent with NRC's Enforcement Policy. According to *Radiation Technology,* the Staff must prove its allegations by a preponderance of the reliable, probative, and substantial evidence. *See also* 10 C.F.R. § 2.732. Consistent with this burden, under established federal employment discrimination law and NRC regulations, the Staff bears the ultimate burden in this case to prove by a preponderance of the evidence that a violation of 10 C.F.R. § 50.7 occurred. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (in cases under Title VII of the Civil Rights Act of 1964, plaintiff bears ultimate burden); 10 C.F.R. 2.732 (2002) ("the proponent of an order has the burden of proof").

b. Section 211 Burdens Should Apply.

13.2 The legal standard used to determine if the Staff has met its ultimate burden raises a matter of first impression: No Licensing Board has previously interpreted the legal standards applicable in a hearing on an enforcement action under section 50.7. Nevertheless, a substantial body of federal law concerning discrimination in employment has developed in recent decades. This precedent should govern and inform this Board's decisionmaking under section 50.7, a point with which the Staff agrees. *See* Staff Legal Brief, March 1, 2002, at 6. In particular, precedent developed under section 211 (known at the time of the promulgation of section 50.7 in 1982 as "section 210") of the Energy Reorganization Act of 1974, *as amended*, 42 U.S.C. § 5851, is particularly persuasive as to the legal standards applicable in this section 50.7 proceeding.

13.3 Indeed, section 50.7 was promulgated in 1982 to "implement" section 210 (the statutory predecessor to what is now section 211), to "complement" the DOL's processing of discrimination claims, and to "announce the statutory prohibition of discrimination of the type described in section 210." 47 Fed. Reg. 30,452 (July 14, 1982). Indeed, section 50.7 tracks the language of the original section 210. *See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, 21 NRC 1759, 1764, DD-85-9 (1985) ("The Commission's current employee protection rules, including § 50.7, are derived from § 210 of the [ERA].") The NRC expressly cited section 210 as authority for the regulation. 47 Fed. Reg. 30,452, at 30,456 (final rule); 45 Fed. Reg. 15,184, at 15,187 (Mar. 10, 1980) (proposed rule). Further, in at least one specific instance, the Commission acknowledged that it could not depart from section 210 because it lacked authority to do so. The NRC rejected the suggestion that it penalize employees who supply false information about a discrimination claim because "the statutory authority of the Commission under section 210" did not so provide. 47 Fed. Reg. 30,452, 30,454. At least at that time, the Commission acknowledged that it was barred from departing from what section 210 expressly authorized.[20]

13.4 Where, as in section 211, Congress has entrusted the administration of a remedial scheme to an agency (DOL) for addressing employment discrimination, another federal agency (NRC) has no authority to extend that scheme by providing new remedies or imposing new burdens on the regulated parties. Addressing the most familiar of the federal employment discrimination laws, Title VII of the Civil Rights Act

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20 The Staff has also previously recognized and applied sections 210/211. In its 1994 "Review Team Report, Reassessment of NRC's Program for Protecting Allegers Against Retaliation," the Review Team wrote (at app. B-5): "The Staff's position is that the same burden of proof that would apply in DOL proceedings either under Section 210 or Section 211 (depending on which statute was in effect at the time of the violation) apply in NRC proceedings."

of 1964, the Supreme Court has emphasized that the "comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent" that the scheme not be modified by the addition of new rights or remedies. *Northwest Airlines v. Transp. Workers Union*, 451 U.S. 77, 93-94 (1981) (refusing to alter statutory scheme by reading into Title VII a right of a defendant to seek contribution from a third party who participated in discrimination); *Brown v. GSA*, 425 U.S. 820, 828 (1976) (comprehensive remedial statutes are given preclusive effect which bars plaintiffs from seeking relief outside the remedial framework). Section 211's comprehensive scheme—its precise application to NRC licensees, specific proof mechanisms, delegation to DOL to adjudicate claims, enumeration of available remedies, and substantive terms drawn from longstanding federal labor and employment law—precludes any other federal body, including the NRC, from imposing greater burdens upon licensees by eliminating substantive elements or altering the statutorily mandated burdens of proof.

c. The Essential Elements of a Case Under Section 50.7 and Section 211.

13.5 Like other federal law, section 50.7(a) establishes a causal requirement by proscribing "[d]iscrimination . . . against an employee for engaging in certain protected activities . . . ." (10 C.F.R. § 50.7(a)). Section 50.7(d) even more explicitly provides that a violation occurs only "when the adverse action occurs ***because*** the employee has engaged in protected activities." Section 50.7 accordingly requires proof of intent by the employer to take adverse action against an employee in retaliation for engaging in protected activity, and proof that the adverse action was the result of such intent.

13.6 Section 50.7(d) further recognizes that "[a]ctions taken by an employer, or others, which adversely affect an employee ***may be predicated*** upon non-discriminatory grounds." This provision establishes that employers are not precluded from taking employment actions for legitimate, business reasons. Accordingly,

section 50.7 as applied may not impede an employer's right, preserved under subsection 50.7(d), to take appropriate employment actions when there is a legitimate reason for such actions.

