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ADJUDICATIONS STAFF

Report of Administrative Inquiry

TVA MANAGEMENT, SUBJECT
GARY L. FISER, MANAGER, RADIOLOGICAL CONTROL,
COMPLAINANT
DEPARTMENT OF LABOR -- ENERGY REORGANIZATION ACT
MATTER

OIG File No. 2D-169

ORIGINAL SIGNED BY
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APPROVED BY:

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NUCLEAR REGULATORY COMMISSION

Docket No. 50-390 Official Ex. No. 7VA13

In the matter of TVA

Staff _____ IDENTIFIED

Applicant RECEIVED

Intervenor _____ REJECTED _____

Other _____ WITHDRAWN _____

DATE 6/19/02 Witness _____

Clerk BHM

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INTRODUCTION

We have completed our investigation of the circumstances surrounding a June 25, 1996, complaint which Gary L. Fiser, former Chemistry and Environmental Protection Program Manager, Operations Support, filed with the U.S. Department of Labor (DOL). In his DOL complaint, Fiser alleged that Tennessee Valley Authority (TVA) management violated Section 211 of the Energy Reorganization Act of 1974, as amended, by discriminating against him because he reported safety concerns. More specifically, Fiser alleged that because he reported safety concerns, TVA posted the job he had been given in a settlement of a previous DOL complaint. He alleged there was no difference between his job and the posted job, TVA posted the job with "malice," and TVA had preselected another candidate for the position. (Fiser subsequently was not selected for the position.¹)

We investigated Fiser's allegations to determine whether any current or former TVA employee was engaged in misconduct. We did not address whether any Section 211 violation occurred since such determinations are, by statute, entrusted to DOL.

SUMMARY OF INVESTIGATION

The evidence did not show that TVA management discriminated against Fiser because he reported safety concerns. Rather, the three corporate PG-8 "Chemistry and Environmental Protection Program Manager" positions, including Fiser's, were eliminated as part of a reorganization. As relevant here,

¹ In a letter dated September 30, 1996, Fiser refused a TVA offer to settle his current complaint by offering him his PG-8 job back. Fiser stated that continued employment with TVA was not an option "since there was such a long and shameful history of harassment and intimidation." !

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two "Chemistry Program Manager" positions were created. Although there is evidence indicating that the actual duties of Fiser's position and the posted position were very similar, the job description, in fact, was changed, and the available evidence did not show by a preponderance of evidence that this reorganization and the elimination of Fiser's position were a pretext to get rid of him because he raised safety concerns.

Fiser applied for a revised position. However, Sam L. Harvey was selected for that position. While there is evidence indicating that one member of the selection committee (sometimes referred to as selection board) (Charles Kent) may have been biased in favor of Harvey, there was insufficient evidence to conclude that TVA selected Harvey because Fiser raised safety concerns. The available evidence does not show that management's conclusion that Harvey was the more qualified candidate for the position was unreasonable or pretextual. The bases for our conclusions are outlined below.

BACKGROUND

During September 1993, Fiser filed a DOL complaint alleging that TVA violated Section 211 of the Energy Reorganization Act of 1974, as amended. More specifically, Fiser alleged that because he reported safety concerns, (1) his position as Sequoyah Nuclear Plant (SQN) Chemistry and Environmental Superintendent was surplused and he subsequently was reduced-in-force, and (2) a later offer to become SQN Chemistry Manager was withdrawn.²

During April 1994, TVA and Fiser settled his September 1993 DOL complaint. As part of the settlement agreement, Fiser was selected for the position of

² On October 31, 1994, the Office of the Inspector General (OIG) issued a report on Fiser's earlier DOL complaint (OIG File No. 2D-135). The OIG report did not find misconduct by TVA management.

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Program Manager, Technical Support, PG-8. According to Fiser, at that time he reported to Ron Grover, then Chemistry Manager.

