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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO TENNESSEE VALLEY AUTHORITY'S POSTHEARING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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March 7, 2003

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APA	Administrative Procedure Act
BWR	Boiling Water Reactor
DOL	Department of Labor
ERA	Energy Reorganization Act
FY	Fiscal Year
HR	Human Resources
HRIS	Human Resources Information System
INPO	Institute for Nuclear Power Operations
LCO	Limiting Condition for Operations
MSPB	Merit Systems Protection Board
NOV	Notice of Violation
NRC	Nuclear Regulatory Commission
NSRB	Nuclear Safety Review Board
OGC	Office of the General Counsel
OI	Office of Investigations
OIG	Office of Inspector General
OPM	Office of Personnel Management
PASS	Post Accident Sampling System
PEC	Predecisional Enforcement Conference
PHR	Personal History Record
PWR	Pressurized Water Reactor
RadChem	Radiological Controls and Chemistry
RadCon	Radiological Controls
RIF	Reduction in Force
SCAR	Significant Corrective Action Report
SQN	Sequoyah Nuclear Plant
SRB	Selection Review Board
TVA	Tennessee Valley Authority
VPA	Vacant Position Announcement

March 7, 2003

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NRC STAFF'S RESPONSE TO TENNESSEE VALLEY AUTHORITY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

1.1. This proceeding involves the imposition of a civil penalty by the Staff of the Nuclear Regulatory Commission (hereinafter "NRC") on the Tennessee Valley Authority (hereinafter "TVA") for an alleged violation of the NRC's employee-protection requirements, set forth in 10 C.F.R. § 50.7. The alleged violation is based upon asserted discrimination against a former employee for engaging in protected activity.

1.2. After granting the June 1, 2001 request for a hearing by TVA, the Atomic Safety and Licensing Board Panel (hereinafter "Board") conducted an evidentiary hearing in Chattanooga, Tennessee and Rockville, Maryland. After the close of the hearing, both parties filed timely posthearing Findings of Fact and Conclusions of Law on December 20, 2002.[1]

1.3. This response brief will not address those areas of fact and law upon which the parties agree, but will focus upon the areas of most significant dispute between the parties.

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[1] *See* "NRC Staff's Findings of Fact and Conclusions of Law Concerning the Tennessee Valley Authority's Violation of 10 C.F.R. §50.7," December 20, 2002 (hereinafter "Staff Brief"); "Tennessee Valley Authority's Posthearing Proposed Findings of Fact and Conclusions of Law," December 20, 2002 (hereinafter "TVA Brief").

II. FINDINGS OF FACT

A. The Staff's Prehearing Actions Are Irrelevant in This *De Novo* Proceeding

2.1. Commission precedent has long held that the notice of hearing identifies the subject matter of the hearing and limits the hearing to those issues specified in the notice. *See General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 476 (1987); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 20 (1991). In this case, the NRC published a Notice of Hearing in the *Federal Register* on July 5, 2001. 66 Fed. Reg. 35467 (July 5, 2001). Under this line of cases, the issues before the Board in this proceeding are limited to the issues identified in that notice of hearing.

2.2. The *Federal Register* notice clearly defines the relevant issues in this proceeding. The notice states:

> The issues to be considered, as set forth in the Order Imposing Civil Monetary Penalty, are (a) whether the Licensee violated the Commission's requirements, as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty, dated February 7, 2001 [sic]; and, if so, (b) whether, on the basis of such violation, the Order Imposing Civil Monetary Penalty should be sustained.

66 FR at 35468. The Board lacks the authority to enlarge its jurisdiction to consider issues beyond the scope of the notice of hearing. *See General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 476 (1987) and *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985).

2.3. As noted in the *Federal Register* notice, the Staff set forth the violation of 10 C.F.R. § 50.7 in a February 7, 2000 Notice of Violation and Proposed Imposition of Civil Penalty (hereinafter "NOV"). Joint Exhibit (hereinafter "Jt. Exh.") 47, p. AB000026. The violation states:

> 10 CFR 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and privileges of employment. The activities which are protected include, but are not limited to, providing a Commission licensee with information about nuclear safety at an NRC licensed facility or testifying at any Federal proceeding regarding any provision related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.
>
> Contrary to the above, the Tennessee Valley Authority (TVA) discriminated against Mr. Gary L. Fiser, a former corporate employee, for engaging in protected activities. Specifically, in July 1996, TVA eliminated Mr. Fiser's position of Chemistry and Environmental Protection Program Manager, Operations Support, as part of a reorganization, and took subsequent actions to ensure that he was not selected for one of two new positions within Operations Support. TVA took these actions, at least in part, in retaliation for Mr. Fiser's involvement in protected activities. Mr. Fiser's protected activities included the identification of chemistry related nuclear safety concerns in 1991-1993, and the subsequent filing of a Department of Labor (DOL) complaint in September 1993 based, in part, on these chemistry related nuclear safety concerns.

Jt. Exh. 47, p. AB000026.

2.4. In its Brief, TVA argues that the Staff's theory of the purported violation has changed over the course of the NRC's investigation and decision-making process in this matter.[2] TVA Brief at ¶¶ 1.2-1.9. TVA asserts that the Staff relied upon the report by the Office of Investigations (hereinafter "OI") in making its initial determination that a violation of 10 C.F.R. § 50.7 had occurred, but later "divorced" itself from that report.[3] TVA Brief at ¶ 1.2. According to TVA, the Staff then changed its position as to the basis of the violation after conducting Predecisional

[2] Although the Board ultimately concludes that any alleged changes in theory by the Staff would be irrelevant to the matters at issue in this proceeding, the Board notes that the Staff's theory of the case has not changed. The Staff has always asserted that TVA violated 10 C.F.R. § 50.7 by discriminating against Fiser, and that evidence of preselection, failure to follow procedures, temporal proximity, and disparate treatment supported that violation. The only change made in the Staff's case is the evidence introduced to support that case. Given the penchant of TVA witnesses and Counsel to provide different stories at various stages of the case, it is not surprising that the Staff would introduce evidence to address TVA's constantly changing theories.

[3] Despite this allegation, Staff Counsel has emphasized from the start of this proceeding that it was not relying upon the OI Report as evidence of discrimination, but instead was relying upon the Exhibits to that Report. *See* Tr. p. 44, l. 23; p. 91, l. 23; p. 92, l. 15; p. 96, l. 18.

Enforcement Conferences (hereinafter "PEC") with TVA, Wilson McArthur, and Thomas McGrath. TVA Brief at ¶¶ 1.6-1.7. *See also* Staff Exhs. 133, 134, and 135. The February 7, 2000 NOV to TVA reflected this alleged "new position" by the Staff. TVA Brief at ¶ 1.7.[4] TVA next raises the failure of either NRC OI or the Staff to review the OI Report related to Gary Fiser's 1993 Department of Labor (hereinafter "DOL") complaint. TVA Brief at ¶ 1.7. Finally, TVA argues that the Staff has expanded the scope of Fiser's protected activities since it issued the February 7, 2000 NOV.[5] TVA Brief at ¶ 1.8.

2.5. TVA again picks up its theme of relying upon prior Staff actions during its discussion of Fiser's 1993 DOL complaint. TVA Brief at ¶¶ 4.2-4.3. In that section of its Brief, TVA argues that it did not discriminate against Fiser and Fiser did not engage in protected activities leading up to that complaint. TVA bases this argument solely upon the conclusions of the TVA Office of the Inspector General (hereinafter "OIG"), the NRC Regional Counsel, and NRC OI. TVA Brief at ¶ 4.3.

2.6. The Board concludes that these arguments are both outside the scope of this proceeding and otherwise irrelevant to the issues raised in the NOV. The scope of this hearing is limited to the issues set forth in the notice of hearing. *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 476 (1987); *Duke Power*

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[4] James Luehman, the Deputy Director of the NRC Office of Enforcement, testified that the purpose of a PEC is to allow the licensee the opportunity to correct any misinterpretations or errors made by the Staff in the Apparent Notice of Violation, and to provide any additional information which the licensee believes is relevant to the apparent violation. *See* Tr. p. 318, l. 23. In fact, the Staff periodically dismisses proposed enforcement actions after a PEC. The Board cannot imagine that TVA would want to prevent the Staff from changing its position in such a manner. Under these circumstances, it is completely reasonable for the Staff to have considered the information supplied at the PEC in reaching its decision to issue a violation.

[5] The Board notes that, after conducting numerous depositions and receiving voluminous responses to interrogatories and document requests, it is completely reasonable for the Staff to have expanded its view of Fiser's protected activities. If the parties were not permitted to use information gleaned during discovery, then discovery would serve no valid purpose.

Company (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985). As noted above, these issues are limited to whether TVA committed a violation of 10 C.F.R. § 50.7 and whether the Civil Penalty should be sustained. 66 Fed. Reg. at 35468. Neither of these issues encompass an inquiry into the *Staff's* actions, but instead are limited to an inquiry into *TVA's* actions. Because these issues are outside the scope of the hearing notice, the Board lacks the jurisdiction to consider them.

2.7. In the TVA Brief, TVA refers to the February 7, 2000 cover letter to John Scalice as the "NOV." This constitutes an inaccurate identification of the NOV. The letter is merely a cover letter transmitting the NOV and proposed Civil Penalty to TVA, and is not a part of the NOV. The NOV itself is attached to this letter as Enclosure 1. Jt. Exh. 47, p. AB000026. The issues relevant to this proceeding are those raised in the NOV itself, not those raised in a letter by the Staff. Under these circumstances, the Board rejects TVA's attempts to characterize the NOV as including the cover letter to TVA.

2.8. The Board has repeatedly addressed the relevance of the OI Report and investigation, as well as other Staff actions, in multiple prehearing conferences. During the July 19, 2001 conference, TVA was informed that

> what the Staff did or the Office of Investigation or the Office of Enforcement did and how they did it and what standards they applied. . . . they're not at all relevant in this proceeding. This proceeding will be de novo in the sense that our decision will be based on the records, on the facts, excuse me, on the facts that are presented to us in the Hearing of this case.

Tr. p. 45, l. 20. TVA Counsel agreed at that time that the hearing would not encompass anything not included in the NOV. Tr. p. 46, l. 15.

2.9. The Board reiterated this position in the November 14, 2001 prehearing conference, after TVA Counsel attempted to argue that "the staff is bound by the position they have taken below. They can't proceed on some new theory." Tr. p. 94, l. 16. The Board explicitly rejected that argument because "[i]n a de novo proceeding the staff is bound by the notice of violation and the

allegations it makes . . .” and “this is a de novo proceeding that will be based upon the evidence presented at the hearing of this proceeding.” Tr. p. 94, l. 21; p. 95, l. 3.

2.10. This issue was raised yet again in the January 9, 2002 prehearing conference, during which TVA Counsel conceded that it is the NOV itself that constitutes the “formal charges,” but also argued “that the letters are instructive as to what the staff’s theory was about these violations.” Tr. p. 160, l. 2. This argument was rejected because the Board failed to “see the relevance of what the Staff’s theory was before that.” Tr. p. 160, l. 8.

2.11. Finally, in the April 9, 2002 prehearing conference, the parties discussed TVA’s desire to call the Region II OI Director as a witness to testify regarding why the Staff did not address certain matters in its investigation of Fiser’s complaints. The argument that the Staff’s investigation and prior actions are relevant to this proceeding was rejected yet again. Specifically,

> this proceeding is a de novo proceeding and I think it is fairly basic that we’re not really looking at how well the staff did what the staff did. We have to base our decision on the evidence we hear at this proceeding. Whether the staff did or did not do something appropriately or did not give appropriate attention to particular evidence is really not relevant in this case.

Tr. p. 216, l. 5. After reaching the conclusion that this information is irrelevant in a *de novo* proceeding, the Board excluded the OI Director from TVA’s witness list. Tr. p. 230, l. 23.

2.12. As for the conclusion reached by the NRC Regional Counsel, the Board has already concluded above that the Staff’s investigation of Fiser’s DOL cases is not relevant to the matters at issue in this proceeding and is outside the scope of the hearing notice. TVA would like to use the Regional Counsel and NRC OI’s conclusions in the 1993 case as conclusive evidence that Fiser did not engage in protected activities and therefore TVA did not discriminate against him in violation of 10 C.F.R. § 50.7. Under this rationale, the NRC OI conclusion in the 1996 case that Fiser did engage in protected activity and that TVA discriminated against him in violation of 10 C.F.R. § 50.7 should therefore also be conclusive evidence that TVA did discriminate against Fiser. This would be an absurd result in this *de novo* hearing. The Board therefore will not

consider the conclusion by the NRC Regional Counsel that Fiser had not engaged in protected activity in 1993 as evidence that he did not in fact engage in those protected activities. The Board also notes that the Regional Counsel's review of this matter was limited to a review of the TVA OIG Report and Fiser's Sequence of Events. Jt. Exh. 67, p. 3. The Board has significantly more information before it regarding Fiser's protected activities than did the Regional Counsel when she made her determination that Fiser did not engage in protected activity. Therefore, even if the Board concluded that her analysis was relevant, it would be of little evidentiary value.

2.13. Because an inquiry into the NRC OI investigation and any prior positions taken by the Staff is both outside the scope of this proceeding and irrelevant, the Board rejects TVA's arguments regarding the Staff's alleged inconsistent theories.[6]

2.14. The Board would like to address one further point with respect to TVA's argument that the Staff has given inconsistent theories of the violation. The Board finds it disingenuous for TVA to argue that the Staff has changed its theory of the violation, given that TVA's explanations have changed dramatically over the almost seven years since Fiser filed his 1996 DOL complaint. Since the Staff addressed TVA's inconsistent statements at length in its Brief, the Board will not repeat those arguments here. However, the Board does note that 10 C.F.R. § 50.9 requires TVA to provide complete and accurate information to the NRC. A review of TVA's inconsistent statements indicate that TVA has not done so. Although the Board is not here to determine whether or not TVA violated 10 C.F.R. § 50.9, the evidence that it has done so demonstrates a lack of credibility by TVA witnesses and by TVA as a party.

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[6] The Board would like to note the distinction between the OI *Report* and the *exhibits* to that report. TVA refers to the report and the exhibits interchangeably, when in fact they are very different documents. The OI Report is OI's interpretation of the evidence gathered during its investigation of an alleged violation of Commission regulations, and contains no evidence. By contrast, the exhibits to that report, specifically the interviews taken by OI agents of current and former TVA employees, under oath, are admissible evidence relevant to this proceeding. Therefore, the Board's holding regarding NRC OI and prior Staff actions is limited to an exclusion of evidence related to the OI Report, and does not extend to the OI exhibits.

2.15. After setting forth its argument about the Staff's inconsistent theories, TVA then provides a summary of its factual findings. TVA Brief at ¶¶ 1.10-1.11. This summary fails to include citations to the evidence in the record. The Board will therefore only consider the arguments raised in this summary to the extent that they are discussed, with appropriate evidentiary support, later in the TVA Brief.

2.16. TVA also discusses its history as an organization and federal agency, and the responsibilities of its Nuclear organization. TVA Brief at ¶¶ 2.0-2.2. In support of that discussion, TVA cites to its 1999 Annual Report, a copy of which it attached to its Brief. TVA Brief at ¶ 2.1. TVA claims that the Board can take judicial notice of the Annual Report. TVA Brief at fn. 4 (citations omitted). Although the Board does not dispute its authority to take administrative notice of a TVA Annual Report, the appropriate time at which to request such notice is when the record is open for evidence. The Board closed the record to the admission of new evidence on October 24, 2002. *See* Memorandum and Order (Rejection of Late-filed Exhibit; Closing of Evidentiary Record; Transcript Corrections; Schedules for Proposed Findings of Fact and Conclusions of Law). The Board refuses to consider the information in the Annual Report because it has not been admitted into evidence, and for the same reason that it rejected TVA's attempt to introduce TVA Exhibit 75: such an untimely proffer deprives the Staff of an opportunity to question witnesses with respect to its relevance. *Id.* at 4.

B. TVA Fosters a Hostile Work Environment Toward Whistleblowers

2.17. TVA maintains that it is committed to nuclear safety, and that it is TVA policy to protect employees against retaliation for raising nuclear safety concerns. TVA Brief at ¶ 2.3. TVA also cites to a policy which states that employees found guilty of retaliation will be subject to disciplinary action. TVA Brief at ¶ 2.4, *citing* TVA Exh. 66, p. CA000253. TVA asserts that its establishment of the Nuclear Safety Review Board (hereinafter "NSRB") is inconsistent with

retaliating against an employee for raising safety concerns, and that the NSRB avoids discussing the performance of specific individuals. TVA Brief at ¶¶ 2.5, 2.7.

2.18. The Board rejects TVA's argument that it is supportive of employees who raise concerns or file complaints. The Staff presented ample evidence that TVA fosters a work environment that is hostile toward employees who file complaints. *See* Staff Brief at ¶¶ 3.125-3.130. Additionally, there is no evidence to indicate that TVA actually does impose any meaningful disciplinary action on those employees found guilty of whistleblower retaliation. McGrath testified that he was not aware of any individual who had been disciplined under this policy. Tr. p. 883, l. 16. A better understanding of TVA's approach to its anti-retaliation policy is that it only disciplines those employees found guilty *by TVA* of discrimination.[7] This case is a perfect example of that approach: although the NRC issued NOVs to McArthur and McGrath, TVA has not disciplined either of them for their discrimination against Fiser.

2.19. TVA's argument that its establishment of the NSRB is inconsistent with retaliation against employees who raise safety concerns is somewhat misleading. TVA implies that the NSRB is a voluntary organization it has established in order to promote nuclear safety, when in fact the NSRB is mandated by its license. McGrath specifically testified that the NSRB is required by a technical specification to the TVA license, and that through this technical specification, the NRC sets forth some of the NSRB's duties. Tr. p. 592, l. 10. The Board therefore rejects TVA's argument that the establishment of the NSRB is inconsistent with whistleblower retaliation. The Board likewise rejects TVA's assertion that the NSRB avoids discussing the performance of specific individuals. TVA itself contradicts that argument by noting that McArthur testified that the

[7] The September 6, 1996 letter to McArthur is a perfect example of TVA's approach to disciplining employees found guilty of discrimination by another agency such as DOL, but that it has not found guilty of such discrimination. This letter never stated that McArthur should avoid engaging in retaliation against employees involved in safety matters. Instead, the letter indicates that McArthur should merely avoid the "perception of impropriety or precipitousness." Staff Exh. 91.