13.7 Like the complainant in a section 211 case, or even a Title VII case, the Staff may attempt to prove discrimination because of protected activity by using one of two paths: (1) by putting forward "direct evidence" that the defendant had a discriminatory motive in carrying out its adverse employment action; or (2) if no direct evidence exists, by using the indirect or circumstantial burden shifting approach. *Bartlik v. Dep't of Labor*, 73 F.3d 100, 103 (6th Cir. 1996) (holding that to state a claim under the ERA, an employee must establish that the employer retaliated "because" the employee engaged in a protected activity). ("With direct evidence, the existence of unlawful discrimination is 'patent.'") (*Id.* at 103 n.5; internal quotations and citations omitted). The Staff in this case does not assert there is direct evidence of unlawful discrimination. Thus, this case must be analyzed using the indirect method of proof. The Supreme Court has recently reaffirmed that a plaintiff must prove a discrimination case using either "the *McDonnell Douglas* framework" or through the use of "direct evidence of discrimination" (*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)).

13.8 Under the *McDonnell Douglas* or indirect evidence method, the Staff must first establish a prima facie case of discrimination. *Bartlik*, 73 F.3d at 103. To establish a prima facie case of discrimination, the Staff must establish that (1) TVA is governed by section 50.7; (2) the employee, Fiser, engaged in protected activity as defined in section 50.7; (3) which was known to the pertinent TVA decisionmakers; and (4) because of engaging in such activity, the employee's terms and conditions of employment were adversely affected. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995). The Staff has the burden to prove a prima facie case by a preponderance of the evidence. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S.

at 252-53; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 & n.3 (1993). The Staff cannot meet its burden to prove that the adverse action was motivated by the protected activity by the mere fact that the decisionmaker is aware of the protected activity. As held in *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996):

> [T]he mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action. . . . If we held otherwise, then by a parity of reasoning, a person in a group protected from adverse employment actions *i.e.*, anyone, could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the group, *e.g.*, race, age, or sex.

See also Sutton v. Lader, 185 F.3d 1203, 1208 n.6 (11th Cir. 1999). In addition, in a pretext case, a finding of discrimination requires more than mere inference drawn from circumstantial evidence, such as temporal proximity. *Dysert v. Florida Power Corp.*, 93-ERA-21, at 4 (Sec'y Aug. 7, 1995), *aff'd sub nom. Dysert v. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997).

13.9 Once the Staff establishes a prima facie case, the burden of production (but not the burden of persuasion) shifts to TVA to *articulate* a nondiscriminatory reason for its adverse employment action. If TVA provides such a reason, the Staff then must show by a preponderance of the evidence that the proffered reason for discharge actually is a pretext intended to hide unlawful discrimination. As noted, while the burden of production shifts back and forth between the parties under this indirect proof framework, the ultimate burden of proving that the employer discriminated against the employee because of his or her protected activity remains at all times with the Staff. *See St. Mary's Honor Ctr.*, 509 U.S. at 511 ("The Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'").

13.10 To show pretext, the Staff must prove *by a preponderance of the evidence* that TVA's proffered legitimate reason for taking the adverse employment

action is pretextual. In the Sixth Circuit, the court with jurisdiction to review any decision in this proceeding, a plaintiff may prove pretext in one of three ways—by showing that the proffered reason either (1) had no basis in fact, (2) did not actually motivate its decision, or (3) was insufficient to motivate the decision. *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 883 (6th Cir. 1996). In effect, the Staff "must demonstrate that the employer's reasons (*each of them*, if the reasons independently caused [the] employer to take the action it did) are not true." *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) (*quoting Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997)). Further, where the plaintiff (in this case the Staff) claims that the employer's reason is not the "actual or true reason for the adverse action, the plaintiff cannot rely on evidence used to make a prima facie showing, but must introduce additional evidence of discrimination" (*Lovas v. Huntington Nat'l.Bank*, 215 F.3d 1326 (table), No. 99-3213, 2000 WL 712355, at **4 (6th Cir. May 22, 2000)). *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

14. THE STAFF DID NOT MEET ITS BURDEN TO PROVE DISCRIMINATION.

a. There is No Evidence of Discriminatory Intent.

14.0 In this case, the Staff did not make a "prima facie showing" (42 U.S.C. § 5851(b)(3)(A), (B)) of any nexus (i.e., causal connection) between Fiser's claimed protected activity and any adverse action. The Staff has not established an essential element of its prima facie case—that McGrath and McArthur, the persons it has named responsible for the adverse actions respecting Fiser, were motivated by his protected activity. The Secretary of Labor's decision in *Bartlik v. TVA*, No. 88-ERA-15 (Dec. 6, 1991, and Apr. 7, 1993), *aff'd sub nom. Bartlik v. United*

States Dep't of Labor, 73 F.3d 100 (6th Cir. 1996), expressly holds that the complainant must prove "that responsible managers knew" of his "protected activity" and were driven by "discriminatory motive[s]" by evidence of "the record" (Apr. 7, 1993, at 2). Further, the evidence is undisputed that the reorganization which eliminated his position was TVAN wide and was undertaken without regard to any protected activity in which Fiser may have engaged. Moreover, the evidence is clear that he was not selected because, in the opinion of the SRB, he was not the best candidate. Since the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the [employee] ***remains at all times*** with the [employee]" (*Burdine*, 450 U.S. at 253), the Staff's discrimination claims about the reorganization and Fiser's nonselection fail as a matter of law.