During July 1994, Operations Support reorganized and combined the chemistry and environmental programs into one group--Chemical and Environmental Protection. During that reorganization, the job descriptions for the managers of the Chemistry/Environmental Protection groups were rewritten to combine the functions, and they posted the positions. Fiser had to reapply for one of the PG-8 positions, and he was selected as a Chemistry and Environmental Protection Program Manager. According to Grover--who became the Chemistry and Environmental Protection Manager--the objective of combining the two groups was to allow the organization to cross-train and "cross-fertilize" both positions so the managers could handle multiple functions. According to a March 31, 1995, strip list, Grover supervised four program managers, including Fiser and Harvey. The strip list showed John P. Maciejewski and Donald E. Moody as General Managers, Operations Support.

During late 1995, according to Fiser, Thomas J. McGrath became the Operations Support General Manager. Fiser stated McGrath was one of the people directly responsible for his earlier "demise," and McGrath had previously told top management they should get rid of Fiser. On June 17, 1996, Wilson C. McArthur (who had been over Radiological Control) assumed Grover's duties as well as maintaining his own. (McArthur had been one of Fiser's managers during the time frame of his prior DOL complaint.) According to Fiser's complaint, these realignments allowed McGrath and McArthur to have their way in selecting Harvey for the posted position.

During Spring 1996, TVA called for the downsizing of organizations, including the Operations Support Group. James Boyles, Human Resources (HR) Manager, provided a "Corporate Staffing Plan" which shows planned

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reductions in several Nuclear organizations in addition to Operations Support. During the planning process, Operations Support decided to split the Chemistry and Environmental groups. Grover explained they were doing basically the same thing as the 1994 reorganization when they combined the two positions, but they now were splitting the positions.

Before the 1996 reorganization, there were three PG-8 Chemistry/Environmental managers: Fiser who worked mainly at the Watts Bar Nuclear Plant (WBN), Harvey who worked at the SQN, and E. S. Chandrasekaran who worked at the Browns Ferry Nuclear Plant (BFN). (An organizational chart dated September 14, 1994, showed five positions of Chemical/Environmental Program Specialist, including Fiser's, Harvey's, and Chandrasekaran's positions, reporting to the Chemistry and Environmental Protection Manager [Grover]. Of these five, three were PG-8 Chemistry positions.)

Management decided to keep two Chemistry program manager positions, a program manager in Chemistry -- Boiling Water Reactor (BWR) and a program manager in Chemistry -- Pressure Water Reactor (PWR). The job descriptions were rewritten to include only chemistry functions and not environmental responsibilities. McGrath explained that the new concept was standard throughout the nuclear industry, and benchmarking gave them ballpark numbers for the new organization. While Grover was responsible for rewriting the position descriptions, McGrath and Corporate HR made the decision to rewrite the position descriptions and post the positions. As relevant here, Fiser, Harvey, and Chandrasekaran applied for the PWR position, and Harvey and Chandrasekaran applied for the BWR position.

On July 18, 1996, a three-member selection board interviewed candidates for five positions, including the PWR Chemistry position. The selection board consisted of Charles E. Kent, Jr., SQN Radiological and Chemistry Control

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Manager, John M. Corey, BFN Radiological and Chemistry Control Manager, and Heyward R. Rogers, Operations Support Maintenance and Support Manager.³ According to McArthur, he sat in on the interviews but did not ask questions. The committee recommended Harvey for the PWR manager position and Chandrasekaran for the BWR manager position, and McArthur concurred with their recommendations.

ALLEGATION REGARDING SAFETY CONCERNS FISER RAISED

Fiser believed TVA posted the job because he raised deficiencies in TVA activities and in management decisions in TVA's Nuclear Power program. According to Fiser, McGrath (Acting General Manager of Operations Support) and McArthur (Radcon and Chemistry Control Manager) orchestrated the reorganization to get rid of him. In addition to the safety concerns in his prior DOL complaint, Fiser believed McGrath was upset because at one time Fiser had sent a report on the chemistry program, which was marked limited distribution, to the Nuclear Regulatory Commission (NRC). According to Fiser, McGrath was trying to teach Fiser a lesson.