NSRB viewed Fiser as part of the problem with the concerns about the SQN Chemistry Program. TVA Brief at ¶ 4.52.

C. TVA Failed to Follow Required RIF Procedures

2.20. The parties generally agree that, under both Office of Personnel Management (hereinafter "OPM") regulations and TVA personnel policies, two positions must be mutually interchangeable in order to be in the same competitive level. TVA Brief at ¶ 2.17; Staff Brief at ¶ 3.89. In setting forth its interpretation of competitive level requirements, TVA cites to the testimony of Keith Fogleman, the Senior Manager of Human Resources (hereinafter "HR"), and a number of federal and Merit Systems Protection Board (hereinafter "MSPB") cases to support the proposition that a competitive level determination must be made based upon the employee's official position, and that the official position description is used as evidence of the duties of the position. TVA Brief at ¶ 2.17 (citations omitted). The Staff agrees with this testimony and line of cases. Staff Brief at ¶¶ 3.94-3.95 . However, TVA then claims that the MSPB requires it to use the "position description of record," defined as the last official position description in the employee's Personal History Record (hereinafter "PHR"), to make these competitive level determinations. TVA Brief at ¶ 2.18.

2.21. TVA has not cited to a single case which requires it, in making a competitive level determination, to use a position description for a position to which the employee is no longer officially appointed. In fact, the regulation and cases cited by TVA require that the agency use the position description for the employee's official position. TVA Brief at ¶¶ 2.17-2.18, *citing* 5 C.F.R. § 351.403(a)(1) and (2), and *Townsel v. Tennessee Valley Authority*, 36 MSPR 356, 360 (1988). Neither the regulation nor the case (nor TVA's personnel policy) permits the use of a position description for a position to which the employee is no longer appointed just because no position description for the position to which he is currently appointed can be located in the employee's PHR.

2.22. TVA also claims that, even if its interpretation of the OPM regulations and its personnel policy is in error, "what is important here is that TVA consistently and in good faith applied that interpretation." TVA Brief at ¶ 2.18. As the Staff pointed out in paragraphs 3.57 through 3.58 of its Brief, TVA did not consistently apply that interpretation. In 1993, Fiser was reduced-in-force (hereinafter "RIF") from his "position description of record," the Sequoyah (hereinafter "SQN") Chemistry Superintendent position, even though he was currently working as a Corporate Chemistry Program Manager. Under TVA's interpretation of the law, this RIF was both legal and proper because it was based upon his "position description of record." However, Reynolds admitted that he settled Fiser's 1993 complaint in part because Fiser was RIF'ed from a position he no longer occupied and that TVA therefore would have had a weak case before the MSPB. Tr. p. 3365, l. 5. This demonstrates that TVA has not consistently applied its interpretation of the law governing competitive level determinations.

D. Fiser's Prior Performance is Not Relevant to This Proceeding

2.23. TVA argues that the only protected activity in which Fiser engaged was the filing of his 1993 DOL complaint. TVA Brief at ¶ 4.4. The Board agrees with both parties that the filing of a DOL complaint constitutes protected activity under 10 C.F.R. § 50.7. *See Zinn v. University of Missouri*, 93-ERA-34, 93-ERA-36, 1996 DOL Sec. Labor LEXIS 8 at 17 (Sec'y, Jan. 8, 1996). The Board therefore concludes that the filing of both the 1993 and the 1996 DOL complaints is protected activity.

2.24. Although TVA acknowledges that the complaint itself is protected activity, it argues that the issues raised by Fiser in his 1993 DOL complaint do not constitute protected activities. TVA Brief at ¶ 4.7. Instead, TVA claims that the three issues identified by Fiser in that complaint were examples of Fiser's poor performance, for which management at SQN held Fiser responsible. TVA Brief at ¶ 4.7. TVA then proceeds to explain Fiser's alleged lack of involvement in the identification or documentation of these three issues.

2.25. TVA initially attempts to rely upon two facts in reaching its conclusion that the issues raised by Fiser in the 1993 DOL case were not protected activities, but examples of his poor performance. First, TVA cites to the TVA OIG finding that Fiser had not engaged in protected activities, but instead was being held responsible for his failure to identify and fix certain problems. TVA Brief at ¶ 4.10. Second, TVA notes that the NRC Region II Regional Counsel reviewed the TVA OIG report as part of her review of Fiser's 1993 DOL case and concluded that Fiser had not been engaged in protected activities but had performance problems. TVA Brief at ¶ 1.7.

2.26. A conclusion reached by TVA OIG in its report is clearly not evidence that its conclusion is accurate, especially in light of TVA Counsel's description of those reports as "an investigative report done when a case is in litigation . . ., it's self-serving as all get out." Tr. p. 1255, l. 8. Under these circumstances, the Board gives no weight to a TVA OIG conclusion that Fiser did not engage in protected activities. Additionally, as noted above in Section II.A. of this Opinion, any conclusions reached by NRC OI or the Regional Counsel with respect to Fiser's 1993 DOL complaint are both irrelevant and outside the scope of this proceeding.

2.27. Although the Board will address TVA's arguments with regard to each specific issue raised by Fiser in the 1993 DOL complaint, we first must address the relevance of Fiser's alleged poor performance. Fiser's performance, either good or bad, leading up to the filing of his 1993 DOL complaint is irrelevant to the matters at issue in this proceeding. As noted earlier, the scope of this proceeding is limited to the issues identified in the notice of hearing: whether TVA violated 10 C.F.R. § 50.7 in 1996, and whether the civil penalty for that violation can be sustained. 66 Fed. Reg. at 35468. *See General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 476 (1987); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985). More specifically, this proceeding involves a determination of whether the NOV issued to TVA as a result of discrimination against Fiser in 1996 is supported by the evidence in the record. The Staff is not required to prove also

that TVA discriminated against Fiser in the 1993 case (although the Board notes that there is evidence in the record that supports this conclusion).

2.28. TVA conceded during the hearing that Fiser's performance was not a factor in the two decisions which resulted in this NOV. On three separate occasions, TVA Counsel stipulated that Fiser's past performance had no effect upon either the decision to post the Chemistry Program Manager positions or Fiser's non-selection for one of those positions. Tr. p. 2476, l. 2; p. 4388, l. 21; p. 4392, l. 8. In the absence of any dispute regarding whether Fiser's performance from 1989 through 1993 had any effect upon the adverse actions taken against him in 1996, the Board finds that any evidence of Fiser's alleged poor performance is irrelevant to this proceeding.

2.29. Although the Board finds that Fiser's alleged poor performance is irrelevant, it would like to address TVA's attempt to portray Fiser as a poor Chemistry Superintendent at SQN. In paragraphs 3.0 through 3.11 of the TVA Brief, TVA cites to performance appraisals, reports by the Institute of Nuclear Power Operations (hereinafter "INPO"), and minutes from meetings of the SQN NSRB to support its claim that Fiser was a poor performer during his assignment at SQN Chemistry Superintendent. The Board has some concerns about TVA's selective use of the evidence, as well as its attempts to blame Fiser for matters that occurred when he was not in charge of the SQN Chemistry Program.

2.30. TVA first addresses some of the negative performance evaluations Fiser received from 1989 through 1992. TVA Brief at ¶¶ 3.1-3.4. Specifically, TVA quotes negative statements about Fiser's performance from his January, 1989, September, 1989, and Fiscal Year (hereinafter "FY") 1991 performance appraisals. Jt. Exhs. 30, 31 and 32. The Board recognizes that these performance appraisals do contain some negative statements about Fiser's performance. However, the Board notes that TVA has conveniently ignored the evidence in the record which demonstrates Fiser's strong performance as SQN Chemistry Superintendent. The Staff addresses this evidence at ¶¶ 2.13 - 2.24 of its Brief. The Board agrees with the Staff's analysis of this

evidence, that Fiser's performance as Chemistry Superintendent showed steady improvement from 1989 through 1991. *See* Jt. Exhs 30 and 31 (Fiser's performance improved from "adequate performance" in January 1989 to "solid performance" in September 1989); Staff Exh. 44 (Fiser completed all assigned goals and received highest rating on each performance standard); and Jt. Exh. 32 (Fiser demonstrated continued strong performance as Chemistry Superintendent).

2.31. TVA cites to some of the negative evaluation statements contained in Fiser's FY 1991 performance appraisal. Jt. Exh. 32. However, those negative evaluations related to Fiser's performance in Outage Management, not to his performance as Chemistry Superintendent. Those sections of the appraisal which discussed Fiser's performance as Chemistry Superintendent noted his continued strong performance. Jt. Exh. 32, p. 2b, p. 4a, and Third Quarter Evaluation. Under these circumstances, the Board rejects TVA's argument that Fiser was a poor performer as SQN Chemistry Superintendent.

2.32. TVA next argues that INPO Reports from 1989 and 1991 demonstrate some significant problems with the SQN Chemistry Program, and attempts to place the blame on Fiser for those problems. TVA Brief at ¶ 3.5. While Fiser could potentially be held partially responsible for the results of the 1991 INPO Report, it is patently unreasonable to hold Fiser responsible for the results of the 1989 INPO Report. Fiser testified that the information utilized by INPO to evaluate the SQN Chemistry Program in 1989 had been accumulated and sent to INPO prior to his assuming the SQN Chemistry Superintendent position, and that he could not have recalled that information and replaced it with more accurate information. Tr. p. 2438, l. 12. TVA presented no evidence to contradict this testimony. Additionally, TVA noted that the 1989 INPO Report shows "longstanding problems" with the SQN Chemistry Program. TVA Brief at ¶ 3.5. Clearly, TVA cannot expect the Board to conclude that Fiser should be blamed for problems that existed long before he assumed authority over the SQN Chemistry Program.

2.33. With regard to the 1991 INPO Report, TVA argues that this report demonstrates that the SQN Chemistry Program "was still struggling to resolve the problems identified in the 1989 INPO report." TVA Brief at ¶ 3.5, *citing* TVA Exh. 48, p. AJ000310-11. The Board disagrees with TVA's interpretation of the 1991 INPO Report. The pages cited by TVA as evidencing SQN Chemistry's failure to remedy problems identified in the 1989 INPO Report are a verbatim copy of the 1989 findings and response. Specifically, pages AJ000309 through AJ000312 of the 1991 INPO Report are simply a copy of the findings identified in pages AJ000299 through AJ000302 of the 1989 INPO Report. TVA Exh. 48. TVA completely ignores the portion of the 1991 INPO evaluation that reports on the status of these findings from the 1989 Report. TVA Exh. 48, p. AJ000312. The status report indicates the schedules for certain corrective actions, and then notes that "[a]ll other items are complete." *Id.* at AJ000313. Under these circumstances, it is disingenuous for TVA to claim that the SQN Chemistry Program had not improved or addressed the 1989 INPO Report during the course of Fiser's tenure as SQN Chemistry Manager.

2.34. TVA then cites to NSRB meeting minutes to further demonstrate that the SQN Chemistry Program had "longstanding problems." TVA Brief at ¶ 3.8. TVA correctly notes that the February 1991 meeting minutes indicate that post accident sampling system (hereinafter "PASS") training could be improved. Jt. Exh. 1, p. CC000087. TVA then claims that the August 1991 NSRB meeting minutes show that SQN Chemistry had not yet addressed the PASS training concern. Similarly, TVA attempts to blame Fiser for the fact that this issue had still not been addressed by the November 1991 NSRB meeting. TVA Brief at ¶ 3.8. Although these meeting minutes may demonstrate some continued problems with the SQN Chemistry Program, the Board is concerned with yet another attempt by TVA to blame Fiser for failing to correct problems over which he had no control. Fiser testified that from approximately April 1991 to January 1992, he rotated to a position in Outage Management at SQN. Tr. p. 2272, l. 8. During that time, he did not retain his supervisory duties over the SQN Chemistry Program, but instead placed two direct reports in

charge of the program in his absence. Tr. p. 1008, l. 10; p. 2275, l. 5. The Board refuses to label Fiser as a poor performer based on the issues raised in these NSRB minutes, since he was not in a position to correct those issues during his rotation to Outage Management.[8]

2.35. TVA then moves on to discuss Fiser's rotation to the Corporate Chemistry Manager position in the spring of 1992. The Board reiterates its earlier finding that Fiser's performance during this time frame is irrelevant to the matters at issue in this proceeding. Despite this ruling, the Board is compelled to address some of TVA's arguments on this subject because they reflect upon the credibility of TVA witnesses, and on TVA as a party.

2.36. The Board would first like to address TVA's use of two pieces of evidence: the TVA OIG statement given by Patrick Lydon, and the Sequence of Events containing the transcriptions of Fiser's tape recorded conversations. TVA Exh. 122 and Jt. Exh. 27. With respect to the Lydon statement, TVA first quotes from that statement as if it is reliable evidence that the SQN Chemistry Program was poor and had longstanding problems, and as evidence that Beecken and Bynum wanted Fiser rotated to Corporate Chemistry because of these problems. TVA Brief at ¶ 3.12, *citing* TVA Exh. 122, p. 3. However, TVA later portrays Lydon as making false statements about Beecken in the same TVA OIG interview. TVA bases this allegation on Beecken's denial that he ever "fired people for effect," as alleged by Lydon in this statement. TVA Brief at fn. 8, *citing* Tr. p. 4835, l. 3; TVA Exh. 122.

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[8] The Board notes that, upon his return as the SQN Chemistry Superintendent after his rotation in Outage Management, Fiser worked with Jocher to resolve the PASS training issue in two ways. First, he and Jocher drafted a response to the NSRB in February, 1992 indicating that they would be investigating and documenting any problems with meeting the three hour PASS requirement, including a determination that all personnel could meet the requirement. Staff Exh. 177, Exh. 2, p. 13. Second, when SQN site management disputed their interpretation of the PASS requirements, Fiser and Jocher contacted the NRC and confirmed that their interpretation of the requirements was correct. Staff Exh. 34, p. AJ000136. These documents indicate that Fiser did, in fact, take actions to resolve the PASS issue.

2.37. TVA cannot have it both ways: either Lydon's statement is reliable evidence that the Board should rely upon in reaching its decision, or it is unreliable evidence the Board should disregard in its entirety. TVA cannot choose to focus only upon those sections of the statement that support its case, then disregard those sections of the statement that support the Staff's case. Specifically, the Board notes that TVA has ignored three key portions of the Lydon statement which support the Staff's case. First, TVA's Brief suggests that Lydon himself thought that the state of the SQN Chemistry Program was due to Fiser's alleged poor performance. TVA Brief at ¶ 3.12. The statement does not state this, but instead states that Beecken and Bynum wanted Lydon to fire Fiser. Lydon told the TVA OIG that he would not fire Fiser "because he did not have any documented justification to take such action." TVA Exh. 122, p. 3. The documentation of Fiser's performance prior to his rotation to Corporate Chemistry supports Lydon's conclusion: Fiser's 1990 and 1991 performance appraisals both indicate that he was performing his Chemistry Superintendent duties well. *See* Staff Exh. 44; Jt. Exh. 32.

2.38. Second, TVA ignores Lydon's statement that TVA was "the most abusive place" he ever worked, and that he resigned his TVA employment because of his disgust with senior TVA management. TVA Exh. 122, p. 5. Finally, TVA ignores that Lydon's statement bolsters Fiser's testimony with regard to TVA's management's failure to adequately fund the Chemistry Upgrade Project. *Id.* Additionally, the Board gives little credence to Beecken's denial that he engaged in abusive management behavior, or that he "fired people for effect," as it is unlikely that any witness would admit to engaging in such behavior in a whistleblower retaliation case.

2.39. The Board is also distressed by TVA's inconsistent arguments regarding Fiser's tape recordings and the transcripts of those recordings contained in the Sequence of Events (Jt. Exh. 27). TVA claims that the Sequence of Events:

> 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 recorded secreted in Fiser's pocket, are in large part indecipherable.

TVA Brief at fn. 10. Despite this argument, TVA then proceeds to cite to the Sequence of Events at length with respect to conversations Fiser recorded with Jack Wilson and Beecken, arguing that these conversations demonstrate that Wilson and Beecken had problems with Fiser's performance, rather than with his involvement in protected activities. TVA Brief at ¶¶ 3.20-3.26.

2.40. The Board has listened to those recordings submitted as evidence by both parties,[9] and has compared those recordings to the relevant transcriptions contained in the Sequence of Events. The Board finds that those recordings in evidence are largely audible, and that Fiser's transcriptions of those recordings are remarkably accurate. Therefore, the Board will consider both the recordings themselves and the Sequence of Events as evidence in this proceeding.

2.41. TVA also attempts to discredit the recording and transcript of the November 16, 1992 conversation between Fiser and McArthur. TVA argues that McArthur has no recollection of McGrath telling him to remove Fiser, or of telling Fiser that McGrath made such a statement. TVA Brief at fn. 9, *citing* Tr. p. 1404, l. 1; p. 1408, l. 6; p. 1409, l. 10. TVA claims that whether McArthur told Fiser that McGrath made this statement is not evidence that McGrath had authority to or did in fact have any involvement in Fiser's removal from his SQN Chemistry Superintendent position. The Board has listened to the recording of this conversation, and McArthur clearly tells Fiser that the "downhill slide" started on him after the NSRB meeting at which McGrath and Peterson were present, and that after that meeting, "McGrath said that we have a Chemistry Manager at Sequoyah that is not effective."[10] Staff Exh. 168; Jt. Exh. 27, p. 22-23.

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[9] The Board notes that TVA submitted into evidence a recording of the December 9, 1992 conversation between Fiser and Beecken. TVA Exh. 148. It is somewhat disingenuous for TVA to argue that the recordings that the Staff introduced as evidence are inaudible and indecipherable, but that the recording it introduced should be used as evidence.

[10] These statements are supported in part by McArthur's January 10, 1994 statement to TVA OIG. McArthur told the OIG that McGrath left that NSRB meeting very upset, and went to speak to Beecken. According to McArthur, Beecken initiated the swap between Fiser and Jocher shortly after this NSRB meeting. Staff Exh. 177, Exh 6, p. 1. Dan Keuter's statement to TVA OIG (continued...)