14.1 The Staff has not established an essential element of its prima facie case--that McGrath and McArthur, the persons it has named responsible for the adverse actions respecting Fiser, were motivated by his protected activity. The Secretary of Labor's decision in *Bartlik v. TVA*, No. 88-ERA-15 (Dec. 6, 1991, and Apr. 7, 1993), *aff'd sub nom. Bartlik v. United States Dep't of Labor*, 73 F.3d 100 (6th Cir. 1996), expressly holds that the complainant must prove "that responsible managers knew" of his "protected activity" and were driven by "discriminatory motive[s]" by evidence of "the record" (Apr. 7, 1993, at 2).

b. McGrath Did Not Know of Fiser's Protected Activity.

14.2 Here, there is no evidence that McGrath knew of Fiser's protected activity. In the Sixth Circuit, an essential element of a claim of retaliation under Title VII is evidence that "'plaintiff's exercise of his civil rights was known by the defendant.'" Lacking that evidence, the court approved the dismissal of one complaint in *Mulhall v. Ashcroft*, 287 F3d 543, (6th Cir. 2002). *See also Lubetsky v. Applied Card Sys.*, Inc. 296 F.3d 1301, 1306 (11th Cir. 2002) ("an employer cannot

intentionally discriminate against an individual based on his religion unless the employer knows the individual's religion."); *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987) ("An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race."); *Gibson v. Frank*, 785 F. Supp. 677, 682 (S.D. Ohio 1990); *Dodson v. Marsh*, 678 F. Supp. 768, 772 (S.D. Ind. 1988) ("The plaintiff cannot prove that she was a victim of [race] discrimination . . . when the selecting official did not even know the plaintiff's race."). Further, the Staff has asserted "speculative assumptions," or "illogical, unsupported, inferences," or "suppositions" (*Bartlik*, Apr. 7, 1993, at 3, 10), about McGrath's awareness of Fiser's claimed protected activity which cannot serve to prove its prima facie case. Without knowledge on the part of McGrath, the Staff's theory of a violation based on a plot to retaliate against Fiser begins to unravel.

14.3 The Staff asserts that McGrath was "knowledgeable and critical of Fiser's 1991-1993 protected activity" (JX47 at AB000022) and his "actions in this regard were part of the information developed associated with the 1993 DOL case. Moreover, given his position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews, the NRC also considers it more likely than not that [McGrath] was aware that Fiser filed a 1993 DOL complaint prior to 1996" (*id.*). That is demonstrably wrong. Because it was settled, there was no decision and no public hearing in the 1993 DOL case, and not a single TVA employee was interviewed by DOL. The employees who were interviewed by the TVA OIG were not in McGrath's organization, and there is no evidence that McGrath was informed of any of those interviews. The Sixth Circuit has upheld the dismissal of a retaliation case based on the plaintiff's failure to offer any direct evidence to prove that the employee knew of the plaintiff's protected activity. In that case, the plaintiff attempted to prove that the employer must have known based on the "'gossipy' work environment." *Peterson v. Dialysis Clinic, Inc.*, No. 96-6093,

1997 U.S. App. LEXIS 26254, at *8 (6th Cir. Sept. 8, 1997). *See also McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 518 (6th Cir. 2000) ("McKenzie has alleged no evidence that supports that her employer, BellSouth, was aware of her protected activity.").

c. An Inference of Discrimination Based on Temporal Proximity Is Contrary to Law and Not Supported by the Circumstances.

14.4 There is no evidence whatsoever, direct, circumstantial, or inferential, to support a notion that McArthur harbored a retaliatory animus towards Fiser. Although McArthur was aware of Fiser's 1993 DOL complaint no later than May 1994, an inference based on proximity between that DOL complaint and adverse action in 1996 cannot stand as a matter of law. The Supreme Court held in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), that where "temporal proximity" is relied upon, "the temporal proximity must be 'very close'" (*id.* at 273), citing two cases in which a three-month and four-month period was deemed insufficient to support an inference of discrimination. *See also TVA v. Frady*, 134 F.3d 372 (table), No. 96-3831, 1998 WL 25003, at 5 (6th Cir. Jan. 12, 1998), holding that a finding of discrimination by the Secretary of Labor was "not supported by substantial evidence" where the finding was based on "'an inference of retaliatory motive based on temporal proximity'" (slip op. at 5) and the period between protected activity and adverse action was seven or eight months. *See also Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999) ("loose temporal proximity is insufficient to create a triable issue" where disciplinary actions were taken beginning five and ten months after plaintiff filed charges); *Warren v. Ohio Dep't of Pub. Safety*, No. 00-3560, 2001 U.S. App. LEXIS 21664, at *12 (6th Cir. 2001) ("Temporal proximity alone in the absence of other direct or compelling circumstantial evidence is generally not sufficient to support a finding of

causal connection. . . . Cases addressing this issue have said that temporal proximity may establish a *prima facie* case only if the temporal proximity is 'very close'").