McGrath, McArthur, and Boyles stated they were not aware of any safety concerns raised by Fiser. McGrath also said he had no knowledge of Fiser's previous DOL complaint or his settlement agreement.

³ Based on discussions with Ben G. Easley, Human Resource Officer (HRO), McArthur had decided to select the three site Radcon/Chemistry managers to serve as the selection board. However, Jack Cox (WBN) was replaced by Rogers. McGrath explained that Cox had schedule problems, and Cox removed himself because he was biased in favor of one candidate. Kent and McArthur confirmed that Cox had a scheduling conflict and Cox had stated he was biased in favor of Fiser, who had worked for him.

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ALLEGATION THAT FISER'S JOB DID NOT CHANGE

According to Fiser, during June 1996, TVA posted the job he had been given in a settlement of his previous complaint. Fiser alleged that TVA violated this agreement by posting his position, because in fact his position had not changed. Fiser, who acknowledged having some input into rewriting the position descriptions, stated the position description for the new position was changed from his position description "very, very slightly." According to Fiser, a "few environmental functions" were taken out, but none of his job functions actually changed. Fiser believed that instead of posting the jobs, TVA should have used the retention register and kept the most senior people. Fiser stated he would have been number one on the retention register because he had the most seniority, and he believed that is why TVA posted the jobs.

Our investigation developed the following information regarding Fiser's previous DOL settlement and the decision to rewrite the job descriptions and post the positions.

- According to Easley (Corporate HRO), management determined there was nothing in the settlement agreement between TVA and Fiser stating how long Fiser was to be retained in the position. Easley stated they had to post the positions because they had eliminated the environmental portion, which was one half of the duties. They were not advertising Fiser's position, which was Chemistry and Environmental Protection. Rather, the new positions only included the chemistry portion. In addition, they wanted to be fair to the three employees currently in the positions. Easley stated they followed all the rules in rewriting the position descriptions and posting the positions.

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- James E. Boyles (HR Manager) stated he concurred with Easley's decision to post the positions because they were different after the reorganization. Boyles stated they were performing a restructuring process for five different organizations and used the same process for each group.
- Boyles and Katherine J. Welch, Federal Appeals Specialist, confirmed that they reviewed the settlement agreement. Boyles stated he determined the agreement did not impact the posting of the new positions. Welch stated she could not find anything in the agreement that guaranteed Fiser a position at TVA for any length of time. (Our review also disclosed no provision in the settlement agreement which guaranteed Fiser a position at TVA for any period of time.)
- Grover (Fiser's former supervisor) stated they planned to keep two chemistry positions and rewrite the job descriptions to specifically detail the jobs. According to Grover, while the new job descriptions were a little different from the old ones, they did not change the basic function the managers performed in the past. However, they did delete the environmental work from the position descriptions. Grover stated that Corporate HR made the decision to advertise so everyone would have an equal opportunity to compete.
- McGrath stated he worked closely with Boyles during the reorganization process and they treated all organizations and positions equally. He and the HR office jointly decided to post and advertise the new positions.

Our review of the position descriptions disclosed there were differences, including the following.

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- The environmental functions were removed from the new position description, e.g., the responsibility for providing direction in the implementation of site hazardous materials control plans was removed, as was assisting in carrying out environmental priority tasks.
- The new position description titles were specific for, respectively, BWR and PWR plants.
- The minimum qualifications were changed from at least eight years' experience in "applied chemistry or environmental protection" to eight years' experience in "applied chemistry." The requirement for knowledge of environmental analyses, environmental requirements, and permitting requirements was deleted.