2.42. TVA's argument that McGrath lacked the authority to take action against Fiser in 1992 to 1993 misses the point: the Staff did not introduce this evidence in attempt to prove that McGrath had such authority or did take an action to remove Fiser during that time frame. It is irrelevant in this proceeding whether McGrath had such authority, because the Board is not considering whether TVA discriminated against Fiser in 1993, but whether TVA discriminated against him in 1996. However, a statement by McGrath that he wanted Fiser removed as the SQN Chemistry Superintendent, after the NSRB meeting at which Fiser explained to him that drafting a procedure requiring daily trending would result in a violation of that procedure, is evidence of discriminatory intent. Additionally, it sheds light on the credibility of both McGrath and McArthur. Either McGrath made this statement or he did not; therefore either McArthur told Fiser the truth on November 16, 1992 and McGrath was lying during his hearing testimony, or McArthur lied to Fiser, and McGrath was telling the truth during the hearing. Based on the recording, as well as the other more contemporaneous statements regarding McGrath's reaction after the NSRB meeting, the Board concludes that McGrath was angry with Fiser for pointing out the problem with McGrath's proposed trending procedure, and that his statements regarding the removal of Fiser from the SQN Chemistry Manager position are evidence of a discriminatory intent against Fiser.

2.43. The Board would like to address one final point regarding Fiser's performance during his tenure as SQN Chemistry Manager. TVA cites Beecken's testimony and the December 9, 1992 conversation between Beecken and Fiser in support of its argument that Beecken did not want Fiser to rotate back to SQN in part because of the problems noted in a 1992 INPO Report. TVA then notes that:

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[10](...continued)
also indicates that McGrath had made statements in an attempt to prevent Fiser from being rotated to Corporate Chemistry. Staff Exh. 177, Exh. 8, p. 1. Keuter also stated that McArthur and *McGrath* told him that Fiser was not working out in the Corporate Chemistry Manager position. *Id.* at p. 2. Each of these interviews supports McArthur's statement to Fiser that McGrath was angry with Fiser after the NSRB meeting.

> 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. However, Beecken pointed out that Fiser's service review was referring to the "INPO assist visit" and not an INPO "evaluation." Beecken also noted that in their conversation, which Fiser tape recorded on December 9, 1992, Fiser specifically referenced the INPO findings.

TVA Brief at ¶ 3.26 (citations omitted). Although the 1992 performance appraisal does contain an entry referencing an INPO assist visit, a separate entry addresses an INPO evaluation. This entry states: "There have been no Chemistry related findings by INPO for SQN. THIS IS A RECORD FOR SQN." Jt. Exh. 33, p. CB000002. This appraisal could not have been referring to the 1992 INPO evaluation to which Beecken was referring, since the excerpts from that INPO Report indicate that there were Chemistry findings. The only logical conclusion is that McArthur and Beecken were referring to two different INPO Reports.

2.44. Additionally, this is another example of TVA attempting to place blame for problems in the SQN Chemistry Program on Fiser, despite his extended absence from that program. It is undisputed that from April 1991 through January 1992, and again from March 1992 through his termination in August 1993, Fiser was not the SQN Chemistry Superintendent, and in fact had no authority over the Chemistry Program during those times. Under these circumstances, it is completely unreasonable for TVA to claim that Fiser was responsible for the problems INPO noted with the SQN Chemistry Program.

2.45. The Board rejects as without merit TVA's arguments that Fiser was a poor performer during his tenure as SQN Chemistry Superintendent. Under TVA's interpretation of the law, a poor performer could never be found to have engaged in protected activities as long as the employer could cite to evidence that the protected activities were perceived by management as poor performance. The Board unequivocally rejects such an approach. Even the poorest of performers is entitled to the protection of the Commission's anti-whistleblower retaliation regulations. Further, as this proceeding is limited to the 1996 violation of 10 C.F.R. § 50.7, and TVA stipulated that

Fiser's non-selection in 1996 was not based in any part upon his performance during his tenure as SQN Chemistry Superintendent, the Board concludes that any evidence related to Fiser's performance from 1989 through his termination in August 1993 is irrelevant.

E. Fiser's 1993 RIF from the SQN Chemistry Position Further Demonstrates Disparate Treatment

2.46. Although many of the issues related to Fiser's 1993 DOL complaint are not relevant to this proceeding, TVA's handling of Fiser's 1993 RIF is both relevant and informative to the matters at issue in this proceeding. The parties agree that in February 1993, the SQN Radiological Controls (hereinafter "RadCon") and Chemistry organizations were combined into a single Radiological Controls and Chemistry (hereinafter "RadChem") organization under the supervision of Charles Kent. TVA Brief at ¶ 3.29; Staff Brief at ¶¶ 2.33-2.34. There is also no dispute that the interim organization proposed by Kent did not have a Chemistry Manager position. TVA Brief at ¶ 3.29; Staff Brief at ¶ 2.33. However, at this point, the parties' statements of the facts diverge. TVA claims that Fiser's position as the SQN Chemistry Superintendent was eliminated during the 1993 reorganization, and only recreated later in that year, whereas the Staff asserts that the Chemistry position was never eliminated, but continued to exist through Fiser's August 1993 termination from TVA. TVA Brief at ¶ 3.30; Staff Brief at ¶ 2.35. A review of the evidence reveals that the Staff's position is accurate.

2.47. Kent testified, and TVA acknowledged, that the February 25, 1993 proposed organization was an interim organization rather than the final organization. Tr. p. 3008, l. 2; Jt. Exh. 58. *See also* TVA Exh. 12, p. EE000080. Kent also acknowledged that it is not normal TVA policy to RIF employees based upon an interim organization, and McArthur testified that it was not normal TVA policy for the Corporate office to RIF a plant employee. Tr. p. 3016, l. 8, p. 1433, l. 11. Additionally, there is no dispute that the final SQN RadChem organization, approved by Joseph Bynum on April 27, 1993, contained a Chemistry Manager position. Staff Exh. 12. There

is also no question that the position existed as of the date of Fiser's termination, as evidenced by the fact that Kent was actively seeking to fill that position during that time frame. *See* TVA Exh. 12, p. EE000082; Jt. Exh. 60. Therefore, the Board concludes that the SQN Chemistry Manager position existed at the time of Fiser's 1993 RIF from that position.

2.48. TVA acknowledges that Fiser's 1993 DOL complaint was settled because of an "administrative error."[11] TVA Brief at ¶ 3.33. This administrative error involved RIF'ing Fiser from the SQN Chemistry Superintendent position when Fiser was not serving as the SQN Chemistry Manager at that time. According to Reynolds, Fiser was actually employed as a Corporate Chemistry Program Manager at the time, but his paperwork had not caught up and he was RIF'ed based on his "position description of record," the SQN Chemistry position. Tr. p. 3364, l. 1. Reynolds further stated that he would have had a weak case before the MSPB if he had attempted to defend Fiser's RIF from the SQN Chemistry Manager because he was not in that position at the time he was RIF'ed. Tr. p. 3365, l. 5.

2.49. On its face, this appears to be a completely reasonable rationale for settling Fiser's 1993 DOL complaint. However, a closer examination of the evidence in this proceeding reveals that this rationale contradicts TVA's explanation of why it was required to place McArthur in the RadChem Manager position without competition. Reynolds, Boyles, and Fogleman each testified that TVA is required to make competitive level determinations for RIF purposes using an employee's "position description of record." Tr. p. 3367, l. 2; p. 3888, l. 20; p. 5400, l. 25. They define "position description of record" as the last position description contained in an employee's

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[11] TVA also cites to the TVA OIG conclusion that Fiser's RIF was due to confusion as to whether Fiser's position as Corporate Chemistry Program Manager or as SQN Chemistry Superintendent was being RIF'ed. TVA Brief at ¶ 4.3, *citing* TVA Exh. 11, p. 1. Although the Board has already decided that TVA OIG conclusions are not evidence that those conclusions are true, this statement is instructive. This conclusion is an acknowledgment that the purpose of the 1993 RIF was not to eliminate a particular position (either the Corporate Chemistry Program Manager position or the SQN Chemistry Superintendent position), but to eliminate a particular person (Fiser). This clearly indicates that the 1993 RIF was done for improper purposes.

PHR. Tr. p. 3367, l. 2; p. 3368, l. 14. According to TVA's HR employees, they are required to use the "position description of record" even if they know that it is inaccurate or out-of-date. Tr. p. 5400, l. 25. Applying this rationale, TVA argues that because the most recent position description in McArthur's PHR was for his 1990 Technical Programs Manager position, they were required to use that position description in making the determination to roll him over into the RadChem Manager position, despite their knowledge that McArthur had been serving as the RadCon Manager from 1994 to 1996. Tr. p. 3778, l. 16; p. 3779, l. 3; p. 3786, l. 14.

2.50. This rationale is the complete opposite of the rationale given by Reynolds for why he settled Fiser's 1993 DOL complaint. Under this rationale, the fact that Fiser was no longer serving in the SQN Chemistry Superintendent position and was instead working in Corporate Chemistry should have been completely irrelevant, since the SQN Chemistry Superintendent position was his "position description of record." If TVA is, as it repeatedly claims, required by MSPB to use the "position description of record" in making competitive level determinations, then there is no reason why Reynolds should have felt he would be unable to defend before the MSPB TVA's use of that position description in making a RIF determination on Fiser.

2.51. This contradiction in TVA's rationale serves to further highlight the disparate treatment of Fiser in 1996. Reynolds apparently did not think the "position description of record" argument would be successful before the MSPB in 1993, yet TVA continues to argue that it was required to use this in making the determination that McArthur could be transferred into the RadChem Manager position. Additionally, the Board summarily rejects TVA's attempts to argue that McArthur's placement in that position had no effect on the competitive level determinations made for the Chemistry Program Manager positions or on Fiser's non-selection for one of those positions. The evidence clearly indicates that if Grover had been selected as the RadChem Manager, both the competitive level determinations and the selections could have potentially been decided differently. *See* Staff Brief at ¶ 2.150.

F. Fiser was Offered the SQN Chemistry Manager Position by Kent in 1993

2.52. TVA claims that Kent discussed the SQN Chemistry Manager position with Fiser, but that Kent did not offer Fiser that position. TVA Brief at ¶ 3.35. The Staff asserts that Kent offered this position to Fiser, but later withdrew this offer after receiving negative feedback from McArthur. Staff Brief at ¶¶ 2.35-2.38. The evidence indicates that Kent did offer Fiser the position, and then withdrew that offer after his discussion with McArthur.

2.53. The parties do not dispute that Kent invited Fiser out to SQN to discuss the possibility of bringing Fiser back to his SQN Chemistry Manager position. Tr. p. 1102, l. 14; Jt. Exh. 27, p. 74; TVA Exh. 12, p. EE000081. There is also no dispute that, after speaking to McArthur about the possibility of hiring Fiser as the SQN Chemistry Manager, Kent decided that he did not want to place Fiser in that position. Tr. p. 1110, l. 1; Jt. Exh. 27, p. 75-76; Staff Exh. 179. The parties generally dispute whether Kent made an offer of that position to Fiser, which he later withdrew. The only evidence TVA cites to support its conclusion that Kent did not offer Fiser that position is TVA OIG's conclusion that Kent did not make such an offer. TVA Brief at ¶ 3.35, *citing* TVA Exh. 11, p. EE000048. The Board has already determined that a conclusion reached by TVA OIG is not evidence that the conclusion is accurate, since TVA OIG Reports are "done when a case is in litigation . . ., it's self-serving as all get out." Tr. p. 1255, l. 8. The Board therefore finds that the TVA OIG conclusion that Kent did not offer Fiser the SQN Chemistry Manager position lacks evidentiary value. TVA has completely failed to cite to any other testimony or documentary evidence to support its argument that Kent did not offer the position to Fiser. TVA Brief at ¶ 3.35.

2.54. By contrast, the Staff has cited both testimony and documentary evidence to support its argument that Kent offered Fiser the SQN Chemistry Manager position and that he later withdrew that offer. Staff Brief at ¶¶ 2.35-2.38. Specifically, Fiser testified that Kent offered him the position, quoting him the salary, pay grade, and a start date. Tr. p. 1104, l. 1; p. 2343, l. 15;

Jt. Exh. 27, p. 74. This testimony is bolstered by the TVA OIG statement of Ronald Brock, then the coordinator of the Employee Transition Program. Brock stated that he contacted Kent about the offer, and in response, Kent provided him the title, salary, and grade level of the position, as well as noting that the position he was offering Fiser was his old position.[12] Staff Exh. 177, Exh. 7, p. 1. Based on this evidence, the Board concludes that Kent did offer Fiser the SQN Chemistry Manager position, and withdrew that offer after receiving negative feedback from McArthur.

2.55. TVA then makes the specious argument that "Kent did not refuse to select or even consider Fiser for the job; Fiser simply did not apply." TVA Brief at ¶ 3.35, *citing* TVA Exh. 11, p. EE000046-48. The Board initially notes that TVA is again relying solely upon a TVA OIG conclusion which has no evidentiary value. Second, although it is undisputed that Fiser did not apply for the SQN Chemistry Manager position when Kent posted the Vacancy Position Announcement (hereinafter "VPA"), the Board concludes that Kent had already informed Fiser during their July 9, 1993 meeting that he would not work out in that position. Jt. Exh. 27, p. 75-76; Staff Exh. 179. The Board finds it completely reasonable that Fiser would not waste his time applying for a position for which the selecting official had already informed him he would not be selected.

G. Fiser's Taping is Relevant Evidence of Protected Activity and Discriminatory Intent

2.56. Both parties agree that Fiser filed a DOL complaint on September 23, 1993 after receiving a notice terminating him from TVA because the SQN Chemistry Superintendent position was RIF'ed. TVA Brief at ¶ 4.0; Staff Brief at ¶ 2.46. Jt. Exh. 60. The parties also agree that TVA

[12] Just as there is a distinction between the relevance of the OI Report and the OI Exhibits, there is a parallel distinction between the relevance of the TVA OIG Report and the TVA OIG witness statements. Both OI Reports and TVA OIG Reports are investigatory reports that reach conclusions which are irrelevant in this *de novo* proceeding. However, the interviews conducted in support of those conclusions are relevant evidence because they contain statements by the witnesses without reaching a conclusion as to the meaning of those statements. Therefore, the Board will consider TVA OIG statements as evidence to the extent that they contain information relevant to the matters at issue in this proceeding.

and Fiser settled this complaint and that the settlement included placement of Fiser in a Corporate Chemistry Program Manager position. TVA Brief at ¶ 4.0; Staff Brief at ¶ 2.48. Jt. Exh. 34. TVA claims that sometime during the DOL complaint and settlement, "McArthur was informed that Fiser had surreptitiously tape recorded him and various other employees." TVA Brief at ¶ 4.1. TVA then proceeds to make a number of assertions regarding both the tapes themselves and McArthur's knowledge about the tape recording of conversations. TVA has provided no evidentiary support for these statements, and the Board therefore rejects them.

2.57. TVA asserts that neither the recordings admitted into evidence nor the transcripts of those recordings demonstrate that Fiser was pursuing nuclear safety concerns. TVA Brief at ¶ 4.5. TVA's narrow view that only raising, documenting, or identifying nuclear safety concerns constitutes protected activity is unsupported in the law. Additionally, TVA attempts to restrict the use of the recordings and transcripts to a determination of whether or not Fiser pursued any nuclear safety concerns. The recordings and transcripts contain relevant evidence beyond any statements (or lack thereof) of nuclear safety concerns.

2.58. The recordings and transcripts contain information related to some of the protected activities in which Fiser engaged. Both the recording and the transcript of the November 16, 1992 conversation between McArthur and Fiser clearly indicate that McArthur told Fiser that his problems at SQN started as a result of the NSRB meeting at which the trend plots were discussed. McArthur stated that McGrath left that meeting and said, "We can't have this guy in the Sequoyah Chemistry Manager position." Jt. Exh. 27, p. 22; Staff Exh. 168. Fiser again discussed the trending issue and his refusal to institute a procedure with which he knew the SQN Chemistry Program could not comply in his December 9, 1992 conversation with Beecken. Jt. Exh. 27, p. 52; TVA Exh. 148. In that discussion, Fiser states that he was not objecting to performing the trends, but that a procedure requiring them to be performed every day would be violated because the current equipment and staffing levels could not support such a procedure. *Id.*

2.59. The recordings and transcripts also contain evidence relevant to the TVA work environment for whistleblowers. In their March 24, 1993 conversation, McArthur told Fiser that TVA management sends the message to its employees that they should not raise problems because if they do so, management will consider it a negative rather than a positive. Jt. Exh. 27, p. 71. McArthur also warned Fiser that individuals who file lawsuits against the company would be viewed as troublemakers and could have difficulty finding a position. Jt. Exh. 27, p. 80.

2.60. Each of the above conversations is relevant to the matters at issue in this proceeding. The Board therefore refuses to adopt TVA's narrow view of the evidentiary value of the recordings and transcripts.

2.61. TVA next claims that McArthur was counseled not to take any action against Fiser because he had taped conversations, but that he should assume that future conversations "were also being recorded." TVA Brief at ¶ 4.1. TVA cites not a single piece of evidence to support this assertion. Although McArthur testified that TVA Counsel Marquand informed him that Fiser was taping conversations, there is no evidence in the record that McArthur was counseled not to take action against Fiser for the taping. Tr. p. 1406, l. 15; p. 1512, l. 10. Additionally, there is no evidence that Fiser taped any conversations after his 1993 DOL complaint was filed and resolved.

2.62. TVA then makes the following unsupported declaration:

> 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.

TVA Brief at ¶ 4.1. Upon Fiser's return to TVA after the settlement of his 1993 DOL complaint, McArthur informed Grover, Fiser's immediate supervisor, that Fiser had taped conversations with his colleagues in the past. Tr. p. 1850, l. 12. TVA claims that McArthur never took an adverse action based upon Fiser's taping activities, but disregards Grover's testimony that he felt McArthur was attempting to influence him in a negative manner against Fiser. Tr. p. 1853, l. 13. This testimony is evidence that McArthur harbored some discriminatory animus toward Fiser for his past

taping, an activity the Board has already concluded was protected.[13] The Board also notes that it would have been both difficult and foolish for McArthur to take an adverse action against Fiser immediately after the settlement of his DOL complaint. The Board therefore concludes that McArthur's statements about Fiser's taping evidence a discriminatory animus against Fiser.

H. Fiser Engaged in Protected Activities

2.63. The parties agree that the filing of a DOL complaint pursuant to section 211 of the Energy Reorganization Act (hereinafter "ERA") (42 U.S.C. § 5851) constitutes protected activity under 10 C.F.R. § 50.7. TVA Brief at ¶¶ 4.5, 4.7; Staff Brief at ¶ 3.34. Therefore, there is no doubt that the Staff met its burden of proof with respect to Fiser's protected activity because Fiser filed DOL complaints pursuant to section 211 of the ERA in 1993 and 1996.[14] TVA Brief at ¶ 4.4; Staff Brief at ¶ 3.34.