14.5 The Secretary of Labor has held that the proximity in time of the protected activity and the adverse action can give rise to an inference of discriminatory intent. In *Mandreger v. Detroit Edison Co.*, No. 88-ERA-17 (Sec'y Mar. 30, 1994), the Secretary held that six months between an initial internal complaint and a job transfer constituted a sufficient temporal nexus between protected activity and adverse action to raise the inference of causation. However, the Secretary has gone on to hold that where nearly a year had elapsed between a complainant's filing of several reports and the decision to terminate his employment, the evidence was insufficient to establish that the termination decision was inspired by the protected activity. *Evans v. Washington Pub. Power Supply Sys.*, No. 95-ERA-52 (ARB July 30, 1996). *See also Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2 and 5 and 93-CAA-1, slip op. at 87 (Sec'y Jan. 26, 1996) ("A finding that adverse action closely followed protected activity gives rise to a reasonable presumption that the protected activity caused the adverse action. However, if the adverse action is distant in time from the protected activity, doubt arises as to whether the alleged retaliator could have still been acting out of retaliatory motives."). In a case against TVA, the Secretary has also held that the passage of a year and a half between the protected activity and the adverse action is too long to give rise to an inference of discrimination. *Dillard v. TVA*, No. 90-ERA-31 (Sec'y July 21, 1994). In this case, nearly three years passed between the filing of Fiser's 1993 DOL complaint and his 1996 nonselection and more than four years had passed between Fiser's newly claimed protected activity, the "January 1992" NSRB meeting in which he claims he upset McArthur and McGrath, and the 1996 reorganization and elimination of his position. Clearly, the passage of time negates any inference of discrimination. In the present case there is insufficient temporal proximity to draw any inference of discrimination.

14.6 The inference of discrimination that the Staff would draw based on the "temporal proximity between the appointment of [McGrath and McArthur] as Fiser's supervisors and his non-selection in July 1996" (Feb. 7, 2000, letter at 3), is legally flawed. The Supreme Court in *Clark County Sch. Dist. v. Breeden* held that where "temporal proximity" is relied upon to infer discrimination, it is the time between the "employer's knowledge of protected activity and an adverse employment action" that is subject to measurement (532 U.S. 273). *See also TVA v. Frady*, 1998 WL 25003, at **3 n.1, holding that "the more appropriate date to use" in measuring temporal proximity is the date of the earlier DOL complaint. We are not aware of any employment case law inferring retaliatory motive based on "temporal proximity" by, in effect, allowing the suspension of the measurement of time while an alleged discriminating official is not in the chain of command. It strains credulity to believe that either McGrath or McArthur was so strongly motivated, yet so patient, in their alleged retaliatory animus to wait as long as the Staff assumes they did.[21] Legally, an inference cannot be drawn that this was the case.

14.7 The Staff's measurement of temporal proximity based on when McGrath and McArthur became Fiser's superiors is also factually flawed. As we pointed out above, when Fiser settled his 1993 DOL complaint on April 7, 1994, he returned to Corporate Chemistry where McArthur continued to be his second-level

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21 The Staff would have the Board believe that McArthur's and McGrath's retaliatory animus was so strong that they patiently waited for nearly three years for an opportunity to discriminate against Fiser. The courts reject such waiting-in-the-weeds arguments because as "the time separating protected conduct and the adverse employment action grows the causal inference weakens and eventually time becomes the plaintiff's enemy" *Lalvani v. Cook County, Illinois*, 269 F.3d 785, 790 (7th Cir. 2001). Thus, the court in *Lalvani* upheld the dismissal of a retaliation claim where there was "a substantial time lag" and the plaintiff offered only "pure speculation that Coleman was biding his time, awaiting an opportunity to punish Lalvani" (269 F.3d at 791).

supervisor until a reorganization in August 1994. During that time, McArthur also interacted with an SRB that selected Fiser for the Chemistry and Environmental Protection Program Manager position. Further, McGrath was officially designated the Acting General Manager of Operations Support in October 1995, more than eight months before the purported discrimination. Under those circumstances, even if temporal proximity was measured from the date they assumed supervision over Fiser, no inference of discrimination could be drawn. If either McGrath or McArthur had been motivated to discriminate against Fiser, they each had opportunity to do so and it is far more likely that the animus would have become manifest earlier. The Staff offered no evidence to suggest that this was the case.

14.8 Moreover, even where there is a "temporal proximity" between protected activity and adverse action, it is evidence of a cause and effect relationship; it is not evidence that management's articulated reason is pretextual. There simply is no evidence and the Staff has not proven by a preponderance of evidence that TVA's stated reasons for the employment decisions are pretext. There is no evidence that the independent SRB's decision was motivated by discrimination. As discussed above, the fact that Rogers knew nothing of Fiser's DOL complaint or other claimed protected activity and scored him lower than the other two candidates shows that the other members of the SRB were acting without discriminatory animus. *See, TVA v. Frady*, 1998 WL 25003, **5 (The fact that Union representatives, who were not alleged to be biased, was "compelling evidence that the TVA representatives were not biased by Plaintiff's protected activity.").

15. TVA'S NONDISCRIMINATORY REASONS FOR ITS ACTIONS WERE NOT A PRETEXT FOR DISCRIMINATION.

15.0 Even if the Staff had proven a prima facie case, TVA has shown that it had legitimate nondiscriminatory reasons for the actions it took that affected

Fiser. See 10 C.F.R. § 50.7(d). TVA's 1996 reorganization and Fiser's nonselection were undertaken without regard to any 1991-1993 protected activity in which Fiser may have engaged. Even where a complainant has engaged in protected activity, that does not obligate TVA to confer special privileges upon him. Rather, his alleged protected activity is irrelevant where TVA's decisionmakers had nondiscriminatory reasons for their actions, as they did here.

a. There Was No Evidence of Discriminatory Intent in the Reorganization.