As we understand it, the test for whether reduction-in-force procedures should be followed, rather than posting a revised job description, is whether the revised job and the eliminated job are "mutually interchangeable." They would be "mutually interchangeable" if someone who is qualified for either one of the positions would also be qualified for the other position "without undue interruption." ("Undue interruption" is defined generally as a degree of interruption that would prevent the completion of required work by the employee 90 days after the employee had been moved from one of the jobs to the other one.)

We cannot conclude from our review of the required job qualifications that a person who would be qualified for the "Chemistry Program Manager" position could transfer to the "Chemistry and Environmental Protection Program Manager" position and perform that job, as defined in the job description, without "undue interruption."

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OIG Conclusions

Although there is evidence that in actuality the functions of the job as performed did not change, we cannot say that the changes to the position description were insufficient to support posting for the positions. Moreover, we cannot disprove the assertions that the intent was not to get rid of Fiser, but to give all three candidates an opportunity to apply. Based on the differences in the job descriptions and the fact that TVA was taking this approach in other organizations, we conclude there was insufficient evidence to support Fiser's allegations that this reorganization and the elimination of his position were a pretext to get rid of him for raising safety concerns.

ALLEGATION THAT TVA HAD PRESELECTED HARVEY

Fiser stated he had no reason to believe that the selection board made any promises to anyone that they would get a job. However, he believed Harvey was promised a job because of a discussion between Harvey and David J. Voeller, WBN Chemistry Superintendent, in which Harvey said that he would be working a lot closer with Voeller. Fiser also noted that SQN personnel, including Kent, tried (unsuccessfully) to get Harvey's position transferred to SQN, and they wanted to keep Harvey's expertise in support of SQN.

The individuals we interviewed who were involved in the reorganization and selection process stated that they did not preselect anyone for the positions. Rather, they stated they changed the position descriptions and had to post the job and it was a fair and unbiased selection process. Below we discuss Harvey's discussions with Voeller, and the efforts to have Harvey transferred to SQN.

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Harvey's Discussions With Voeller

Grover stated that Fiser called him one day and said Harvey had told Voeller that he was going to be working a lot closer with Voeller in the future. Fiser said Harvey was telling people that he was going to be working a lot closer with the people at WBN. Grover stated that the next day, he (Grover) called Voeller, and was told by Voeller that "out of the blue" Harvey had called him and told him he would be working a lot closer with him. Harvey told Voeller that he was going to get the position, but TVA would have to go through the normal process of posting, interviewing, and selecting the candidates. Grover stated he could understand why Fiser was upset because of Harvey's comments. Grover felt there might be a perception on some people's part that a preselection had been made. However, Easley told Grover they had not preselected anyone for the position.

Voeller, who has worked with both Fiser and Harvey, stated he was not aware of any preselection for the positions. He made the following additional statements.

- Sometime during the week of June 3, 1996, Harvey called him and said that he (Harvey) probably would be working more closely with WBN in the future. Voeller asked Harvey to explain what he meant, and Harvey said that he had not been allowed to transfer from Corporate to SQN. Harvey said he was earmarked for the PWR position at Corporate.
- He thought Harvey believed that he was not being transferred to SQN because Corporate wanted him for the PWR position. Harvey seemed pretty certain that he would be working more closely with Voeller. Harvey also expressed concern for Fiser because Fiser would be the one without a position.

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- He asked Harvey if they were going to post the positions, and Harvey told him that the positions would be posted and interviews would be conducted. However, he did not believe that the interviews would be relevant, because he felt he would end up getting the PWR position. Harvey did not say who told him that he would get the position. (According to Voeller's planner notes, Harvey "said he felt sorry for Fiser as odd man out," and Harvey commented that the interviews would be done to "keep it legal.")
- On June 7, 1996, Voeller told Grover about his conversation with Harvey. Voeller told Grover that Harvey felt pretty certain about working more closely with WBN because of his inference from Corporate management about not releasing him for a job at SQN.
- In addition, during this time, David F. Goetcheus, Corporate Maintenance and Technical Support Manager, called Voeller and appeared to be campaigning for Harvey. Goetcheus said he was aware that they were downsizing in Corporate and if Harvey did not get the PWR position, then they should try to keep Harvey at WBN or SQN in some other capacity.