2.64. Although TVA acknowledges that the 1993 DOL complaint itself is protected activity, it argues that none of the issues identified by Fiser in that complaint are protected because they "were not nuclear safety concerns raised by him." TVA Brief at ¶ 4.7. More specifically, TVA claims that Fiser did not "discover, raise, report or document" the issues raised by his 1993 DOL complaint. TVA Brief at ¶ 4.9. TVA then details why it believes that Fiser did not discover, raise, report or document the three issues he identified in his 1993 DOL complaint. TVA Brief at ¶¶ 4.12-4.19. TVA seems to argue that only the individual who *originally* discovered, raised, reported or documented a safety issue has engaged in protected activity. Additionally, despite the fact that TVA has conceded that the 1993 complaint constitutes protected activity, it argues that

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[13] McArthur also expressed this animus during his hearing testimony. During questioning about Fiser's taping by TVA Counsel, McArthur stated that "I think the taping is highly offensive, it's an attack on the person to have somebody in the room that's taping your conversation without your knowing it." Tr. p. 1586, l. 25.

[14] Although TVA limits it concession to admitting that the 1993 DOL complaint constitutes protected activity, since it admits that filing a complaint is protected, the Board concludes that there is also no dispute between the parties that the 1996 DOL complaint is protected.

because none of the issues raised by Fiser were demonstrated to be nuclear safety concerns discovered, raised, reported or documented by Fiser, that they therefore are not protected activities.

2.65. The Staff asserts that since the 1993 DOL complaint itself is protected, the issues raised in the complaint are protected simply by nature of the fact that Fiser raised them in the complaint. Staff Brief at ¶ 3.35. In fact, although the Staff identifies and explains Fiser's involvement with the three issues Fiser discussed in his 1993 DOL complaint, the Staff does not rely upon those issues, standing alone, to demonstrate that Fiser engaged in protected activities. Staff Brief at ¶¶ 3.34-3.35. The Staff relies upon the DOL complaint itself, and the fact that Fiser raised those issues in that complaint, as one of the many protected activities in which Fiser engaged. The Board is not making a determination on the validity of the 1993 complaint; it is making a determination whether Fiser engaged in protected activities that led to his non-selection in 1996. Therefore, the Board disregards TVA's arguments with respect to the three activities raised in the 1993 DOL complaint, and instead concludes that the 1993 complaint, standing alone, constitutes protected activity.

2.66. The Board would also like to address TVA's narrow view of protected activity. Although clearly discovering, raising, reporting or documenting safety concerns is protected activity, TVA appears to be arguing that Fiser did not engage in protected activity because he was not the individual who originally identified the problem or filed any corrective action documents. Neither section 211 of the ERA nor 10 C.F.R. § 50.7 is so limited. For example, in *Zinn v. University of Missouri*, 93-ERA-34, 93-ERA-36, 1996 DOL Sec. Labor LEXIS 8, (Sec'y Jan. 18, 1996), the NRC investigated a shipment error by the licensee, leading to the establishment of a Task Force to examine the issue. Despite not having raised the issue himself, the Secretary concluded that a complainant's support to another employee who had raised an issue to the Task Force, and participation in committee meetings on the subject, constituted protected activities. The Secretary

further stated that the complainant's pursuit of these concerns, even though initially raised by his co-complainant, was protected under section 211 of the ERA. 1996 Sec. Labor LEXIS 8 at 26, fn. 10. The Board therefore rejects TVA's argument that protected activities are limited to those initially raised, documented, or identified by the complainant.

2.67. TVA next claims that Fiser "recharacterized" his protected activity from the 1993 DOL complaint in the Sequence of Events he compiled in support of his 1996 DOL complaint. TVA Brief at ¶ 4.20. According to TVA, the Sequence of Events attached to the 1996 complaint alleged completely different protected activities and different discriminating officials than did his 1993 complaint. *Id.* After detailing Fiser's explanation of the NSRB meeting at which McGrath became angry with him regarding the trending issue, TVA then argues that Fiser's 1996 Sequence of Events contains a number of inaccuracies.[15]

2.68. As an initial matter, the Board notes that the parties to this case are the NRC Staff and TVA. Fiser, although a key witness in this case, is not a party to this proceeding. Therefore, Fiser's characterization of the events leading up to his 1996 complaint is only relevant to the extent that one of the parties relies upon those characterizations to support its case. The Staff is not bound by those characterizations. The Staff did not rely upon Fiser's 1996 characterization of his 1993 DOL complaint in order to prove that Fiser engaged in protected activities. The Board concludes that whether Fiser "recharacterized" his 1993 DOL complaint in the 1996 Sequence of Events is irrelevant to matters at issue in this proceeding.

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[15] The Board will address one asserted inaccuracy at the outset. TVA notes that Fiser's 1996 Sequence of Events states that the NSRB meeting at which trending was addressed occurred in January 1992, when in fact this meeting occurred in November 1991. TVA Brief at ¶ 4.26. While TVA is correct that the meeting occurred in November 1991 rather than January 1992, the Board concludes that this inaccuracy does not impact upon either Fiser's credibility or the accuracy of the Sequence of Events as a whole. The Board notes that McArthur made a similar error as to the date of the meeting, and that the date of the meeting is not the relevant fact with respect to that meeting. Tr. p. 1400, l. 1; Staff Exh. 95.

2.69. After asserting that Fiser "recharacterized" the events leading up to the 1993 complaint, TVA then proceeds to rebut the assertions made in the 1996 Sequence of Events. First, TVA claims that the actual reasons that Fiser was removed from his SQN Chemistry Superintendent position were because of problems that Beecken perceived with the SQN Chemistry program, and that both Beecken and McGrath denied that McGrath had ever recommended Fiser's removal. TVA Brief at ¶ 4.24. TVA cites to no evidence in the record to support this assertion. Other evidence in the record supports Fiser's assertion that McGrath attempted to have him removed from SQN. Specifically, McArthur told Fiser during their November 16, 1992 conversation that McGrath wanted Fiser removed as the SQN Chemistry Superintendent after the November 1991 NSRB meeting. Jt. Exh. 27, p. 22-23; Staff Exh. 168. McArthur also told the TVA OIG during his interview that McGrath told him after that NSRB meeting that he would discuss this issue with Beecken, and that Beecken approached McArthur to initiate the swap between Fiser and Jocher soon after. Jt. Exh. 24. The Board concludes that there is ample evidence in the record to conclude that McGrath wanted Fiser removed as the SQN Chemistry Manager after their dispute in the NSRB meeting.

2.70 TVA next argues that trending was not a key issue at the NSRB meeting, relying upon the NSRB meeting minutes and McGrath's testimony (although the Board notes that TVA completely failed to cite any such testimony). TVA Brief at ¶ 4.25. According to TVA, the issues that the NSRB considered important were assigned action items, and trending was not assigned an action item at the November 1991 meeting. *Id.* This argument ignores two key pieces of evidence: the listing of key items in the Executive Summary of the meeting minutes, and the testimony of three witnesses present at that meeting. Although the trending was not assigned an action item,[16] McGrath thought the issue was important enough to list as a key item in the

[16] It is not surprising that McGrath would not assign an action item to the trending (continued...)

Executive Summary he submitted to the TVA Board of Directors. Jt. Exh. 3, p. CC000093. Additionally, Fiser, McArthur, and Ritchie each testified that trending was a major issue discussed at that NSRB meeting. Tr. p. 1018, l. 1; p. 1400, l. 6; p. 4701, l. 27.

2.71. TVA also claims that Fiser's assertions are contradicted by Ritchie's testimony because Ritchie testified that the argument over trending was between Jocher and Fiser, and that neither McArthur nor McGrath appeared upset at the meeting. TVA Brief at ¶ 4.27. However, as noted above, McArthur told Fiser on November 16, 1992 that McGrath was upset with Fiser after that NSRB meeting and wanted him removed as SQN Chemistry Superintendent. Jt. Exh. 27, p. 22-23; Staff Exh. 168. McArthur repeated the statement that McGrath was upset with Fiser after the NSRB meeting to the TVA OIG. Jt. Exh. 24. Under these circumstances, the Board is inclined to give greater credence to those statements made more contemporaneously to the incidents, than to Ritchie's memory of the meeting almost eleven years after it occurred.

2.72. Finally, TVA argues that "Fiser's inability to provide data trending is not protected activity." TVA Brief at ¶ 4.28. TVA characterizes the trending dispute as Fiser refusing to provide trending information "because of the perceived difficulty of the task and the administrative inconvenience to him." *Id.* TVA then asserts that an employee's failure to perform required job responsibilities is not protected activity. *Id.*, *citing Skelly v. Tennessee Valley Authority*, 87-ERA-8, slip op. at 10 (ALJ Feb. 22, 1989), *adopted* (Sec'y Mar. 21, 1994). The Board concludes that this case is inapposite, and that TVA's argument amounts to a complete mischaracterization of the evidence.

2.73. First, the *Skelly* case is inapposite because it involves an individual's failure to perform job responsibilities assigned by management. TVA has introduced no evidence that Fiser's management at SQN assigned him a job responsibility to institute a procedure requiring

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[16](...continued)
procedure request since Fiser had explained the problem with that suggestion.

daily trending. The evidence demonstrates that the NSRB simply made a request to Fiser that he institute such a procedure. Tr. p. 1400, l. 19. As McGrath testified, the NSRB has no supervisory authority over the plants, and therefore could not impose a job requirement on Fiser. Tr. p. 918, l. 21. At the NSRB meeting where the parties discussed trending, no one testified that the NSRB was assigning a job responsibility to either Fiser or to the SQN Chemistry Program. The Board therefore concludes that Fiser's refusal to institute a trending procedure does not amount to a failure to perform a required job responsibility.

2.74. The evidence does not support TVA's assertion that Fiser had an "inability" to perform the trending, or that he refused to perform the trending because of administrative inconvenience. Fiser never told the NSRB that he was unable to perform the trending, he stated that he was unable to *proceduralize* a trending requirement because if the computer malfunctioned again or he had a lack of personnel on a particular day, SQN would have a procedural violation. Tr. p. 1020, l. 1; p. 1022, l. 21. Additionally, Fiser stated that he did not refuse to institute the procedure because of administrative inconvenience, but because he reasonably believed that instituting such a procedure would result in future procedural violations. Tr. p. 1022, l. 21. In light of McGrath and McArthur's testimony that SQN had recently incurred a number of procedural violations, it is certainly reasonable that Fiser did not want to adopt a procedure that would place the SQN Chemistry Program at risk of further violations. Additionally, Fiser testified, and Ritchie concurred, that the SQN Chemistry Program was in fact performing such trending. Tr. p. 1024, l. 15; p. 4699, l. 19. The Board therefore concludes that Fiser was not unable to perform the trending, because the trending was being performed, nor did Fiser refuse to perform the trending because of an administrative inconvenience.

2.75. TVA also asserts that "Fiser was not entitled to refuse to provide the requested data" because an employee's refusal to work loses its protected quality once management determines that no work hazard exists. TVA Brief at ¶ 4.29, *citing Sutherland v. Spray Sys. Envt'l*, 95-CAA-1,

slip op. At 3 (Sec'y Feb. 29, 1996). Once again, TVA has both mischaracterized evidence and cited to inapposite case law. Fiser never refused to perform the trending, he refused to proceduralize the trending. Fiser informed the NSRB during that meeting that the SQN Chemistry Program was performing the trending and would continue to do so, despite the absence of a procedural requirement. Tr. p. 1024, l. 15. Second, TVA again cites to a case which involves management making a determination regarding an employee's actions. As noted above, the NSRB has no management authority over the SQN Chemistry Program, and there is no evidence in the record that SQN plant management determined that no work hazard existed. Therefore, the Board rejects TVA's argument that Fiser was not entitled to refuse to institute the trending procedure and finds that Fiser engaged in protected activity when he refused to institute the trending procedure as requested by the NSRB.

1. The Sasser letter constitutes protected activity

2.76. TVA next addresses whether or not the Sasser letter constitutes protected activity. First, TVA makes another attempt to raise the issue of the Staff's actions in this case. As noted at length in Section II.A. of this Opinion, the Staff's actions are not relevant to the matters at issue in this proceeding. Additionally, the Board notes that there is no "shell game" involved where the Staff identified the Sasser letter in a supplemental discovery response. As noted earlier, it would make no sense to prohibit the Staff from relying upon information it gleaned during the discovery period.

2.77. TVA then claims that there is no evidence that either McArthur or McGrath were aware of the Sasser letter. TVA Brief at ¶ 4.31. After also stating that neither the SRB members nor the HR employees involved in the 1996 reorganization were aware of the letter, TVA concludes that the letter could not have been the basis for the adverse actions against Fiser. The Staff provided ample evidence indicating that McArthur and McGrath were aware of the Sasser letter and the allegations raised in that letter. Staff Brief at ¶ 2.130. The Staff makes no assertion regarding

whether the SRB members and HR employees had knowledge of the Sasser letter or took any action against Fiser based upon that letter. The Board concludes that the Sasser letter constitutes protected activity of which both McArthur and McGrath were aware.[17]

2. The Diesel Generator Fuel Oil Storage Tanks Issue Constitutes Protected Activity.

2.78. First, TVA argues that the Staff did not identify the problem with the diesel generator fuel oil storage tanks until it filed supplemental interrogatory responses. TVA Brief at ¶ 4.32. The Board again states that the Staff's actions are irrelevant to the matters at issue in this proceeding, and it is perfectly proper for the Staff to provide supplemental responses to TVA interrogatories after receiving discovery responses from TVA. *See* Section II.A. TVA then claims that Fiser exaggerated his involvement in the identification of the diesel generator fuel oil storage tanks issue, and claims that the issue was identified by SQN Licensing after it received information from an operating experience at another utility. Licensing then recommended that SQN Chemistry write a Significant Corrective Action Report (hereinafter "SCAR"). TVA Brief at ¶ 4.34. Next, TVA cites to the testimony of Mark Burzynski, then the SQN Licensing Manager, that SQN Chemistry should have discovered this problem during a surveillance instruction review, and that it was reasonable for SQN plant management to discuss disciplining Fiser for the failure to identify this issue. TVA Brief at ¶¶ 4.35- 4.36. Finally, TVA attempts to blame Fiser for the failure to identify this issue during the surveillance instruction review. TVA Brief at ¶ 4.36.

2.79. The Board notes that Fiser's involvement in the diesel generator fuel oil storage tanks issue only appears exaggerated by looking at the SCAR in isolation, without consideration of related corrective action documents. An examination of all the corrective action documents related to this problem reveals that Fiser was intimately involved with the resolution of this problem. In fact, Fiser was the Event Manager assigned to supervise the implementation of the necessary

[17] The Board notes that TVA concedes that the Sasser letter is protected activity in paragraph 17.2 of its Brief.

corrective actions. TVA Exh. 147, p. FI000262. Additionally, the initial information that came to TVA from the operating experience was limited to an identification of a problem with sampling procedures. Fiser testified that he and the chemistry staff then discovered the problem with the construction of SQN's storage tanks, and the fact that there were four tanks instead of one. Tr. p. 2275, l. 16. Based upon this evidence, the Board rejects TVA's argument that Fiser was not involved in the identification and resolution of this problem simply because his name does not appear on the SCAR.

2.80. The Board is concerned with TVA's continued attempts to blame Fiser for the failure to identify the problem with the storage tanks during the surveillance instruction review. TVA Brief at ¶ 4.36. Burzynski testified that Fiser was not the SQN Chemistry Superintendent at the time the surveillance instruction review was conducted. Tr. p. 4926, l. 3. Additionally, David Goetcheus testified that he was the SQN Chemistry Superintendent at the time the surveillance instruction review was conducted, and that he was responsible for that review. Tr. p. 5111, l. 17. However, despite this responsibility, Goetcheus stated that no one ever disciplined him for this problem, and in fact, he only learned of this problem from TVA Counsel just prior to his testimony in this proceeding.[18] Tr. p. 5112, l. 1. The Board concludes that it is disingenuous for TVA to blame Fiser for the failure to identify the diesel generator fuel oil storage tank problem during the surveillance instruction review when two of its own witnesses testified that Fiser was not responsible for that review.

[18] The Board also notes that, even if Fiser had discovered the problem with the storage tanks during earlier procedure revisions, SQN would still have been subject to a Limiting Condition for Operation (hereinafter "LCO") because the plant had already restarted. The only way SQN could have avoided the LCO was if Goetcheus had discovered the problem during the surveillance review. *See* Staff Brief at ¶ 2.98.

3. The Tape Recording is Part of Fiser's 1993 DOL Complaint

2.81. TVA argues that Fiser did not engage in protected activity by tape recording conversations with his co-workers because he was recording those conversations out of concern for his future TVA employment rather than in pursuit of any nuclear safety concerns. TVA Brief at ¶ 4.38. The Staff included the tape recording as part of Fiser's 1993 DOL complaint because Fiser submitted the transcripts of those tapes (as well as the tapes themselves) to TVA OIG in support of his complaint. It is irrelevant why Fiser started taping these conversations; the relevant factor is their use to support a DOL complaint.[19] Providing either the NRC or an employer information about an alleged violations of Commission regulations or statutes is specifically protected by 10 C.F.R. § 50.7(a)(1)(i). Therefore, the Board concludes that the taping may be considered protected activity in furtherance of Fiser's 1993 DOL complaint.

2.82. TVA then argues that there is no evidence that McArthur took an adverse action against Fiser for the tape recording. TVA Brief at ¶ 4.39. Even if McArthur did not take an adverse action, this assertion ignores evidence of McArthur's negative attitude toward the taping and his attempts to pass that attitude to Fiser's new supervisor. Grover testified that McArthur told him about the tape recording, and that he felt that McArthur was attempting to negatively influence him against Fiser. Tr. p. 1853, l. 13. Additionally, McArthur told Grover that Fiser was excluded from a meeting of the site RadChem Managers because they were discussing sensitive issues and were concerned that Fiser would record their discussion. Tr. p. 1856, l. 18. McArthur also testified that he found the tape recording personally offensive and was angered by it. Tr. p. 1586, l. 25. This evidence is more than sufficient to establish a discriminatory intent against Fiser based upon his tape recording activities.

