RAS 5970 50-390 CIVP, et.al. Licensee Exhibit 111-Recd 6/12/02

December 15, 1999

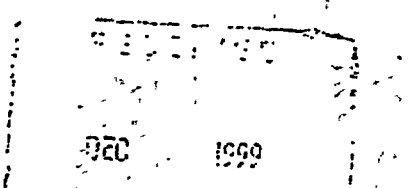
Ms. Anne T. Boland, Director
U.S. Nuclear Regulatory Commission
Enforcement & Investigations Coordination Staff
Region II
61 Forsyth Street, SW, Suite 23T85
Atlanta, Georgia 30303-8931

Dear Ms. Boland:

ADDITIONAL INFORMATION ASSOCIATED WITH CLOSED ENFORCEMENT CONFERENCE (OFFICE OF INVESTIGATIONS REPORT NO. 2-98-013)

This responds to NRC's request that TVA provide additional information in connection with the subject enforcement conference held in the NRC Region II office in Atlanta on December 10, 1999. Specifically, the NRC asked that TVA provide additional information on three matters. First, NRC asked that TVA address, and provide applicable case law in support of, TVA's process of arriving at competitive level determinations as well as its practice of declaring positions to be surplus. Secondly, NRC asked that TVA describe the impacts on headcount that the 1996 TVA Nuclear reorganization had on its corporate staff, especially those associated with the Operations Support organization. Thirdly, NRC asked that TVA describe the reporting relationship of the Nuclear Safety Review Board Chairman.

Enclosures 1, 2, and 3 address each of these topics, respectively. Because this information is provided in connection with a closed enforcement conference not subject to public observation, we ask that you protect the information contained in this letter in accordance with the closed enforcement policy process.



TVA Exh. 111

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NUCLEAR REGULATORY COMMISSION

Docket No. 50-390 Official Exh. No. TVA III

In the matter of TVA

Staff	IDENTIFIED ✓
Applicant ✓	RECEIVED ✓
Intervenor	REJECTED
Other	WITHDRAWN
DATE 6/12/02	Witness
Clerk BHM	

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RULEMAKINGS AND
ADJUDICATIONS STAFF

If there is any further information that would be of help to you , or if you have any questions, please do not hesitate to call me at (423) 751-2508.

Sincerely,

Original signed by

Mark J. Burzynski
Manager
Nuclear Licensing

Enclosures

EJV:MJB:LYM
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s/nuclic/corplic/nrc/addl info OI 2-98-013

Enclosure 1

TVA's Practice of Declaring Positions to Be Surplus

As discussed at the December 10 conference, TVA has adopted measures to ameliorate the difficulties encountered by employees who may lose their TVA employment when their services are no longer needed. OPM's regulations authorize an agency to conduct a reduction in force (RIF) when there is a surplus of employees, lack of work, or shortage of funds. When an agency conducts a RIF it must follow the regulations in 5 CFR part 351. However, an agency is not required to conduct a RIF simply because there is a surplus of employees, lack of work, or shortage of funds. Further, unless an employee's TVA employment is terminated in a RIF, the OPM regulations in 5 CFR part 351 are inapplicable to TVA's determination that a position is surplus.

In the past, rather than conducting a RIF, TVA chose to declare positions surplus and reassign the employees to its Services organization (also known at other times as the Employee Transition Program and Career Transition Services). Because employees who are assigned to Services are kept in their previous position, grade, and salary, the MSPB and the Court of Appeals for the Federal Circuit have ruled that TVA's action in declaring a position surplus and assignment of the employee to Services is not appealable under the RIF regulations in 5 CFR pt. 351 (1999). *Crain v. Merit Sys. Protection Bd.* No. 98-3015, 178 F.3d 1308 (Table) (Nov. 13, 1998), *aff'g* No. AT-3443-96-0939-I-1 (Mar. 12, 1997) (A copy of this unreported decision is enclosed); *Tankesley v. TVA*, 54 M.S.P.R. 147, 150-51 (1992) ("Although the agency announced that the appellant's position was surplus as a result of a reorganization and he was assigned to the ETP for a period to last 6 months, there is no evidence to show that these actions on the agency's part constituted a RIF.").