(Goetcheus acknowledged that he called Voeller but stated he was not campaigning for Harvey. He stated his comments to Voeller had nothing to do with the Chemistry positions. Rather, he was promoting Harvey and another individual to assist in providing additional technical and management support to help solve problems at WBN. He was promoting Harvey and the other individual because they had more experience than Fiser in dealing with steam generator corrosion.)

- On June 10, 1996, Voeller talked to Harvey again, and Harvey said he might be calling Voeller for help getting a job because he (Harvey) was not

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sure who was going to get the job. Harvey said he would either be working closer with Voeller or not at all.

- He believed Harvey had overstated his comments about having the job. Harvey said that everyone would have to compete for the job.

- Between the first and second conversation with Harvey, he talked with Fiser. He told Fiser what Harvey had said to him. He could see where Fiser could be upset from the initial conversation. He did not talk to Fiser after his second conversation with Harvey, and he did not believe that Fiser was aware of Harvey's last comments.

Harvey stated he was not preselected for the position. He stated he had to apply for the position just like anybody else. Harvey stated that during June 1996, he had two conversations with Voeller. During each conversation, he told Voeller that he would be working with him a lot more or not at all. What he meant from that statement was that he would either get the job or not. He had been told not to worry, because there was nothing he could do about whether or not he would get the job.

Efforts to Transfer Harvey to SQN

McGrath stated that during the reorganization, Grover said Kent wanted to have Harvey's position transferred from Corporate to SQN. He told Grover that Harvey's position description was written specifically for Corporate and he could not transfer the position because the position was assigned to Corporate. In addition, he had three employees in Corporate with identical position descriptions (Harvey, Fiser, and Chandrasekaran) and he could not preselect one person to be transferred. He discussed the matter with Boyles, who told him that there was no way to transfer a position and a person from Corporate

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to a site. He told Grover that transferring a position from Corporate to a site would violate the personnel rules.

Kent acknowledged that he wanted to keep Harvey's expertise in support of SQN. He stated that he asked McGrath to transfer Harvey to SQN. He stated that Grover told them that McGrath did not think they were going through the correct process in trying to transfer Harvey, and he denied the request. After he denied it, they did not discuss it again.

Grover stated Kent expressed a desire to have Harvey transferred to SQN, and he (Grover) talked to McGrath about it. According to Grover, McGrath was against the idea. He stated McGrath knew there would be a new PWR position, and he wanted to keep Harvey's expertise in Corporate. He stated McGrath did not say that Harvey was preselected for the position, but he wanted him available to compete for it.

SELECTION OF HARVEY

McGrath stated he, McArthur, and Boyles decided who would be on the selection committee. They wanted to be certain that whoever they selected for the selection committee was not biased toward any of the candidates or the positions to be filled. McGrath also made the following statements.

- They also had HR review the previous DOL settlement to ensure none on the selection committee had any involvement in that settlement.

- They did not inform the selection committee that Fiser had filed a previous DOL complaint.

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- Normally a Corporate HR Officer (HRO) serves on the selection committee as a facilitator. Easley was assigned that role, but he was removed from the Chemistry manager selections because of his knowledge and association with the prior DOL settlement. They used a different HRO because they wanted a totally unbiased HR person.

McArthur stated that the review board was a totally independent selection group. McArthur stated he prepared the questions, and all applicants were asked the same questions. McArthur stated that during the reorganization process, he had no contact with Fiser.