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[19] Additionally, these tapes were given to the TVA Office of the General Counsel (hereinafter "OGC") for use in Bill Jocher's section 211 complaint against TVA before the DOL. Staff Exh. 173.

2.83. Finally, TVA argues that TVA Counsel advised McArthur that he should not take any action against Fiser for engaging in the tape recording of their conversations. TVA Brief at ¶ 4.39. TVA cites to no evidence that supports this argument. McArthur never testified that he was counseled not to take action against Fiser for the recording. Instead, McArthur merely testified that he was informed by TVA Counsel of the taping and that he should be aware of that taping. Tr. p. 1406, l. 15; p. 1462, l. 10; p. 1543, l. 3. This testimony in no way indicates that McArthur did not take action against Fiser for the tape recording.

4. McGrath and McArthur Had Knowledge of Fiser's 1993 DOL Complaint

2.84. TVA asserts that McGrath had no prior knowledge of Fiser's 1993 DOL complaint, and that McArthur was not critical of any chemistry-related concerns raised by Fiser in 1991-1993. TVA also argues that there is no evidence that McArthur retaliated against Fiser for raising any such concerns. TVA Brief at ¶ 4.40. TVA then at length argues that the Staff failed to review the 1993 DOL complaint in issuing the NOV. As noted on numerous prior occasions, the Staff's actions are not relevant in this *de novo* proceeding. *See* Section II.A.

2.85. Although the Board rejects TVA's arguments regarding the Staff's asserted failure to review the 1993 DOL complaint, the Board is compelled to address a related legal argument by TVA. TVA asserts that a reviewing court would set aside the NOV as arbitrary and capricious under section 706 of the Administrative Procedures Act (hereinafter "APA") because NRC OI failed to obtain a copy of Fiser's 1993 DOL complaint and the Staff misread that complaint. TVA Brief at fn. 13, *citing* 5 U.S.C. § 706. TVA misinterprets section 706(2) of the APA. In the event this proceeding results in judicial review, the reviewing court would be examining the Board's decision on the NOV and civil penalty, not the Staff's actions. More specifically, the reviewing court would

be reviewing whether the Board's decision was arbitrary and capricious based upon the evidence asserted at the hearing, not based upon Staff actions not in evidence.[20]

2.86. TVA then addresses a number of alleged errors in the Staff's conclusions regarding the 1993 DOL complaint. Although whether or not the Staff made these alleged errors is irrelevant, the Board will address these arguments to the extent that they raise relevant factual issues. First, TVA claims that Fiser's 1993 DOL complaint did not identify either McArthur or McGrath as a discriminating official, and it did not assert that Fiser had raised any issues for which McArthur or McGrath were responsible. TVA Brief at ¶ 4.45. However, the tapes Fiser provided in support of his complaint, the Sequence of Events, and the TVA OIG interviews taken during the investigation of that complaint all indicate that McGrath did, at a minimum, attempt to discriminate against Fiser by seeking his removal from his SQN Chemistry Superintendent position. Jt. Exh. 24; Jt. Exh. 27; Staff Exh. 168; Staff Exh. 177, Exh. 8, p. 2. Additionally, when the Board compares the recorded conversations McArthur had with Fiser to the statements he provided to the TVA OIG, the Board finds that although McArthur told Fiser he was willing to assist him, he was in fact working behind the scenes to Fiser's detriment. *See* Staff Brief at ¶ 2.199. Under these circumstances, the Board has no trouble concluding that McGrath and McArthur were discriminating officials in 1993.

2.87. Next, TVA asserts that given McGrath's position in the organization and the number of TVA employees interviewed by the TVA OIG, there was no reason for McGrath to learn of Fiser's 1993 DOL complaint. TVA Brief at ¶¶ 4.47, 4.48. TVA cites no evidence to support this

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[20] The Board also notes that the Staff's investigation of a potential violation of Commission regulations does not end with the OI investigation and report. The investigation, and information gathering associated with that investigation, continues through the PEC and up until the Staff has issued an NOV. It is therefore absurd to argue that the failure of OI to obtain a document and the Staff's alleged misreading of that document are arbitrary and capricious, especially in light of the fact that the Staff obtained a copy of the 1993 complaint and corrected its alleged misreading by the time the NOV was issued.

conclusion. On the contrary, the Staff cited sufficient evidence for the Board to conclude that McGrath had knowledge of the 1993 DOL complaint prior to 1996.[21] Staff Brief at ¶ 2.132, fn. 28.

2.88. TVA argues that "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." TVA Brief at ¶ 4.49 (citations omitted). First, the Board notes that it is not the Staff's "theory" that McGrath made such a recommendation to SQN management. This conclusion is supported by the evidence in the record, which contradicts McGrath's categorical denial. Although hearsay, the Board finds the more contemporaneous evidence contained in the recorded conversations and the McArthur statement to TVA OIG that McGrath wanted Fiser removed from the SQN Chemistry Superintendent position more credible than McGrath's categorical denial. Jt. Exh. 27; Staff Exh. 168, Jt. Exh. 24. It is unlikely that McGrath would admit to something which evidences discriminatory intent on his part when he is accused of discrimination.[22] The Board therefore concludes that, despite McGrath's denial, he did seek to have Fiser removed as SQN Chemistry Superintendent.

2.89. TVA then claims that Grover's testimony regarding negative comments made by McGrath and McArthur about Fiser should be disregarded because the testimony amounts to mere gossip and because Grover was disgruntled at the loss of his position during the 1996 reorganization. TVA Brief at ¶ 4.50. First, the Board does not consider Grover's testimony about the negative statements to be mere gossip. Grover testified that McGrath and McArthur made

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[21] TVA also argues that if the Staff or NRC OI had reviewed the TVA OIG investigation of Fiser's 1993 DOL complaint, they would have learned that McGrath is not mentioned as being involved in discrimination. TVA Brief at ¶ 4.48. To the contrary, a review of the TVA OIG interviews demonstrates that at least two people, McArthur and Dan Keuter, identified McGrath as desiring an adverse action be taken against Fiser. Jt. Exh. 24; Staff Exh. 177, Exh. 8, p. 2.

[22] The Board notes that the Staff addressed McGrath's credibility at length in its Brief. Staff Brief at ¶¶ 2.193-2.198. The Board also finds that McGrath lacked credibility during his testimony in this proceeding.

these statements directly to him, as Fiser's immediate supervisor. Tr. p. 1850, l. 12; p. 1853, l. 13; p. 2215, l. 7. Grover's interpretation of those statements is relevant, as McGrath and McArthur were Grover's supervisors (and Fiser's second line supervisors) at the time they made their respective statements. Additionally, the Board does not find that Grover's testimony about these statements was colored by his being "disgruntled" about the loss of his position in the 1996 reorganization. Grover's testimony does not indicate any such bias against TVA, and a review of his prior statements reveals an absence of such a bias. Specifically, when interviewed by NRC OI and questioned about his predicament at that time, Grover refused to make negative statements about those at TVA who he felt at that time were making a good faith effort to resolve the problems. Staff Exh. 53, p. 18, 36. The Board therefore rejects TVA's argument that the Board should give little weight to Grover's testimony regarding the negative statements made by McGrath and McArthur about Fiser.

2.90. According to TVA, the Staff ignored the fact that Fiser viewed McArthur as an ally when he filed his 1993 DOL complaint. TVA Brief at ¶ 4.51. TVA is correct that when Fiser filed his 1993 complaint, he believed that McArthur was trying to help him. However, TVA ignores Fiser's testimony that he later learned that McArthur was not his ally, but in fact was telling Fiser one thing, and doing something else behind his back. Tr. p. 1120, l. 20; p. 2347, l. 2. McArthur's own testimony indicates his willingness to say one thing to an employee in order to avoid a confrontation, but then take a different action than discussed with the employee. Tr. p. 1552, l. 7. Additionally, as the Board noted in Section II.H. of this opinion, Fiser's characterization of events in 1993, including his characterization of McArthur, is not relevant to the matters at issue in this proceeding. The relevant factor is whether the Staff has proven that TVA discriminated against Fiser in 1996, not whether TVA discriminated against Fiser in 1993. Therefore, the Board concludes that McArthur was not an ally of Fiser in 1993, and that the evidence indicates that McArthur worked behind the scenes to Fiser's detriment in both 1993 and 1996.

I. Fiser Did Not Voluntarily Abandon his Chemistry Position in the 1994 Reorganization

2.91. The parties agree that Fiser returned to Corporate Chemistry in April 1994 as a Chemistry Program Manager as a result of the settlement of his 1993 DOL complaint. TVA Brief at ¶ 5.0; Staff Brief at ¶ 2.48. TVA asserts that the settlement agreement did not guarantee the continued existence of that Chemistry position, and did not guarantee Fiser continued TVA employment. TVA Brief at ¶ 5.0. TVA cites no evidence in the record which supports this conclusion, and a review of the settlement agreement indicates that it is silent on the issue as to how long Fiser was entitled to the position. Jt. Exh. 34. The Board therefore rejects TVA's conclusion that the settlement agreement did not guarantee Fiser a position for *any* length of time.

2.92. The parties also do not dispute that the Corporate organization underwent a reorganization in the summer of 1994 that resulted in the Chemistry and Environmental organizations being combined into a single organization. TVA Brief at ¶ 5.1; Staff Brief at ¶ 2.50. During this reorganization, the Chemistry Program Manager position which Fiser held was eliminated, and he competed and was selected for a Chemistry and Environmental Protection Program Manager position in the new organization. *See* Staff Brief at ¶¶ 2.50, 2.52. TVA claims that Fiser was required to compete for that position because it was in a different competitive level than the Chemistry Program Manager position, and therefore he and the other Chemistry incumbents did not have rights to the new position under TVA's interpretation of OPM RIF regulations. TVA Brief at ¶ 5.2. Yet again, TVA fails to cite any evidence in the record to support this conclusion, therefore the Board will not adopt that conclusion.

2.93. TVA also argues that, by virtue of accepting the Chemistry and Environmental Protection Program Manager position, Fiser voluntarily abandoned the position he was given in the settlement. TVA Brief at ¶ 5.3. The Board disagrees with TVA's characterization of this event. TVA acknowledged that Fiser received a surplus notice, and that if Fiser was not selected for a new position, he would be sent to TVA Services. TVA Brief at ¶ 5.2. Thus, Fiser did not "voluntarily"

abandon the Chemistry Program Manager position; he was given no choice but to leave that position shortly after receiving it in the settlement of his 1993 DOL complaint, and either find another position or be subject to an eventual RIF.

2.94. TVA then makes the ludicrous assertion that Grover's advice to Fiser that he cease talking to a reporter about his 1993 DOL complaint was a "thinly-veiled threat." TVA Brief at ¶¶ 5.4, 5.5. Grover's testimony indicated that he provided nothing but support to Fiser during the time he was Fiser's supervisor. Additionally, despite attempts by McArthur and McGrath to color Grover's opinion of Fiser in a negative manner, Grover consistently maintained that he would judge Fiser based upon his performance, rather than on past events. Tr. p. 1847, l. 15; p. 1850, l. 12; p. 2215, l. 7. *See also* Staff Brief at ¶ 2.223. Under these circumstances, the Board finds TVA's assertion that Grover threatened Fiser to be absurd.

2.95. TVA next argues that despite similarities between the 1993, 1994, and 1996 reorganizations, Fiser opted not to file a DOL complaint in 1994. TVA Brief at ¶ 5.6. First, the Board concludes that whether or not Fiser filed a complaint in 1994 is irrelevant to the matters at issue in this proceeding. The Board is concerned with determining if TVA discriminated against Fiser in 1996, not whether Fiser should have filed a DOL complaint based on the 1994 reorganization. Additionally, TVA's support for this argument is based upon faulty premises. TVA first asserts that in all three reorganizations, Fiser knew his position was being eliminated and that he would have to compete for a new position in order to continue his TVA employment. TVA Brief at ¶ 5.6. This argument is inaccurate, as the circumstances of the three reorganizations are different. In 1993, Fiser's SQN Chemistry Superintendent position was not eliminated; he was RIF'ed from a position that continued in existence. *See* Staff Exh. 12. In 1994, Fiser believed that the reorganization was legitimate, and that his Chemistry Program Manager position was actually

being eliminated.[23] Tr. p. 2304, l. 4. In 1996, Fiser believed that the "new" Chemistry position was the same position that he had been given in the 1994 settlement agreement. Tr. p. 2359, l. 17. These differences in the three reorganizations make it eminently reasonable that Fiser would file DOL complaints in 1993 and 1996, but decline to file one in 1994.

2.96. TVA also claims that Fiser's explanation for why he did not file a DOL complaint for the 1994 reorganization is unworthy of credence given the so-called threat by Grover and Fiser's inability to know in advance who would be involved in the selection process. TVA Brief at ¶ 5.6. As noted above, the Board rejects outright TVA's claim that Grover threatened Fiser. More importantly, TVA's argument assumes that Fiser would have filed any such DOL complaint in 1994 *before* the selection process, presumably because he filed his 1996 complaint before the selection process. However, in 1993, Fiser waited until *after* his RIF and non-selection for the SQN Chemistry Manager position before filing his complaint. *See* Jt. Exh. 60; Staff Exh. 34. Fiser's explanation that the people involved in his 1993 DOL complaint were not involved in the 1994 reorganization is eminently reasonable, as he knew by the time the interviews were conducted that the individuals conducting the interview were not involved in his 1993 complaint. The Board therefore rejects TVA's argument that Fiser's explanation is unworthy of credence.

2.97. Finally, TVA argues that McArthur was assigned, but "never officially appointed to" the RadCon Manager position in the 1994 reorganization.[24] TVA Brief at ¶ 5.7. TVA also claims

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[23] The evidence in the record indicates that the 1994 reorganization was never implemented. Fiser and the other two Chemistry and Environmental Protection Program Managers continued to perform the same duties they had performed as Chemistry Program Managers. The only change made during that reorganization was the title of the position. Tr. p. 1750, l. 2; p. 1885, l. 22; p. 2311, l.13; p. 2841, l. 18; p. 3066, l. 7; p. 5036, l. 19.

[24] The Board notes that TVA did not present this argument to the NRC until it filed discovery responses. *See* "TVA's Responses to NRC Staff's Second Set of Interrogatories," Response to Interrogatory No. 3. Until that time, including at the November 22, 1999 and December 10, 1999 PECs, TVA never disputed that McArthur was officially appointed to the RadCon Manager position. This is one example of TVA's failure to provide complete and accurate (continued...)

that an approved position description for that position was never placed in McArthur's PHR. *Id*. TVA fails to cite any evidence to support the proposition that McArthur was never officially appointed to the RadCon Manager position. Additionally, all the evidence in the record, including McArthur's testimony and the Employee Action Reasons form from the Human Resources Information System (hereinafter "HRIS"), indicates that McArthur was officially appointed to that position.[25] Tr. p. 1450, l. 23; p. 1451, l. 12; p. 1484, l. 10. Although Sewell testified that a position description for the RadCon Manager position was not contained within McArthur's PHR, he also stated that the HRIS, not the PHR, governs official personnel actions at TVA. Tr. p. 4485, l. 19. Based on this evidence, the Board finds that McArthur was officially appointed to the RadCon Manager position during the 1994 reorganization.

J. McGrath and McArthur Used the 1996 Reorganization as an Opportunity to Discriminate Against Fiser

2.98. In 1996, the Corporate Operations Support organization underwent a reorganization under McGrath's supervision as the General Manager of Operations Support. TVA Brief at ¶¶ 6.0 6.2; Staff Brief at ¶ 2.75. This reorganization involved a five-year reduction plan, with an overall goal of a 40 percent reduction. TVA Brief at ¶ 6.2; Staff Brief at ¶ 2.75. TVA then argues that the Staff misunderstands the purpose of the reorganization, which was purportedly to implement the necessary changes as soon as possible, and to carry out the reductions over Operations Support as a whole, rather than over individual organizations.[26] TVA Brief at ¶ 6.4.

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[24](...continued)
information, as required by 10 C.F.R. § 50.9.

[25] The Staff addressed this evidence at length in paragraphs 3.110 through 3.112 of its Brief, and the Board will not repeat those arguments here.

[26] McGrath never adequately explained why it was good for employee morale to eliminate an employee's position up front rather than at a future date, when presumably the employee would have had time to prepare for the loss of his position and the opportunity to search for another position. Additionally, the need for RIF'ing an employee might have been alleviated over the course
(continued...)

This argument contradicts the initial instruction McGrath gave to his subordinates regarding the budget cuts. Grover testified that at the beginning of the reorganization, McGrath instructed his direct reports to cut a minimum of 17 percent in the first year of the budget plan, with a 40 percent reduction to be completed within each organization within five years. Tr. p. 1857, l. 21. Only after Grover proposed a first year organization that did not require any of the incumbents to lose his position did McGrath then instruct Grover to make deeper cuts in the Chemistry program in the first year, and limit the two remaining positions to one PWR position and one BWR position. Tr. p. 453, l. 17; p. 1699, l. 15; p. 1860, l. 15; p. 1862, l. 10; p. 1863, l. 10; p. 2199, l. 16.

2.99. TVA argues that McGrath implemented the Operations Support reorganization based on completely legitimate motives. TVA Brief at ¶¶ 6.6, 6.10. Although the Board has some doubts about McGrath's credibility and his asserted legitimate motives for the reorganization, the Board notes that a violation of 10 C.F.R. § 50.7 only requires that discrimination be a contributing factor in the adverse action, not the sole factor. Thus, even if the Board was willing to accept TVA's argument that McGrath acted with some legitimate motive for the reorganization, the Board nonetheless concludes that the Staff has introduced sufficient evidence both that this legitimate basis is a pretext for discrimination and that discrimination was at a minimum a contributing factor to the adverse actions taken against Fiser.

2.100. TVA then claims that there was a consensus among McGrath, McArthur, and Grover that there would be two Chemistry Program Manager positions, one for PWR Chemistry and one for BWR Chemistry. TVA Brief at ¶ 6.7. However, both Grover and McArthur testified that McGrath made the decision to retain only two Chemistry positions, and that he also decided that those two positions should be broken down into a PWR and a BWR position. Tr. p. 1699, l. 15; p. 1860, l. 15; p. 1862, l. 10; p. 1863, l. 10; p. 2199, l. 16. In fact, McArthur testified that he did not believe

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[26](...continued)
of the reorganization if another employee in that competitive level found employment elsewhere.

that PWR/BWR was necessarily the best way to break down the two remaining Chemistry positions, but was just one way to divide the duties. Tr. p. 1726, l. 18. TVA also asserts that McGrath's notes on the 1996 reorganization demonstrate that Fiser was treated the same as the rest of the employees affected by the reorganization. TVA Brief at ¶ 6.7. A review of those notes demonstrates only that the reorganization underwent numerous iterations; it in no way reveals that Fiser was treated the same as the rest of the organization.