15.1 Here, the record is clear that TVA was reorganizing its entire Nuclear Power organization, including its Corporate Chemistry organization, to be more productive, hold rates stable, and be competitive in the electric utility industry. "Where the employer has a legitimate management reason for taking adverse action against the employee, the employer is not required to hold off such action simply because the employee is engaged in a protected activity." *Ashcraft v. Univ. of Cincinnati*, No. 83-ERA-7, dec. at 11 (Nov. 1, 1984); *Dunham v. Brown & Root, Inc.*, No. 84-ERA-1, recommended dec. & order at 13 (Nov. 30, 1984), *adopted by the Secretary* (June 21, 1985), *aff'd*, 794 F.2d 1037 (5th Cir. 1986).

15.2 In defending to the Eleventh Circuit the Secretary's final order in TVA's favor in *Sellers v. TVA*, No. 90-ERA-14 (Apr. 18, 1991), *aff'd sub nom. Sellers v. Martin & TVA*, No. 91-7474 (Mar. 30, 1992), the Deputy Solicitor of Labor stated to the court:

> An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all as long as its action is not for a discriminatory reason." The employee who is incompetent, or insubordinate, or has become inefficient cannot use his protected activity as a shield against a discharge for non-discriminatory reasons [br. at 22; citations omitted].

The Deputy Solicitor added:

> In enacting anti-discrimination provisions such as the one involved here, Congress did not seek "to tie the hands of employers in the objective selection and control of personnel" [br. at 30; citations omitted; cited pages attached].

15.3 Since protected activity does not shield an employee against a "discharge for non-discriminatory reasons," it is clear that reorganizing a work force, as was done here, is not wrongful discrimination. Simply stated, the record does not contain any facts to support an inference that the legitimate reasons for TVA's reorganization and nonselection of complainant were a pretext for discrimination under the two-prong test set by *St. Mary's Honor Ctr.*, 509 U.S. at 515: "[A] reason cannot be proved to be 'a pretext ***for discrimination***' unless it is shown ***both*** that the reason was false, ***and*** that discrimination was the real reason" (emphasis by the Court).

15.4 Indeed, whether TVA in fact needed one fewer Chemistry Program Manager, measured by "objective" standards or the standards of another decisionmaker, is irrelevant. "What is relevant is that TVA, in fact, acted on its good faith belief" in the need for its actions, and there is no evidence to the contrary. *Pesterfield v. TVA*, 941 F.2d 437, 443 (6th Cir. 1991). Other decisions are in accord. *See, e.g., Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1186-87 (11th Cir. 1984); *Jones v. Orleans Parish Sch. Bd.*, 679 F.2d 32, 38, *modified on other grounds*, 688 F.2d 342 (5th Cir. 1982), *cert. denied*, 461 U.S. 951 (1983) ("Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge."); *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) ("[W]hether HCCAA was wrong in its determination that Jefferies acted in violation of HCCAA guidelines . . . is irrelevant. . . . [W]here an employer ***wrongly*** believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief" (emphasis in original).); *Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 718 (5th Cir. 1983) ("The trier

of fact is to determine the defendant's intent, not adjudicate the merits of the facts or suspicions upon which it is predicated."); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) ("[T]he reasons tendered need not be well-advised, but merely truthful."); *Fahie v. Thornburgh*, 746 F. Supp. 310, 315 (S.D.N.Y. 1990) ("[T]he Bureau's honestly held, although ***erroneous***, conviction that [plaintiff] was not a good employee is a legitimate ground for [his] dismissal.").

15.5 There was no discriminatory intent in the decision whether to post the Chemistry Program Manager and the RadChem Manager positions. The evidence is clear that the decision whether to post new jobs was governed by TVA procedures. Under those procedures the decision is the sole responsibility of the HR organization. Further, the decision in this case whether to post new jobs in Nuclear Operations Support, including the PWR Chemistry Program Manager and the RadChem Manager positions, was made by TVAN HR as it was required to be. Neither McGrath nor McArthur made those decisions. The NOV (JX47) does not assert that anyone in HR intended to discriminate against Fiser. The Staff did not offer any evidence that anyone in HR knew of any nuclear-safety concerns Fiser ever sought to raise or harbored any retaliatory animus against him. Similarly, the Staff offered no evidence that Boyles had actual knowledge of Fiser's 1993 DOL complaint. Finally there is no evidence that anyone influenced HR as to how to exercise its judgment in deciding whether the PWR Chemistry Program Manager and the RadChem Manager positions should be advertised. In view of these facts, the decisions to post the PWR Chemistry Manager position and to not post the RadChem Manager position were made without regard to any protected activity in which Fiser may have engaged. Accordingly, it must be determined that no discriminatory intent was involved in those decisions.

b. There Was No Discriminatory Intent in Fiser's Nonselection.

15.6 The SRB was constituted in accordance with normal TVAN selection practices. There was no evidence that Jack Cox was excluded from the Board in order to discriminate against Fiser, rather he indicated that he was unavailable to participate due to other commitments. Due to the difficulties in rescheduling the SRB and the interviews of all the candidates and the need to proceed with the selections, a qualified replacement was found. The members of the SRB were well-qualified and impartial. A statistical analysis of the ratings of the candidates is persuasive evidence that knowledge by two members of the SRB that Fiser had filed a DOL complaint was not a factor in the SRB's ratings. Further, there is no evidence that the independent SRB's decision was motivated by discrimination. As discussed above, the fact that Rogers knew nothing of Fiser's DOL complaint or other claimed protected activity and scored him lower than the other two candidates shows that the other members of the SRB were acting without discriminatory animus. Further, there was no evidence that anyone attempted to influence the SRB's evaluation of the candidates. Accordingly, the SRB's ratings of the candidates were made without regard to any protected activity in which Fiser may have engaged and no discriminatory intent was involved in its recommendation as to the candidates.

c. The Correctness of TVA's Decisions Are Not at Issue and Do Not Provide Evidence of Discriminatory Intent.