Easley said that prior to the interview, he provided the selection board a binder containing the resume, personal history record (PHR), application, and other pertinent information concerning each applicant. According to Easley, the selection committee considered merit, efficiency, and experience for each candidate. (However, we noted a memorandum dated June 24, 1996, documenting an allegation of intimidation and harassment by a TVA co-op student against Sam Harvey and documenting a subsequent management finding that his behavior was "inappropriate and insensitive" was not included in the materials provided to the selection board members. Easley explained the memo was not a part of Harvey's PHR, and the selections were based on the applicants' responses during the interview.)

The selection board members made the following statements.

- Rogers was not aware of any DOL complaint filed by Fiser or safety concerns raised by Fiser. He knew most of the candidates who had applied for the Chemistry positions and was most familiar with Fiser from when Fiser worked at SQN and WBN. He was selected for the committee two to three days before they met, and McArthur provided him a booklet on each

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applicant for review. During the selection process, they asked each applicant a series of questions and graded each applicant. He totaled his grades for each applicant and turned them in at the end of the process. He did not know who received the highest score for each vacancy and was not aware of who was selected to fill each position. He felt the whole selection process was fair and unbiased.

- Corey had heard that Fiser had filed a previous DOL complaint but had no knowledge regarding that complaint or any settlement. He was not aware of Fiser's current DOL complaint, or any safety concerns raised by Fiser. He was aware of Chandrasekaran's background and abilities, but not those of Harvey and Fiser. All applicants were asked the same questions by the same managers on the selection board. The committee graded each applicant individually, then the totals were added to make the final determination. He thought the selection process was fair.
- Kent was aware of both Fiser's previous and current DOL complaints. He believed McArthur might have told him about Fiser's current complaint. Kent was not aware of any safety concerns brought up by Fiser, and he was not influenced by Fiser's DOL complaints. He believed the selection committee was fair.

Our review of the documentation concerning the selection revealed the following.

- Six people applied for the PWR position (VPA 10703), which closed on June 25, 1996. According to Fiser's resume, he had a BS in chemistry, with a minor in biology and extensive experience. His resume showed he began work at TVA as a program manager during September 1987. According to Harvey's resume, he had a BS in Biology/Chemistry, and he

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also had extensive experience. He began working at TVA as a program manager during May 1991. Chandraskearan's resume reflected a PhD in chemistry and extensive experience. He began working at TVA during May 1991, also as a program manager.

- Each of the three selection panel members ranked Fiser third on his responses during the interview. While Harvey and Chandrasekaran received almost identical total scores, Fiser received approximately 50 points less. Corey and Kent gave Fiser a total score of, respectively, 65.8 and 64, while Rogers gave him a 51. Their scores for Harvey were 78.2 (Corey), 80.5 (Kent), and 77 (Rogers). Their scores for Chandrasekaran were 84.5 (Corey), 76 (Kent), and 75 (Rogers).

- In July 31, 1996, memorandum, McArthur reported that Chandrasekaran was rated highest for both the PWR and BWR positions, although it was a very close ranking for the PWR position. Because Chandrasekaran was recommended for the BWR position, the review board recommended the PWR position be offered to Harvey.

OIG Conclusions

The evidence regarding Kent's efforts to have Harvey transferred to SQN could indicate that Kent was not unbiased regarding the selection. Further, the evidence regarding Harvey's initial comments to Voeller about his getting the job could indicate that someone told Harvey he would be getting the job. However, there were no witnesses to the conversations between Harvey and Voeller, they recalled the conversations differently, and there is no other

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evidence as to who may have told Harvey he would be getting the job.⁴ There also was no evidence indicating the other two selection committee members were biased, and they each consistently scored Fiser lower than the other two candidates. Accordingly, the evidence does not show that management's conclusion that Harvey was the most qualified candidate for the position was unreasonable or pretextual.

RECOMMENDATIONS

Based on our findings, no recommendations are warranted.

REMARKS

Our investigation of this matter is closed.

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⁴ Our review of the scoring indicates Harvey scored two-tenths of a point higher than Chandrasekaran for the PWR position. Easley stated this was probably a mathematical error on his part, and it did not affect the selection.