2.101. Next, TVA argues that Grover was attempting to undermine McGrath's goals for the reorganization by suggesting an organization with a Chemistry Manager position, and by requesting his direct reports lobby the site RadChem Managers to support keeping the Corporate Chemistry organization intact. TVA Brief at ¶ 6.8. TVA focuses here only upon that evidence which supports this tenuous argument, while yet again ignoring relevant evidence to the contrary. Grover testified that his initial proposal involved meeting McGrath's requirements by cutting a vacant position in the Chemistry organization. Tr. p. 1862, l. 19. Although McGrath rejected that proposal, that rejection in no way demonstrates that Grover was working at cross purposes to McGrath, it simply reveals that Grover was attempting to implement McGrath's required cuts in the least painful manner to his current employees. Second, McGrath testified that he requested his direct reports to determine what functions would be necessary to successfully support the three sites. Tr. p. 434, l. 6. Requesting that the Corporate Chemistry and Environmental Protection Program Managers speak to the site RadChem Managers about the support they received from the Corporate organization is clearly a reasonable manner in which to determine what functions would be necessary to retain in the reorganization. The Board therefore rejects TVA's argument that Grover was attempting to undermine McGrath's goals for the reorganization.

2.102. TVA asserts that there is no evidence from which to conclude that discrimination was a motivating factor in the reorganization of Operations Support, the elimination of the Chemistry and Environmental Protection Program Manager positions, or the creation of the two new

Chemistry positions. TVA Brief at ¶ 6.10. TVA misstates the Staff's position as to the reorganization. The Staff is not asserting that the entire reorganization of Operations Support was undertaken in an attempt to discriminate against Fiser. Instead, the Staff argues, quite successfully, that TVA used the opportunity presented by the reorganization to discriminate against Fiser. Additionally, Boyles testified that the process used by TVA to implement reorganizations could easily be manipulated by a manager in order to retain certain employees or eliminate certain employees. Tr. p. 3831, l. 20.

2.103. TVA also asserts that the fact that Fiser had input into the PWR Chemistry Manager position description demonstrates that "there can be no claim that the manner in which the position descriptions were written was intended to discriminate against Fiser." TVA Brief at ¶ 6.11. Yet again, TVA focuses on the wrong argument. The Staff is not asserting that the position description was written in a manner to discriminate against Fiser. The Staff argues that the decision to cut the Chemistry Program to two positions, one PWR and one BWR, and make sufficient changes to those position descriptions to ensure that they would have to be posted for competition, indicates a manipulation of the process.[27] As noted above, the Staff has introduced sufficient evidence to demonstrate that the decisions to cut the Chemistry Program and have one PWR and one BWR position is sufficient for the Board to conclude that those decisions were made, at least in part, to discriminate against Fiser

K. The Decision to Post the PWR Chemistry Position
<u>was in Violation of OPM Regulations and TVA Personnel Policies</u>

2.104. TVA then addresses the decision to post the PWR Chemistry Program Manager position. According to TVA, HR evaluated the new Chemistry position descriptions and determined

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[27] The Board notes that the only change made to the position description that was sufficient to require its posting was the change in minimum qualifications. A review of the listed duties of the PWR Chemistry Program Manager and the Chemistry and Environmental Protection Program Manager reveals that the duties remained substantially the same. *See* Jt. Exhs. 35 and 42.

that they were significantly different from the existing Chemistry and Environmental positions, and therefore had to be posted for competition. TVA Brief at ¶ 7.0. TVA then claims that the process and criteria used in making the determination on the Chemistry positions were the same as those used in making determinations on all the other positions in Nuclear Operations Support. *Id.* TVA states that Ben Easley made the initial determination that the new position descriptions were different, and his supervisor, James Boyles, concurred in that determination. TVA Brief at ¶ 7.1. Finally, TVA claims that HR alone made the determination that the Chemistry positions should be posted for competition, without any input from McGrath or McArthur. *Id.*

2.105. TVA makes these assertions without citing to any evidence in the record to support them. The Board therefore refuses to adopt these findings, and instead adopts the Staff's findings on this issue. *See* Staff Brief at ¶¶ 2.142-2.145.

2.106. TVA next sets forth its interpretation of the OPM standard for making competitive level determinations. The parties agree that for two positions to be in the same competitive level, they must be interchangeable. TVA Brief at ¶ 7.2; Staff Brief at ¶ 2.168. TVA then claims that the MSPB has upheld its test for mutual interchangeability. TVA Brief at ¶ 7.2, *citing Trahan v. Tennessee Valley Authority*, 31 MSPR 391 (1986). However, TVA again focuses on the wrong issue with respect to its personnel policies. The Staff is not arguing that the TVA personnel policy on making competitive level determinations, as written, is an inaccurate interpretation of OPM regulations. The Staff argues that TVA's implementation of this policy in this case violated both the policy itself and the OPM regulations. Staff Brief at ¶¶ 2.164-2.171; 3.87-3.99.

2.107. In *Trahan*, the issue was whether the comparison between two position descriptions supported the agency's determination that the positions were in different competitive levels. 31 MSPR at 391. There was no allegation in that case that the agency was using an inaccurate or out-of-date position description to make a competitive level determination. In fact, despite repeated opportunities to do so, TVA has yet to cite a case in which the MSPB upheld a

competitive level determination where the agency knowingly used an out-of-date or inaccurate position description. Additionally, Reynolds, then the Vice President of HR, testified that he believed that he would have lost an MSPB case on Fiser's 1993 RIF precisely because that RIF was based upon an out-of-date and inaccurate position description. Tr. p. 3365, l. 5.

2.108. TVA next argues that the Staff should not be permitted to argue that the Chemistry positions were interchangeable with the Chemistry and Environmental positions because the Staff did not make such a contention in its interrogatory responses. TVA Brief at ¶ 7.5. The Staff specifically stated in response to a request for admission that it denied that the PWR Chemistry Program Manager position was significantly different from the Chemistry and Environmental Protection Program Manager positions. NRC Staff Supplemental Response to Tennessee Valley Authority's Request for Admissions and Interrogatory, p. 4. This response amounts to a contention that the Staff believes that the positions were interchangeable. The Staff also put TVA on notice in its response to TVA's Motion for Summary Decision that it made such a contention. NRC Staff Response to Tennessee Valley Authority's Motion for Summary Decision, p. 18. Additionally, the Staff's argument about the Chemistry positions is based strongly upon TVA's use of the position descriptions that were inaccurate to make the competitive level determinations. Staff Brief at ¶ 3.96.

2.109. TVA argues that the history of the Chemistry and Environmental job functions supports its argument that the positions are not interchangeable. TVA Brief at ¶ 7.6. TVA bases this argument on the 1994 reorganization, when the Chemistry and Environmental organizations were combined into a single organization, and new Chemistry and Environmental positions were posted for competition. *Id.* According to TVA, if the positions were required to be posted in 1994, then it follows that they were also required to be posted in 1996, when TVA was simply undoing the 1994 reorganization. TVA ignores the fact that the intent of the 1994 reorganization, which was to cross train the Chemists and the Environmental specialists, was never fully implemented. No

fewer than six witnesses testified that the Chemistry and Environmental Protection Program Managers never assumed the environmental duties, and performed 95 percent Chemistry duties. Tr. p. 1750, l. 2; p. 1885, l. 22; p. 2311, l. 13; p. 2841, l. 18; p. 3066, l. 7; p. 5036, l. 19. Grover testified that HR was aware of this division of duties. Tr. p. 1886, l. 5. The Board therefore concludes that at the time of the 1996 reorganization, TVA knew that the Chemistry and Environmental position descriptions were inaccurate.

2.110. The parties agree that Fiser informed Boyles and Easley that he would file a DOL complaint if TVA posted the PWR position because Fiser believed the PWR position was the same as the position he had been given in the 1994 settlement of his earlier DOL complaint. TVA Brief at ¶ 7.7; Staff Brief at ¶ 2.124. According to TVA, Boyles contacted Kathy Welch in Labor Relations to determine if the settlement agreement gave Fiser rights to the PWR position. TVA states that both Welch and TVA OGC determined that the settlement agreement did not give Fiser the right to the PWR position. TVA Brief at ¶ 7.8. Finally, TVA again attempts to argue that Fiser "voluntarily" left the job awarded to him by the settlement agreement. *Id.*

2.111. First, the Board notes that the determination by Welch and TVA OGC was made in a vacuum, without consideration of all the relevant information surrounding the 1996 reorganization. Welch conceded that she did not ask whether Fiser's current position was the same as the one he had been granted in the settlement agreement; Welch merely assumed that he was no longer in that position. Tr. p. 346, l. 23. Additionally, a review of the settlement agreement reveals that it is silent as to whether or not Fiser was entitled to the position for any period of time, and TVA merely chose to interpret that silence as meaning Fiser could be removed from that position at any time. *See* Jt. Exh. 34; Staff Brief at ¶ 2.126.

2.112. Finally, as the Board noted above, TVA's argument that Fiser voluntarily abandoned the Chemistry position in the 1994 reorganization is absurd. Fiser was given a notice informing him that his position had been eliminated and that he must either find another position within TVA or

be assigned to TVA Services. Tr. p. 2290, l. 20. Under these circumstances, the Board finds that Fiser did not voluntarily leave that position, but was forced by the reorganization to leave that position.

2.113. TVA also asserts that VPAs were posted for the Chemistry positions, the other four Corporate RadChem staff positions, and for every new position created in Operations Support. Based on this assertion, TVA concludes that Fiser was treated in the same manner as every other employee in Nuclear Operations Support. TVA Brief at ¶ 7.9. However, TVA has introduced no evidence that the other positions advertised were based upon competitive level determination using inaccurate or out-of-date position descriptions, which is the most relevant factor with respect to the Chemistry positions. In the absence of such evidence, the Board refuses to find that Fiser was treated the same as the other Operations Support employees.

L. McArthur's Placement into the RadChem Manager Position was in Violation of OPM Regulations and TVA Personnel Policies

2.114. TVA states that HR made the determination that McArthur had rights to the RadChem Manager position using the same interchangeability test used to make the competitive level determination on the Chemistry positions. Additionally, TVA claims that the fact that the interchangeability determination resulted in a different outcome made McArthur's situation the exception, and Fiser's situation the norm. TVA Brief at ¶ 8.0. According to TVA, HR only made the determination that McArthur had rights to the RadChem Manager position after McGrath raised the issue in response to an inquiry by McArthur. TVA Brief at ¶ 8.1.

2.115. TVA next claims that TVA used the PHR, "TVA's official personnel records," to make the determination that McArthur had rights to the RadChem Manager position. TVA Brief at ¶ 8.3. TVA then asserts that McArthur's PHR shows that his "position description of record" "was in fact a position interchangeable with the RadChem Manager position description." TVA Brief at ¶ 8.3. TVA argues that McArthur was assigned to work as RadCon Manager in the 1994 reorganization,

but that a position description was never issued for that position and never placed in McArthur's PHR. *Id.*

2.116. These arguments by TVA are completely contradicted by evidence in the record, including testimony by TVA's own witnesses. First, although TVA claims that the same interchangeability test was used to make the determinations on both the Chemistry and the RadChem Manager positions, a review of the evidence indicates that TVA did not apply that interchangeability test to the RadChem Manager position. Boyles testified that when making the competitive level determination for the RadChem Manager position, he did not review the minimum qualifications of the two positions, but focused solely upon the listed job duties in those two position descriptions. Based on that comparison, Boyles determined that McArthur had rights to that position. Tr. p. 3930, l. 20. If HR had used this same test for comparing the Chemistry positions and ignored the minimum qualifications of the positions, HR would have reached the same conclusion it reached with respect to the RadChem Manager position, that the incumbents had rights to that position.

2.117. Second, TVA's assertion that the PHR is TVA's official personnel record for employees is not supported by the testimony of TVA's witnesses. Both Reynolds, formerly the Vice President of HR, and Sewell testified that the HRIS, not the PHR, is the official personnel record for TVA employees. Tr. p. 3349, l. 1; p. 4480, l. 20. More specifically, Sewell testified that the PHR was compiled in part based upon the HRIS, and that in event of a conflict between the HRIS and the PHR, the HRIS governs. Tr. p. 4483, l. 11; p. 4485, l. 19. The Board therefore rejects TVA's claim that the PHR is TVA's official personnel system.

2.118. The Board is highly concerned with TVA's argument that the 1990 Technical Programs Manager position is interchangeable with the RadChem Manager position. TVA Brief at ¶ 8.3. There is no doubt, after the testimony of Boyles, that the two positions are not interchangeable under either TVA personnel policies or OPM regulations. A review of the minimum

qualifications of the two position descriptions reveals that a person who qualified for the Technical Programs Manager position would not necessarily meet the minimum qualifications for the RadChem Manager position. Boyles acknowledged this point during his hearing testimony. Tr. p. 3928, l. 14. *See also* Staff Exhs. 100 and 101. Moreover, TVA's "personnel expert," Fogleman, testified that he would not have made the decision that the positions were interchangeable. Tr. p. 5613, l. 21. The Board concludes that the positions are not interchangeable, and notes that TVA's attempts to ignore this evidence reflect a lack of credibility on its part.

2.119. Next, TVA's argument that McArthur was never issued a position description for the RadCon Manager position is not supported by the evidence in the record. No one testified that a position description was not issued. McArthur testified that he wrote a position description for that position, and Easley testified that the position description existed. Tr. p. 1568, l. 5; p. 1178, l. 18. Sewell's testimony only indicates that the position description was apparently never placed in McArthur's PHR, not that it was never issued. The Board rejects this argument, and finds that McArthur was officially placed in the RadCon Manager position despite the absence of a position description in his PHR. TVA attempts to rebut this conclusion by noting that neither McArthur's performance appraisal as RadCon Manager nor his HRIS indicates that he was ever issued a position description for that position. TVA continues to argue that it relies upon the "position description of record" to make competitive level determinations. TVA Brief at ¶ 8.4.

2.120. TVA asserts that the RadChem Manager position was not subject to TVA policy on vacant positions because, by virtue of McArthur having rights to that position, the position was not vacant. TVA Brief at ¶ 8.5. Not only is this argument not supported by the evidence, but it is also contradicted by TVA in its Brief. *See* TVA Brief at ¶ 6.5. The RadChem Manager position was clearly vacant from the time of Allen Sorrelle's retirement until McArthur was placed in that position.

Tr. p. 907, l. 20; p. 1874, l. 25. Therefore, under TVA policy, the position should have been posted for competition.

2.121. TVA then cites to a number of cases which it claims support its interpretation of OPM regulations as requiring use of the position description of record. A review of the cases cited by TVA reveals that TVA's interpretation of those regulations is not supported by MSPB case law. Instead, a review of those cases indicates that TVA's repeated attempts to argue that the MSPB requires it to use the position description of record show a lack of credibility by TVA.

2.122. TVA first cites to *Bjerke v. Dept. of Education*, 25 MSPR 310 (1994) to support its argument that a competitive level determination must be based upon his "official assignment of record," and that an employee "remains the official incumbent of his most recent position of record." 25 MSPR at 313. TVA also cites to *Griffin v. Dept. of the Navy*, 64 MSPR 561 (1994), which required the use of an employee's "official position of record" to make a competitive level determination. 64 MSPR at 563. Rather than support TVA's argument that the *"position description of record"* governs the competitive level determination, these cases support the Staff's argument that the official position to which the employee is appointed governs a competitive level determination. As the Board has already concluded, McArthur was officially appointed to the RadCon Manager position, and that position was his official assignment of record, as reflected by his HRIS.

2.123. TVA cites one case which, on the surface, might support its position that the "position description of record" should be used to make competitive level determinations. However, a deeper review of that case and other MSPB case law reveals that, far from supporting TVA's argument, it rejects TVA's approach. In *Jicha v. Dept. of the Navy*, 65 MSPR 73 (1994), the MSPB concluded that a competitive level determination must be made by using the duties and qualifications for the position, as set forth in the official position description. 65 MSPR at 77. However, as set forth in detail by the Staff, the MSPB has repeatedly held that, although the

position description is the best evidence of the duties and qualifications of the position, other evidence is also relevant to competitive level determinations, especially where there is evidence that the position description is inaccurate. Staff Brief at ¶¶ 3.94-3.95. In addition, the *Jicha* case did not involve an attempt to use a position description for a position to which the incumbent was not officially appointed, as TVA did when making the competitive level determination on the RadChem Manager position.

2.124. TVA asserts that it presented the undisputed testimony of Reynolds and Fogleman that TVA relies upon MSPB decisions approving TVA's policy of using the most recent "position description of record" to make competitive level determinations. TVA Brief at ¶ 8.8. However, this ignores certain contradictions in Reynolds' testimony regarding TVA arguments before the MSPB. When questioned about why he settled Fiser's 1993 DOL complaint, Reynolds stated that he believed TVA would lose a case before the MSPB because Fiser was RIF'ed from a position that he no longer occupied. Tr. p. 3365, l. 5. Fiser's RIF was based upon his "position description of record", the SQN Chemistry Superintendent position. Reynolds was unable to explain why he would have lost before the MSPB if he did use the "position description of record" for Fiser's RIF in 1993, but then would have lost in 1996 if he did not use the "position description of record" for McArthur.

2.125. TVA argues that how McArthur was treated in the 1996 reorganization "says nothing regarding how Fiser was treated and does not create a logical inference of discrimination." TVA Brief at ¶ 8.10. TVA provides neither evidentiary nor legal support for this argument. It appears that TVA is seeking for the Board to disregard both the evidence and the law regarding similarly situated individuals in a disparate treatment case, as set forth by the Staff in paragraphs 3.48 through 3.58 of its Brief. The Board adopts the Staff's findings of facts and conclusions of law on the matter, as the Staff has provided adequate evidence to support those findings.