As held in both the *Crain* and *Tankesley* cases, TVA's decisions on selections are not appealable to MSPB. Thus, in a reorganization such as the 1996 reorganization of the corporate Chemistry and Environmental Protection organization, where existing positions were declared surplus and new positions were created and advertised, the selections for the new positions are not subject to OPMs regulations governing RIFs or selections.

Even though TVA's decision to surplus an employee's position and to assign the employee to Services is not appealable to the MSPB, TVA does attempt to make such decisions based on the employee's retention standing as determined by 5 CFR part 351. When TVA assigns employees to Services it is aware that the assignment will not last forever and that if the employee is unsuccessful in finding another position, either inside or outside of TVA, a RIF may eventually occur. Because retention standing in a RIF is determined as of the effective date of a RIF (5 CFR § 351. 506 (1999)), assignments to Services are made based on an assumed RIF at some point in the future. Thus, when

conducting a reorganization which involves the establishment of new positions, TVA must first determine whether any such new position should or should not be placed in the same competitive level as existing positions. If a new position is in the same competitive level as an existing position, an incumbent could have retention standing with respect to the new position, in which case TVA would not assign the individual to Services. 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 and would be subject to being assigned to Services. An individual whose position is declared to be surplus, but who successfully competes for a different position would not remain in the same competitive level. An individual who is unsuccessful in finding another position, would remain on the retention register and could be subject to a RIF at some later date.

TVA Makes Competitive Level Determinations by Using the Most Recent Position Description of Record.

TVA Nuclear Human Resources (HR) decided that the position of Chemistry and Environmental Protection Program Manager was not mutually interchangeable with the new positions of Chemistry Program Manager (PWR) and Chemistry Program Manager (BWR) so as to require the positions to be placed in the same competitive level in accordance with 5 CFR § 351.403 (1999). The consequence of that decision was that incumbents of the first position did not have a right by virtue of their retention standing to the new positions which were advertised for competition.

HR likewise decided that Wilson McArthur's position description of record was sufficiently similar to the position description for Manager, Radiological Control, Chemistry and Environmental that the two positions would be on the same competitive level in accordance with 5 CFR § 351.403(a). In making both determinations, NHR utilized the most recent position descriptions without regard to the personal qualifications of the incumbent employees or the duties or details to which they had been assigned from time to time.

The Office of Personnel Managment (OPM) established the standard which TVA follows to determine which positions should be included in a competitive level (5 CFR § 351.403). The test for inclusion involves whether the positions are *mutually interchangeable* and the focus is on the position descriptions -- not the qualifications of the incumbents. *Kline v. TVA*, 805 F.Supp. 545, 548 (E.D.Tenn. 1992), *aff'g* 46 MSPR 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.*

Department 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 their 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.").

Merit Systems Protection Board (MSPB) cases support TVA's use of the last position description of record in determining an employee's competitive level. 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 his RIF, 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 at 1928-33 (1999).

The question was asked at the December 10, 1999, predecisional enforcement conference whether the Chemistry Program Manager (PWR) position should not be in the same competitive level as the previous Chemistry and Environmental 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 two positions must be mutually interchangeable. The fact that one position may include fewer responsibilities but more specialized qualifications defeats that interchangeability. For example in *Trahan v. TVA*, 31 M.S.P.R. 391 (1986), an 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. Department of Army*, 12 M.S.P.R. at 362 holding that "mutual interchangeability" is required for positions to occupy the same competitive level.

During the December 10 conference, TVA pointed out that although Wilson McArthur was assigned as the Manager of Radiological Control, he was not issued a position description for that job. The question was raised as to the appropriateness of using his most recent position description of record to establish his competitive level. TVA's

practice of using the most recent position description of record is consistent with TVA's reading of MSPB precedent. *Bjerke v. Department 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 more seniority, was improperly placed in his GS-15 competitive level. Prior to the RIF, a classification survey determined that Kermoian 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" (25 M.S.P.R. 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; emphasis added unless otherwise noted). 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.*).

Griffin v. Department 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 detailed or in which he is acting [64 M.S.P.R. at 563].

See also Jicha v. Department 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.").