15.4 This case arises out of a reorganization of TVAN in 1996, and in particular a reorganization of a corporate organization, Nuclear Operations Support. Based on the fact that TVAN was transitioning from a construction and startup organization to an operating organization, TVA determined that the corporate organization had to be reorganized to provide the support needed by the operating nuclear units. In addition, TVAN needed to reorganize the corporate organization to

increase productivity and reliability in order to be competitive in the industry. The totality of the evidence shows that TVA's reasons for the 1996 reorganization were legitimate. There is no basis to even consider the wisdom of that reorganization.

15.8 Within Nuclear Operations Support, new jobs were created to support the new organization, while existing jobs were eliminated. There was no evidence that the manner in which the reorganization was carried out was intended to discriminate against Fiser. Although there were undoubtedly a number of ways the reorganization could have been done, it is not the function of the Board to pass judgment on the relative wisdom of a licensee's decision or how best to conduct its business. The law is firmly established. Courts in Title VII cases, and the Board in this case are to decide issues of discrimination. They do not sit as super personnel departments to pass on the wisdom or fairness of business decisions

> Employers are free to make employment decisions based upon mistaken evaluations, personal conflicts between employees, or even unsound business practices. Federal courts do not sit as "super personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments in value intentional discrimination." [*Edmund v. Midamerican Energy Co.*, 299 F.3d 679, 686 (8th Cir. 2002)].

See *Miller v. TVA*, 1997-ERA-2 at 7 (ARB Sept. 29, 1998), aff'd 191 F. 3d 452 (table) (6th Cir). ("Our jurisdiction is limited to determining whether Miller's discharge was based on her protected activities, and whether her discharge was unreasonable or erroneous for other reasons."); *Gale v. Ocean Imaging*, No. 97-ERA-38, at 13 (ARB July 31, 2002) ("'We [courts] do not sit as a super-personnel department that reexamines an entity's business decisions'").

15.9 Similarily, the decisions whether to post jobs for competition was made in accordance with established TVA practices. Indeed, conducting a RIF in accordance with established procedure is strong evidence that discrimination has not occurred *Williams v. Rumsfeld*, No. 01-4016, 2002 US App. Lexis 16524, at **5 (3rd

Cir. Aug. 13, 2002). There was no evidence that these decisions were made even in part with an intent to discriminate against Fiser. Although questions have been raised as to the correctness of the decision not to post the RadChem Manager position, whether or not it was posted had no affect on Fiser. Even if the decision to post the RadChem Manager position was "incorrect," it was no more than a difference of opinion or even a mistake on the part of individuals other than those charged with the violation. This is not evidence of an intent to discriminate against Fiser. The decisions to remove Fiser from Sequoyah Chemistry in 1992 and to not allow him to return in 1993 were made based on perceptions that he was not an effective manager. Neither McGrath nor McArthur were involved in those decisions.

15.10 Even if TVA's reasons for its actions were incorrect, that would not establish that they were pretexts for discrimination. The law has long been established that even though an employer's reasons may not be correct, a judgment against the employer is not compelled—the plaintiff still must show that "intentional discrimination caused the employer to take some unfavorable action," *Benzies v. Illinios Dep't of Mental Health & Development Disability*, 810 F.2d 146, 48 (7th Cir. 1987). The court in *Benzies* noted, for example, that a "public employer may feel bound to offer explanations that are acceptable under a civil service system" as opposed to "personal or political favoritism, a grudge, random conduct, [or] an error" (*id.*). The Supreme Court's decisions in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), have only reaffirmed the principle that "it is not enough to disbelieve the employer, rather that factfinder must believe the plaintiff's explanation of discrimination" (*Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 599-600 (6th Cir. 2001).

15.11 The evidence shows that TVA did not select Fiser for the position of PWR Chemistry Program Manager in 1996 based on the determination that Harvey was a significantly higher recommended candidate. The SRB's evaluation of Harvey

and Fiser and the decision to select Harvey were pursuant to legitimate personnel selection processes and based on legitimate business reasons and not on an intent to discriminate against Fiser. Indeed, TVA made a number of decisions during the 1996 reorganization and the selection process which affected Fiser. The issue in this case is not the correctness of TVA's decisions, or whether the Staff using hindsight might suggest a better way to accomplish TVA's objectives. Rather the sole issue is whether TVA's decisions were made with an intent to discriminate against Fiser. Discriminatory intent did not play a part in TVA's decisions.

d. Kent's Comment Was Not Discrimination.

15.11 The evidence is undisputed that prior to the commencement of the SRB, Kent made a cautionary statement to McArthur which was overheard by Corey. The comment was to the effect that McArthur needed to be sensitive in the selection process to avoid appearances of impropriety because Fiser had filed a DOL complaint. The Staff presented no evidence that the comment was intended to adversely affect Fiser, and in fact, Corey's and Kent's knowledge of his complaint had no adverse effect on his ratings.