2.126. TVA next asserts that the appropriate comparators for Fiser would be all the other employees subject to the 1996 reorganization of Operations Support, not the "exception" of

McArthur. According to TVA, the RadChem Manager position was the only position not posted for competition because competitive level review of all other positions in Operations Support determined that all others positions needed to be posted for competition. TVA Brief at ¶ 8.11. However, TVA introduced no evidence that these other employees were similarly situated to Fiser, other than conclusory statements by TVA witnesses. Additionally, the fact that every other position except McArthur's RadChem Manager position was posted for competition supports the Staff's argument that TVA made an end run around OPM RIF regulations in order to control who would be retained in a reorganization.

2.127. TVA also claims that Grover's position is irrelevant to HR's decision on the RadChem Manager position because Grover's "position description of record" was not interchangeable with the RadChem Manager position, and because TVA's waiver policy did not apply to that position because it was not a vacant position. TVA Brief at ¶¶ 8.12-8.13. TVA misses the relevant point with respect to Grover. The Staff has never asserted that Grover's Chemistry and Environmental Protection Manager position was interchangeable with the RadChem Manager position. However, McArthur's RadCon Manager position, which was at the same level as Grover's position, also was not interchangeable with the RadChem Manager position. Tr. p. 1210, l. 8. The Staff maintains that the RadChem Manager position should have been posted for competition such that Grover would have had the opportunity to compete and be selected for that position. If Grover had been selected for that position, it is possible and even likely that Fiser would have been selected for a position in the new organization. Staff Brief at ¶¶ 2.149-2.150. Additionally, the Board has already concluded that the RadChem Manager position was vacant, and therefore TVA's policy on waivers for minority candidates applied to that position.

M. <u>The Selection Process for the PWR Chemistry Position was Biased against Fiser</u>

2.128. After setting forth the normal selection process for new positions at TVA, TVA then discusses the Selection Review Board (hereinafter "SRB") for the PWR Chemistry position. TVA

claims that McArthur chose the three incumbent Chemistry and Environmental Protection Program Managers to interview for the PWR Chemistry Program Manager position, and that the Staff has never contended that McArthur's selection of these three as the top candidates was incorrect. TVA Brief at ¶ 9.11. TVA is correct: the Staff has never asserted that McArthur's selection of the top candidates to interview was incorrect because the Staff asserts that interviews never should have been conducted for that position. The Staff asserts that the position should have been filled based upon seniority on the retention register.

2.129. According to TVA, McArthur could not have entertained the notion that the SRB should be composed in a manner to ensure that each PWR candidate would have a plant representative as a personal advocate because the proposal to use the site RadChem Managers was made before the VPA for that position was posted and closed.[28] TVA Brief at ¶ 9.13. TVA cites no evidence to support this argument. Additionally, there is evidence that the proposal to use the site RadChem Managers as the SRB was intended to have the managers to whom the candidates had been and would be providing support rate the candidates. Tr. p. 2916, l. 21. The Board therefore rejects TVA's argument that the SRB was not intended to have a representative from each site.

2.130. TVA next focuses on Cox's inability to serve on the SRB, and the asserted reasonableness of McArthur's decision not to reschedule the interviews to accommodate Cox's schedule. TVA Brief at ¶¶ 9.16-9.20. TVA argues that the Staff seeks preferential treatment for Fiser, and that the Staff was not concerned that Cox's conflict meant that he could not serve on the SRB for the other four Corporate RadChem positions being interviewed that day. TVA Brief at

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[28] TVA also argues that it would be contrary to the purpose of an SRB if the members advocated for a particular candidate based upon their personal knowledge of that candidate. TVA Brief at ¶ 9.14. However, the statistical analysis and testimony of Carey Peters indicates that Kent and Corey did in fact favor the candidate who worked at their respective sites. *See* Staff Brief at ¶¶ 3.73-3.74.

¶ 9.19. First, the Board notes that it is irrelevant whether Cox was present for the interviews for the other four positions, as the Board is not aware of any allegations of discrimination by any of the candidates for those positions. Additionally, the Staff's arguments do not indicate that it was seeking preferential treatment for Fiser, but instead was asserting that the absence of Cox worked to Fiser's detriment.[29] Staff Brief at ¶ 3.115. This argument is supported by Peters' testimony and analysis, which demonstrated that Kent and Corey acted as champions during the interviews for Harvey and Chandra, while Fiser lacked a champion. *See* Staff Brief at ¶¶ 3.73-3.74. The Board therefore rejects TVA's assertion that the Staff was seeking preferential treatment for Fiser and concludes that the evidence supports the Staff's argument that Cox's absence worked to Fiser's detriment.

2.131. TVA also claims that Cox would have been excluded from the SRB based upon his "clear preference for Fiser as the PWR Chemistry Program Manager." TVA Brief at ¶ 9.21. As support for this assertion, TVA cites to the testimony of McArthur and McGrath that Cox stated he would select Fiser, and the testimony of Cox and Voeller that they preferred Fiser to Harvey for the PWR position. *Id.*. TVA ignores the evidence in the record that Cox did not indicate that he would preselect Fiser, and that Cox's statement about Fiser could not have impacted McArthur's decision not to reschedule the SRB interviews to allow Cox to serve.

2.132. Cox testified that he did not tell McArthur or McGrath or any of the other RadChem Managers that he would select Fiser as the PWR Chemistry Manager. Tr. p. 1759, l. 9. Cox stated that he simply told the other RadChem Managers, on the day of the interviews and after he told McArthur he would be unable to attend, that, for what his opinion was worth, Fiser had performed

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[29] The Board notes that TVA has claimed throughout this proceeding that it did whatever it could to ensure the fairness of the selection process, especially in light of Fiser's DOL complaint. TVA's failure to ensure that either Cox or some other representative from Watts Bar was present to serve on the SRB belies that claim, as this clearly worked to Fiser's disadvantage and to Harvey and Chandra's advantage.

well for him at Watts Bar.[30] Tr. p. 1760, l. 11. This statement is supported by the testimony of Kent and Corey. Tr. p. 2877, l. 2; p. 3153, l. 2. This testimony in no way indicates that Cox would have preselected Fiser for the PWR position if he had served on the SRB.

2.133. Cox and Voeller's testimony that Fiser had performed well at Watts Bar and that they would have preferred him as the PWR Chemistry Manager does not indicate that Cox would have evaluated him as the best candidate during the interviews.[31] Both Kent and Corey testified that they did not believe that Cox had preselected Fiser, and that they thought he would have evaluated the candidates in a fair and impartial manner if he had served on the SRB. Tr. p. 2877, l. 2; p. 3153, l. 2. There is also no evidence that McArthur was even aware of any conversations between Cox and Voeller about their preference for the PWR Chemistry Manager position. Therefore, any attempt by TVA to use these conversations as proof that Cox should have been excluded from the SRB amounts to nothing more than an after-the-fact justification for a selection process that was biased against Fiser. The Board therefore concludes that Cox had not preselected Fiser, and that TVA's argument about Cox's alleged preselection are simply an attempt to explain away a bias in the selection process.

N. The PWR Chemistry Interview Questions were Slanted against Fiser

2.134. TVA argues that the interview questions posed by the SRB to the PWR Chemistry Manager candidates were selected by the SRB members and that primary chemistry questions were rightly excluded because the PWR position was not intended to be the primary chemistry expert for any of the sites. TVA Brief at ¶ 9.29. According to TVA, there is "undisputed" evidence

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[30] Since Cox did not tell McArthur and the RadChem Managers of his opinion about Fiser until the day of the interviews, Cox's alleged preselection of Fiser could not have motivated McArthur's decision not to reschedule the interviews so that Cox could participate.

[31] If McArthur and McGrath honestly believed that Cox's stated opinion about Fiser indicated a tendency to preselect Fiser, then they should also have excluded Kent from the SRB based upon his obvious preference to have Harvey transferred to the site.

that the PWR Chemistry Program Manager was intended to be the secondary chemistry expert for the sites, and the BWR Chemistry Manager was intended to be the primary chemistry expert for the sites. TVA Brief at ¶¶ 9.29, 9.30. The Board first notes that TVA has never raised this argument before in either the pretrial pleadings, the hearing itself, or in any other statement before the NRC or DOL. Because TVA is raising this argument for the first time in its posthearing brief, the Staff lacked the opportunity to introduce evidence to dispute any evidence that supports this argument. The Board is therefore reluctant to consider this as a valid argument at this juncture, especially in light of TVA's failure to cite any evidence other than language from the position descriptions to support this argument.[32]

2.135. The evidence in the record indicates that primary chemistry was an important part of the PWR Chemistry Program Manager position. At least two of the three SRB members acknowledged in their testimony that primary chemistry was an integral part of the PWR Chemistry position.[33] TVA elicited no testimony from its own witnesses to support its new argument. The Board thus concludes that TVA's argument that the PWR Chemistry Program Manager position was not intended to be the primary chemistry expert for the sites is nothing more than a belated attempt to justify interview questions that favored Harvey's expertise.

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[32] Raising a new argument at this late date also constitutes a failure to provide complete and accurate information to the NRC at the PEC or in its responses to the NOV, in contravention of 10 C.F.R. § 50.9. Additionally, the Board stated during the hearing that it would give little to no weight to arguments that the parties did not raise in the hearing, because raising such an argument for the first time in the proposed findings of fact removes the opportunity for a witness to explain the argument, or for the parties to elicit testimony with respect to the argument. Tr. p. 3982, l. 22. The Board made this finding based on a concern by TVA that the Staff would raise new arguments in its posthearing brief. It is somewhat hypocritical of TVA to now engage in the very behavior in which it sought to prohibit the Staff from engaging.

[33] Additionally, when questioned on the breakdown of the two new Chemistry positions, McArthur specifically testified that one option would have been to have one primary chemistry specialist and one secondary chemistry specialist, but that McGrath decided to break down the positions by BWR and PWR instead. Tr. p. 1727, l. 8. There is no testimony from any witness that the BWR position was intended to be the primary chemistry expert.

2.136. TVA also claims that Fiser should have applied for the BWR position if he wanted to display his primary chemistry expertise, and that his participation in the drafting of the new Chemistry position descriptions demonstrates that he was aware that the BWR Chemistry Program Manager was the designated primary chemistry expert for the sites. TVA Brief at ¶ 9.31. TVA cites no evidence which supports these assertions, but simply expects the Board to assume that Fiser was aware that the BWR position was the designated primary chemistry expert based upon his involvement in drafting the position descriptions. There is no evidence in the record regarding what drafts of that position description Fiser saw, or whether any of those drafts contained a statement making such a designation. The Board therefore refuses to assume that Fiser knew that the BWR position was the primary chemistry position. Additionally, the Board concludes that Fiser's failure to apply for the BWR Chemistry Program Manager position is irrelevant to the matters at issue in this proceeding. The relevant issue is whether TVA discriminated against Fiser in his application for the PWR Chemistry Program Manager position, not whether there was another position available for which he could have applied.

2.137. TVA next argues that the questions asked to the PWR Chemistry candidates were both fair and reasonable, and were not unfairly weighted toward secondary chemistry.[34] TVA Brief at ¶¶ 9.32, 9.33. The Staff does not assert that it was unfair to ask the candidates secondary chemistry questions during the interviews, as secondary chemistry was undoubtably a key job function for the PWR Chemistry Manager. Staff Brief at ¶ 3.119. The Staff has asserted that it is not the presence of secondary chemistry questions, but the absence of primary chemistry questions, which unfairly skewed the interviews toward someone with secondary chemistry

[34] TVA in part argues that Fiser's perceptions of the unfairness of the questions are unreasonable. As noted in Section II.H. of this opinion, Fiser's perception of events is relevant only to the extent one of the parties relies upon that perception. In making its argument that the PWR questions were unfairly weighted in favor of secondary chemistry, the Staff did not rely upon Fiser's perceptions, but instead relied upon the testimony of the SRB members and Grover. Therefore, TVA's argument regarding Fiser's perceptions is irrelevant to this proceeding.

experience. As noted above, at least two SRB members and Grover agreed that primary chemistry was also a key part of the PWR Chemistry position. Tr. p. 1966, l. 21; p. 2976, l. 21; p. 5209, l. 1.

O. The Scoring of the PWR Candidates Reveals a Bias against Fiser

2.138. After setting forth how the SRB members scored the PWR Chemistry candidates, TVA asserts that the Staff's argument 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." TVA Brief at ¶ 9.36. The Staff has never argued that all subjectivity should have been eliminated from the interview process. Instead, the Staff has argued that the interview process for the PWR positions was completely subjective, thus leaving it open for abuse.

2.139. Courts have found discrimination in a number of cases based upon the use of subjective criteria. *See Henry v. Lennox Industries, Inc.*, 768 F.2d 746, 751 (6th Cir. 1985) (citations omitted) ("the legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves are not members of the protected minority.") *See also Widoe v. District # 111 Otoe County School*, 147 F.3d 726, 730 (8th Cir. 1998) (citations omitted) ("subjective criteria for promotions 'are particularly easy for an employer to invent in an effort to sabotage a plaintiff's prima facie case and mask discrimination.'"); *Fowler v. Blue Bell, Inc.*, 737 F.2d 1007, 1011 (11th Cir. 1984) (citations omitted) ("the more subjective the qualification sought and the more subjective the manner in which it is measured, the more difficult will be the defendant's task in meeting the burden imposed by *Burdine* [to articulate a legitimate, nondiscriminatory basis for the action.]" TVA has cited neither evidence nor case law to rebut these arguments, and a review of TVA's articulated reason for the action reveals that it does not pass muster when subjected to close scrutiny. The Board finds that the lack of any criteria by which to rate the candidates, thus leaving the SRB members open to base their ratings upon illegal motives such as Fiser's protected activities, supports an inference of discrimination.

2.140. TVA next argues that Fiser performed poorly in the interview, and that Fiser's belief that the process was rigged is rebutted by the testimony of the SRB members that they did not discuss or agree upon the candidate rankings.[35] TVA Brief at ¶¶ 9.37-9.38. TVA has no way to disprove Fiser's legitimate belief that the process was rigged against him because of the absence of Cox from the SRB interviews. Additionally, the results of the SRB support Fiser's perception that the process was rigged: Kent and Corey scored the candidates who worked at their respective sites the highest, and Fiser was ultimately not selected for the position.

2.141. Finally, TVA claims that there is no evidence to support the Staff's argument that Corey and Kent colluded to rate the candidates in such a manner as to make Rogers' scores irrelevant to the outcome of the interviews. TVA Brief at ¶ 9.39. The Staff has not argued that Corey and Kent engaged in any such collusion, nor is such an argument necessary to support the Staff's case. The Staff has argued, and provided sufficient evidence to support, that Kent and Corey did not need to work together to guarantee Fiser's non-selection, they each needed only to separately rate him third, which each of them did. *See* Staff Brief at ¶¶ 3.72, 3.74 (the two individuals who had knowledge of Fiser's protected activities each rated him third, thus rendering the scores of the third member of the SRB meaningless). The Board concludes that the Staff has introduced sufficient evidence that the scores of the PWR candidates support an inference of discrimination.

2.142. The Board will also address here TVA's argument that the testimony and statistical analysis by Carey Peters supports the conclusion that Fiser's low scores could not have been caused by his engaging in protected activities. TVA Brief at ¶¶ 9.40-9.43. The Staff persuasively discredited Peters' conclusion that Rogers' scores demonstrate that Fiser's protected activities had

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[35] TVA also argues that the Staff conceded that Fiser performed poorly in his interview for the PWR Chemistry Program Manager position. TVA Brief at ¶ 9.38. The Staff never made such a concession, but merely set forth an alternative explanation for TVA's claim that Fiser performed poorly because he was deliberately tanking the interview in order to support his DOL complaint.

no effect upon the outcome of the SRB interviews. Staff Brief at ¶¶ 3.70-3.75. The Board will not repeat those conclusions here, other than to note that Peters' testimony does not support a conclusion that Fiser's protected activities had no effect upon the SRB outcome, and instead supports the Staff's argument that the process was skewed against Fiser.

P. Harvey was Preselected for the PWR Chemistry Position

2.143. TVA maintains that Harvey's phone conversation with Voeller does not indicate that he had been preselected for the PWR Chemistry Program Manager position, but simply that he was confident in his abilities and assumed he was the best candidate for the position. TVA Brief at ¶¶ 9.45-9.46. First, the Board notes that the Staff introduced ample evidence that Harvey was preselected for the PWR Chemistry position, and nothing in the testimony cited by TVA refutes that evidence. *See* Staff Brief at ¶¶ 3.79-3.86. Second, Harvey's testimony that he was simply confident in his abilities when he made statements about being selected for the PWR position to Voeller is not credible in light of the inconsistencies on this point in his prior statements. Harvey claimed that the reason he was confident he would be selected for the PWR position was because Fiser had informed him, after the June 17, 1996 all hands meeting, that he no longer wished to work at TVA.[36] Tr. p. 4982, l. 17. However, Harvey's conversations with Voeller about his selection for that position occurred on June 3 and June 10, 1996. Therefore, Fiser's statement about no longer wishing to work at TVA could not have influenced Harvey in his statements to Voeller. Additionally, the Board gives little weight to Harvey's denial that anyone told him that he had been preselected for the position. In light of Fiser's DOL complaint regarding that position and

[36] TVA also cites to Harvey's claim that, during this June 17 conversation, Fiser accused Harvey of being preselected for the position by McArthur because both McArthur and Harvey are Mormon. TVA Brief at fn. 18. TVA correctly notes that there is no evidence in the record to support this allegation, and the Staff has never argued that religious preference for Harvey was the basis for his preselection. The Staff has argued, and provided sufficient evidence to support, that Harvey's preselection was based upon a desire to remove Fiser from the organization because of his engagement in protected activities. Therefore, the Board will disregard any arguments about religious discrimination.

the subsequent DOL and NRC litigation of that complaint, it is unlikely that Harvey would admit to wrongdoing that resulted in his retention during the reorganization.

2.144. TVA then attempts to compare Harvey's statements to Voeller about his selection with a number of other alleged events that TVA thinks are similar. These events include: Grover's alleged statement to the Corporate Chemistry Staff that only two chemists would be retained in the reorganization, himself and Chandra; the "sales job" by Voeller on Fiser's behalf; Cox and Voeller's alleged agreement to favor Fiser for the PWR Chemistry position; and the "alliance" between Grover and Fiser to get Landers to file a harassment complaint against Harvey. TVA Brief at ¶ 9.47. These arguments are nothing more than TVA's attempts to distract from the evidence of Harvey's preselection, and are not similar to Harvey's statements to Voeller in any relevant way.