15.12 The Staff may argue that Kent's mention of Fiser's protected activity constitutes discrimination *per se*. The Board should reject that contention both legally and factually. The Staff's theory would eliminate all of the elements of a discrimination violation except knowledge of protected activity. The effect of the Staff's theory would be that an off-hand comment would confer knowledge and therefore establish liability. This is unsupportable. The Secretary of Labor has interpreted the ERA to require proof in a blacklisting claim based on the mention of a prior DOL case, of an adverse action and motive (*Smith v. TVA*, 90-ERA-12, at 1 n.1, 3) (Apr. 30, 1992)). Moreover, the NRC has previously recognized the appropriateness of an employer's action in taking "'added assurance'" "to ensure that [allegers]

had not been targeted specifically for reduction." NRC, Millstone Independent Review Team, Report of Review, at 13, (Mar. 12, 1999) (copy attached). Thus, prohibited discrimination under both section 50.7 and the ERA requires that an employee incur an adverse action based on an action by an employer that is undertaken with specific intent to cause an adverse action. In this case, Kent's comment was not made with a retaliatory intent nor did it cause Fiser to incur an adverse action.

15.13 Moreover, Fiser threatened to file a DOL complaint prior to the posting of the job with the intent to cause TVA not to post the job. Fiser filed his 1996 DOL complaint prior to the selection process and informed at least Kent, Grover, and Cox, thinking at the time, that Kent and Cox were to be on the SRB. Fiser clearly intended for the SRB to know of his 1996 DOL complaint when the interviews occurred. Under these circumstances, Kent's remark was intended to be, and was, a reasonable precaution to McArthur.

16. A FINDING OF DISCRIMINATION BASED ON THE FACTS OF THIS CASE WOULD HAVE SERIOUS NEGATIVE IMPLICATIONS TO THE INDUSTRY.

16.0 As discussed above, the Staff's enforcement action is this case is based entirely on strained inferences of a retaliatory motive and attenuated arguments of a causal connection between the alleged protected activity and the adverse employment action (*i.e.*, the posting of the Chemistry Program Manager position and, ultimately, Fiser's nonselection). The inferences used by the Staff — all drawn from circumstantial evidence — include a "temporal proximity" of between three and four years from Fiser's protected activity and his non-selection; perceived subjectivities in the selection process (*e.g.*, the composition of the SRB or the nature of the interview questions); and the "disparate treatment" in the decision to place McArthur in the RadChem Manager position. TVA's factual response to all of these inferences is

discussed above and TVA strongly disputes that the application of the proper evidentiary standard should lead to a conclusion by the Board of a violation of section 50.7 *in this case*. However, it is additionally important to consider the far-reaching and negative implications of any finding of discrimination by this Board based on such unreliable, unrealistic, and tenuous inferences.

16.1 TVA strongly believes that a violation should not be found based on second guessing of normal, reasonable decisions and judgments or based on a reading of nefarious intent into minor human resource process subjectivities or deviations. An endorsement by the Board of the Staff's approach to discrimination enforcement in this case would allow the agency to unfairly target managers across the nuclear industry, and would have detrimental impacts on the management of NRC-licensed activities. This is an important concern ably articulated by the Nuclear Energy Institute in their brief *amicus curiae* filed on March 1, 2002 (*see* pages 23-25).

16.2 The present case has received a significant amount of attention within the nuclear industry. An approach to section 50.7 that would allow a finding of a violation based on the existence of a few isolated and strained inferences would almost inevitably make individual managers—at TVA and industry-wide—reluctant in the future to make important personnel decisions. By the nature of their jobs, most nuclear employees are required to identify, report, and resolve plant safety and performance issues. Almost all employees could, therefore, at some point claim to be "protected" by section 50.7. Likewise, inferences based on creative application of "temporal proximity" or minor process subjectivities could be drawn in almost any employment situation. If such "evidence" is enough to find managers and licensees in violation of section 50.7, the Staff could arbitrarily find a violation in almost any case of alleged discrimination. In this environment, managers could not and would not want to manage.

16.3 For example, hiring processes, personnel performance reviews, and discipline decisions almost always involve subjective decisions. By definition, reasonable minds might often differ in a subjectively decision made. However, these decisions must be made routinely by a manager based upon best judgment, based on direct observation and participation in the appropriate processes, and subject to normal human resources checks and balances. Inferences of an improper motive should not be drawn from nothing more than the degree of judgment or subjectivity inherent in the process. Managers should not be second guessed lightly in these important assessment processes. A hair-trigger evidentiary standard for findings of discrimination would simply frustrate the process and any manager's willingness to make difficult choices to manage in the future for change and improvement.

16.4 Similarly, human resource processes inevitably involve subjectivities and imperfections. However, the NRC should not be applying section 50.7 in a way that drives licensees to ever more rigid and elaborate selection and review processes. If the Staff prevails in urging negative inferences drawn from what appear to be normal variations or subjective factors in employee evaluation and selection processes, the industry would be driven to more process simply to avoid inferences of ill motive. An adverse decision in this case, based on some of the arguments pressed by the Staff, would seemingly create an impossible standard and may lead to human resource processes that are useless in actually differentiating from among qualified candidates (*i.e.*, selection panels with selectors with no knowledge of candidates, or "neutral" but innocuous interview questions).

16.5 Likewise, under the Staff's approach, whereby an inference of discriminatory motive can be drawn based only on *knowledge of protected activity*, *e.g.*, use of the corrective action process, would become something for managers to avoid. Knowledge would become a basis for concluding that any subsequent decisions (at least where there is "temporal proximity") regarding the protected employee were

motivated by the protected activity. This would discourage involving senior managers in the identification and resolution of safety issues or other protected activity for fear of spreading the "knowledge." This result would be contrary to a sound policy that would actually encourage all managers to become involved in these issues to resolve safety concerns and to assure that there is no retaliation. This case is the prime example. The Staff urges a finding of discrimination against two members of an NSRB, the highest level of TVA managers charged with conducting a review for nuclear safety. The Staff would base that finding on their interactions during a safety review more than three years before the claimed adverse action.

16.6 At bottom, TVA management strongly believes that McGrath and McArthur in this situation in 1996 were not in any part or in any way motivated by Fiser's alleged protected activities. They were motivated to do their jobs — including carrying out the TVAN reorganization mandated at the time by senior management — to the best of their abilities. They followed applicable processes and appropriately utilized human resources personnel to assist with important and necessary decisions, such as posting decisions. TVA management has opted to contest the violation issued to TVA because it believes that there was no violation and because the individual managers deserve to be vindicated. However—additionally and importantly— TVA management believes that contesting this case is the right thing for the nuclear industry. This Board must not uphold the Staff's attempt to find a violation at TVA or elsewhere, based on such a minimal evidentiary showing. The bounds of section 50.7 should not be stretched to a degree where the Staff can find a violation based on nothing more than normal variations and subjectivities that enter any human process. The ability of managers to manage based on non-prohibited considerations, as codified and preserved in 10 C.F.R. § 50.7(d) (2002), must be protected. A finding of discrimination based on the facts of the present case would have a very real potential for a "chilling effect" on management — an effect that would be contrary to nuclear safety.

17. CONCLUSIONS OF LAW

17.0 The Licensing Board has considered all of the evidence presented by the parties in this proceeding. Based upon a review of the entire record in this proceeding and the proposed findings of fact and conclusions of law submitted by the parties, and based upon the findings of fact set forth herein, which are supported by reliable, probative, and substantial evidence in the record, the Board has decided all matters in controversy concerning the NOV issued by the Staff to TVA, as well as the NOVs issued to McArthur and McGrath, and reaches the following conclusions with respect to the contested issues raised in this proceeding.

17.1. Under section 50.7, the Staff has the burden to prove by a preponderance of the evidence that the licensee discriminated against an employee for engaging in certain protected activities. Actions which adversely affect an employee who has engaged in protected activities may be taken by an employer for any reason that is nondiscriminatory.

17.2 The Staff has proven by a preponderance of the evidence that Fiser engaged in protected activity by filing a 1993 DOL complaint and by joining in the sending of a letter to Senator Sasser in 1993.

17.3 The Staff has failed to prove by a preponderance of the evidence that Fiser engaged in any other protected activity. The Board is convinced and therefore finds that Fiser's involvement in the issues discussed in the findings of fact, i.e., the radmonitor effluent calculations not accounting for the vacuum, the filter change-out scenario, the inability of Sequoyah personnel to conduct PASS sampling three hours, the refusal to respond to the NSRB's concern about the need for trending analysis, and the inadequate recirculation of the seven-day diesel fuel tanks, does not constitute protected activity since there is no evidence that he identified, raised, documented, or otherwise espoused any of these issues.

17.4 The Staff has not shown by a preponderance of the evidence that McGrath was aware of any protected activity engaged in by Fiser.

17.5 The preponderance of the evidence shows that McArthur was aware that Fiser had filed a 1993 DOL complaint prior to 1996. However, the Staff failed to show by a preponderance of the evidence that McArthur was aware of any other protected activity engaged in by Fiser.

17.6 TVA articulated legitimate nondiscriminatory reasons for the 1996 reorganization of Nuclear Operations Support and the manner in which it was reorganized. The Staff failed to show by a preponderance of the evidence that TVA's reasons were pretexts for discrimination.

17.7 TVA articulated legitimate nondiscriminatory reasons for the posting of the PWR Chemistry Program Manager position and for Fiser's nonselection for that position. The Staff failed to show by a preponderance of the evidence that TVA's reasons were pretexts for discrimination.

17.8. The Staff did not show by a preponderance of the evidence that any of the actions taken by TVA which adversely affected Fiser were undertaken even in part for discriminatory reasons. Stated another way, the Board finds that TVA's actions were undertaken for legitimate reasons.

17.9 The Staff did not prove by a preponderance of the evidence that there was a causal connection between Fiser's protected activity and his nonselection for the PWR Chemistry Program Manager position.

17.10 The Staff failed to show by a preponderance of the evidence that TVA discriminated against Fiser in violation of section 50.7.

17.11 Based on our consideration of all of the evidence in this proceeding, we conclude that TVA, McGrath, and McArthur did not violate 10 C.F.R. § 50.7 by discriminating against Fiser for engaging in protected activities.

Accordingly, the NOVs issued by the Staff against TVA, McGrath, and McArthur should be vacated and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, together with the identified attachments, has been served by regular mail on the persons listed below. Copies of the brief only have also been sent by e-mail to those persons listed below with e-mail addresses.

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