2.145. Grover testified that he did not tell the Corporate Chemistry Staff that only he and Chandra would be retained in the 1996 reorganization. Tr. p. 2163, l. 20. However, even if he did make this statement, the Board has no trouble distinguishing between a comment early in the reorganization process, when no decisions as to the positions had yet been made, and Harvey's statement that he would be the individual selected for a particular position once it was posted for competition.

2.146. Voeller's asserted "sales job" on Fiser's behalf and his and Cox's opinion that Fiser would be the best candidate for the PWR Chemistry position have no relation whatsoever to Harvey's preselection. Even if Voeller and Cox wanted Fiser to be retained in the reorganization, there is no evidence in the record that either one of them, or Fiser, made statements to the effect that Fiser would be the individual selected for the PWR Chemistry position. By contrast, Harvey specifically stated to Voeller that he would be the individual selected for the PWR position. Under these circumstances, the Board has little trouble rejecting TVA's argument that these events demonstrate that Harvey was not preselected for the position.

2.147. Finally, the harassment of Landers by Harvey, far from demonstrating that Harvey was not preselected for the PWR Chemistry position, actually strengthens the Staff's argument that he was preselected. Two of the SRB members testified that interpersonal skills were an important asset for the PWR Chemistry Manager to possess. Tr. p. 3145, l. 18; p. 5215, l. 1. Despite this importance, McArthur determined that the harassment should not be considered in the selection process, and did not provide this information to the SRB members. McArthur also testified that he did not consider the harassment when making his final selection for the PWR Chemistry position. Tr. p. 1536, l. 2. McArthur's failure to consider information relevant to a key skill necessary for the position, as well as his actions to prevent the SRB from considering this information, are further evidence that the selection process was contrived in favor of Harvey.

2.148. The Board would like to address TVA's argument that Grover and Fiser allied themselves in an effort to encourage "Landers to file false charges of sexual harassment against Harvey." TVA Brief at ¶ 9.47. Initially, the Board finds that the evidence clearly demonstrates that Harvey harassed Landers on a regular basis during their time working together in the Corporate RadChem organization. TVA chooses to focus upon Landers' distinction between "sexual harassment" and "harassment and intimidation" in its accusation against Grover and Fiser, and claims that they wanted Landers to file a false complaint of sexual harassment. This argument completely mischaracterizes the evidence in the record. Grover and Fiser both testified that Landers was subjected to harassing behavior by Harvey, and that since informal complaints to Grover had not resulted in a change in Harvey's behavior, she could complain to HR about this behavior. Tr. p. 1842, l. 19; p. 2355, l. 13. Whether or not that complaint was for "sexual harassment" or "harassment and intimidation" is irrelevant; the relevant issue is that Harvey engaged in harassing behavior of Landers, and any complaint based upon that behavior would not

have been a "false" complaint, as TVA alleges.[37] The Board therefore rejects TVA's argument that Grover and Fiser had some illicit motive in encouraging Landers to seek redress for Harvey's misconduct.

2.149. TVA next addresses the aborted attempt to have Harvey transferred to SQN prior to the 1996 reorganization. TVA argues that Grover was the impetus behind the attempted transfer and that SQN's lack of interest in the transfer was demonstrated by the failure of anyone at SQN to contact McGrath directly about the transfer. TVA Brief at ¶ 9.48. The Board is disturbed by TVA's continued disregard for the evidence in the record. Grover testified that Kent and Rich approached him about the possibility of transferring Harvey to SQN. Tr. p. 1864, l. 4. Kent waffled on this issue during his testimony. However, a review of the statements Kent provided before the Staff raised this as an issue all clearly indicate that he and Rich initiated the transfer. *See* Staff Brief at ¶ 2.214. Additionally, Kent's failure to discuss the transfer with McGrath is not evidence of a lack of interest. Grover had already informed Kent that McGrath was adamantly opposed to the transfer and desired keeping Harvey in Corporate Chemistry, thus any further discussion on the subject would likely have been futile. The Board concludes that Kent and Rich initiated the transfer of Harvey to SQN because they desired his expertise as the site.

2.150. TVA then argues that neither Harvey nor his position could have been transferred under TVA policies, and that SQN did not have a vacant Chemistry position into which he could be transferred. TVA Brief at ¶ 9.48. TVA also asserts that any vacant position would have been required to be posted for competition, and that McGrath indicated that SQN could post the position if it so desired. *Id.* As noted by the Staff, it is not relevant whether or not Harvey could have

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[37] Although Landers distinguished Harvey's behavior toward her from "sexual harassment," that distinction appears to be based upon her belief that sexual harassment is limited to harassment that is sexual in nature, or is an unwanted advance toward her. Tr. p. 2065, l. 11. The Board will not get into a lengthy discussion of sexual harassment here, other than to note that it extends to any harassing behavior aimed at an individual because of his or her sex, and the Board has little doubt that such a definition extends to Harvey's behavior.

actually been transferred into the position, because no one actually tried to implement the transfer. The relevant fact with respect to the attempted transfer is that McGrath blocked it because he wanted Harvey to remain in Corporate Chemistry, thus ending any further discussions about the transfer.

2.151. Based upon the evidence in the record, the Board concludes that Harvey told Voeller he would be selected as the PWR Chemistry Manager and that Kent initiated a request to transfer Harvey to a SQN Chemistry position. This evidence indicates that Harvey was preselected for the PWR Chemistry Program Manager position, and supports an inference of discrimination against Fiser.

Q. Kent's Statement about Fiser's DOL Complaint Constitutes Discrimination

2.152. TVA states that the content of Kent's statement about Fiser's DOL complaint just prior to the SRB interviews is not disputed, and that Kent made the statement so that the selection process would not have "even the appearance of impropriety." TVA Brief at ¶¶ 9.51-9.52. TVA claims that the *Supervisor's Handbook* instructs supervisors to "avoid[] any appearance of reprisal" against employees who file complaints. TVA Brief at ¶ 9.52, *citing* TVA Exh. 125, p. 103. Based upon the instruction in that handbook and McArthur's decision not to participate in the SRB interviews, TVA concludes that Kent's statement about Fiser's DOL complaint is not evidence of discrimination. TVA Brief at ¶ 9.52.

2.153. TVA completely ignores the evidence that filing any type of complaint at TVA is generally viewed in a negative manner and that employees choose not to file complaints based on this negative environment. Both Landers and Harvey testified that they feared retaliation for raising complaints during their tenure at TVA, including during the time that McArthur was within their supervisory chain of command. Tr. p. 2050, l. 24; p. 2051, l. 1; p. 2052, l. 5; p. 5054, l. 24; p. 5057, l. 14; p. 5058, l. 3.. The Staff set forth the hostile work environment toward those who file complaints in paragraphs 3.124 through 3.131 of its Brief, and the Board concludes that this

evidence is sufficient to establish a hostile work environment at TVA at the time Kent made his statement about Fiser's DOL complaint. The Board therefore rejects TVA's argument that Kent's statement had no impact whatsoever on the fairness or impartiality of the SRB. Additionally, the Board noted that TVA did not even successfully avoid the appearance of impropriety by McArthur's non-participation in the SRB interviews. McArthur drafted the questions and made the ultimate decision as to whom would be selected for the Chemistry positions. Kent never explained why McArthur's participation in the interviews might cause the appearance of impropriety, but his ultimate decision-making authority caused no such appearance.

2.154. Based on the evidence in the record that TVA management supported a hostile work environment toward individuals who engaged in protected activities, the Board concludes that Kent's discussion of those activities just prior to an interview constitutes discrimination.

R. TVA Took Adverse Actions against Fiser

2.155. TVA claims that Fiser was not subjected to an adverse action during the 1996 reorganization. First, TVA asserts that Fiser's employment was not terminated as a result of his non-selection for the PWR Chemistry Program Manager position, but that he was instead assigned to TVA Services. TVA Brief at ¶ 10.0. Second, TVA argues that Reynolds offered Fiser the same PWR position, and that Sixth Circuit case law holds that no adverse action has taken place where a discharged plaintiff is reinstated. TVA Brief at ¶¶ 10.1-10.2 (citations omitted). Next, TVA asserts that Fiser simply chose to pursue outside interests rather than remain a TVA employee for another year within the TVA Services organization. TVA Brief ¶ 10.4. Finally, TVA claims that it was not reasonable for Fiser to be concerned about retaliation if he accepted Reynolds' offer since the DOL complaint placed a high visibility on him and the two supervisors accused of discrimination. TVA Brief at ¶ 10.5.

2.156. Termination is not the only adverse action under either 10 C.F.R. § 50.7 or section 211 of the Energy Reorganization Act. In another section 211 case against TVA, the DOL

specifically concluded that the involuntary transfer of an employee into the Employee Transition Program (a predecessor of TVA Services) constitutes an adverse action. *Overall v. Tennessee Valley Authority*, 97-ERA-53 (ALJ Apr. 1, 1998), *adopted as modified by* 2001 DOL Ad. Rev. Bd. LEXIS 21 (ARB Apr. 30, 2001). The Board thus rejects TVA's argument that Fiser did not suffer an adverse action because he was not terminated after his non-selection for the PWR position.

2.157. TVA's next argument is that an adverse action has not occurred when the employer reinstates a discharged plaintiff, relying upon a recent Sixth Circuit Title VII case. TVA Brief at ¶ 10.2, *citing White v. Burlington Northern and Santa Fe Ry. Co.*, 310 F. 3d 443, 455 (6th Cir. 2002). In that case, the Sixth Circuit concluded that a plaintiff who has been reinstated after an intermediate employment decision, such as a grievable suspension, has not suffered an adverse action. 310 F.3d at 452. In this case, Reynolds' offer of a position to Fiser was not an offer to reinstate Fiser after an intermediate decision. Fiser's non-selection for the PWR Chemistry position was a final decision, made by McArthur. Reynolds' offer did not undo Fiser's non-selection and Harvey's selection for that position, but simply created a new position, not in the organizational staffing plan, in response to Fiser's DOL complaint. Under 10 C.F.R. § 50.7, TVA took an adverse action on the day McArthur made his final decision that Fiser would not be selected for the posted position. The Commission does not permit a licensee to avoid a violation by offering to reinstate the complainant. An offer of reinstatement, in an NRC case, is only relevant to the determination of the civil penalty. Therefore, Reynolds' offer of a position does not negate an adverse action.

2.158. TVA also fails to recognize the distinction between a Title VII case and a violation of the Commission's whistleblower retaliation regulations. In a Title VII or other private discrimination action, a plaintiff is seeking a personal remedy for the discrimination, so an offer of reinstatement after the discriminating action would certainly be a relevant factor. However, section 50.7 does not provide a personal remedy; its goal is to protect employees engaged in protected

activities from retaliation and to deter NRC licensees from engaging in such retaliation. In a section 50.7 case, once it has been determined that the licensee took an action against employee based upon protected activities, the only relevance an offer of reinstatement has is with respect to whether the licensee should get credit for corrective action in making the civil penalty determination. Since TVA stipulated that the civil penalty issued in this case was determined in accordance with the NRC Enforcement Policy and has not challenged the civil penalty determination, Reynolds' offer to Fiser of another PWR Chemistry position is irrelevant.

2.159. Similarly, any interest Fiser had in pursuing outside employment rather than retaining his TVA employment in the TVA Services organization is irrelevant to whether or not TVA took an adverse action against him. The adverse action taken against Fiser was his non-selection for a position in the 1996 reorganization, not his resignation from TVA. Under TVA's interpretation, a licensee could escape liability for discrimination against a whistleblower simply by offering that person a position after the discrimination has already occurred. Additionally, TVA's interpretation would also mean that an employee who selected the second option of resignation and severance could never assert that TVA took an adverse action against him. The Board refuses to adopt such an absurd result.

2.160. Finally, the Board concludes that Fiser's concern about the future loss of the position Reynolds offered was eminently reasonable in light of the circumstances surrounding that offer. Fiser knew that the final RadChem organization was only intended to have one PWR Chemistry Program Manager position, and that over the course of the five year reorganization plan, one of those positions would be cut. As he learned with his 1994 settlement agreement just three months prior to this offer, (and as TVA itself repeatedly asserts), any offer of a position is not guaranteed for any length of time, and Fiser would have no way of knowing how long he would be in that position before potentially being subject to another reduction and non-selection. The Board therefore concludes that Fiser's non-selection for the PWR Chemistry Program Manager position

constitutes an adverse action, and that Fiser's decision not to accept the offer of that position after his non-selection does not negate that adverse action.

2.161. TVA next briefly addresses Fiser's 1996 DOL complaint. TVA yet again makes the specious argument that Fiser voluntarily and "by his own actions" vacated the Chemistry Program Manager position he was given in the 1994 settlement agreement. TVA Brief at ¶ 11.0. The Board has noted on numerous previous occasions that Fiser did not voluntarily leave that position, but was forced by the 1994 reorganization to either compete for a new position or be assigned to TVA Services. Additionally, the settlement agreement is silent as to the length of the agreement and Fiser's right to remain in that position.[38]

2.162. TVA then argues that Fiser drafted the position description to his own qualifications, and that he only objected to the creation of the new Chemistry positions once he realized that Harvey would not be transferred to SQN. TVA Brief at ¶ 11.1. TVA cites no evidence in the record to support either of these arguments. Although there is evidence that Fiser provided input into the position description for the PWR Chemistry Program Manager position, there is no evidence that he drafted the position description to his own qualifications. Additionally, Fiser was not the only Chemistry manager who provided input to the Chemistry position descriptions; both Harvey and Chandra also were provided copies of the position descriptions so that they could give their input. Tr. p. 2130, l. 22; p. 2133, l. 8. Finally, Fiser never objected to the *creation* of the new Chemistry positions; he objected to the *posting* of the PWR Chemistry position because of its similarity to the

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[38] It is instructive to compare TVA's interpretation of the 1994 settlement agreement with Reynolds' "unconditional offer" of a PWR Chemistry Program Manager position in 1996. TVA Brief at ¶ 10.2. After HR, on the advice of Labor Relations and OGC, informed Fiser that his settlement agreement provided no protection from the loss of his TVA employment, TVA then attempts to persuade the Board that it was unreasonable for Fiser to reject such an "unconditional offer" of TVA employment. If the settlement agreement did not guarantee Fiser a position for any length of time, it is reasonable for Fiser to conclude that Reynolds' offer would likewise not guarantee him the PWR position for any length of time.

position he held after the 1994 settlement of his DOL complaint, and to the duties he was presently performing.

S. TVA Engaged in Disparate Treatment of Fiser

2.163. TVA argues that the Staff has not demonstrated that Fiser was subject to disparate treatment based upon a comparison of his treatment during the 1996 reorganization with McArthur's treatment during that reorganization. TVA first claims that there is no question that the PWR Chemistry Program Manager position was not interchangeable with the Chemistry and Environmental Protection Program Manager position such that the incumbents would have rights to the new position. TVA Brief at ¶ 12.1. Next, TVA asserts that the evidence shows that no one in management prevailed upon HR to write position descriptions such that posting and competition of those positions would be required. TVA also argues that the fact that Fiser had once held a similar position is irrelevant because he was selected for and issued a new position description in the years since he held the similar position. TVA Brief at ¶ 12.2.

2.164. Additionally, TVA maintains that HR reviewed the RadChem Manager position description and determined that it was "substantially similar" to McArthur's "position description of record" such that McArthur had rights to the position. TVA Brief at ¶ 12.3. Then, TVA asserts that the determination on McArthur was made using the same TVA practice as it used in making the determination on the PWR Chemistry Program Manager position, and the fact that McArthur's position was a senior management position meant that the comparison of management functions was more important than a comparison of technical qualifications. *Id.* After insinuating that Grover would not have been eligible for a waiver because he was not qualified for the RadChem Manager position, TVA asserts that even if the RadChem Manager position should have been advertised, that is not evidence that the PWR position should not have been advertised. Finally, TVA concludes that McArthur's noncompetitive transfer into the RadChem Manager position does not

demonstrate disparate treatment, especially when other Nuclear Operations Support positions were advertised for competition. *Id.*

2.165. Initially, the Board notes that TVA did not cite to a single piece of evidence in the record to support its assertions regarding the lack of disparate treatment. Therefore, although the Board will address these arguments, it will not adopt TVA's proposed findings on this matter because of the lack of evidentiary support.

2.166. TVA argues that the PWR Chemistry Program Manager position was not interchangeable with the Chemistry and Environmental Protection Program Manager position so that the incumbents would have rights to the new position. TVA Brief at ¶ 12.1. Whether or not the positions were interchangeable depends upon what parts of the position descriptions are compared. First, there is ample evidence that the Chemistry and Environmental Protection Program Manager positions were 95 percent chemistry functions. Tr. p. 1750, l. 2; p. 1885, l. 22; p. 2311, l. 13; p. 2841, l. 18; p. 3066, l. 7; p. 5036, l. 19. A comparison of the functions listed in each position reveals that the vast majority of duties were the same in the two positions. *See* Jt. Exhs. 35 and 42. Under TVA policy, one of the areas for comparison should also be the minimum qualifications for the position. Although TVA is correct that the Chemistry positions would not be interchangeable making a comparison of the minimum qualifications, Boyles testified that he did not consider the minimum qualifications when making the determination on the RadChem Manager position, but that he simply relied upon a comparison of the listed job functions. Tr. p. 3930, l. 20. TVA cannot have it both ways. Either a comparison of the job functions is sufficient for making competitive level determinations, and the PWR Chemistry position is interchangeable with the Chemistry and Environmental Protection Program Manager position, or the minimum qualifications must also be compared, and both the PWR Chemistry position and the RadChem Manager position were required to be posted for competition. The fact that TVA applied

a different standard to the PWR Chemistry determination than to the RadChem determination only serves to highlight the disparate treatment of Fiser.

2.167. TVA next claims that no one in management prevailed upon HR to write the PWR Chemistry position description so that posting the position for competition would be required.[39] TVA Brief at ¶ 12.2. To the Board's knowledge, the Staff has never asserted that HR drafted the position descriptions such that they required posting and competition. The Staff has introduced evidence supporting the conclusion that management, including McArthur and McGrath, drafted the position descriptions so that they would be sufficiently different and HR would conclude that the new positions needed to be posted for competition. Boyles testified that TVA's reorganization process could easily be manipulated by management in such a manner. Tr. p. 3831, l. 20. Additionally, Fiser's previous holding of a similar Chemistry position would be relevant, according to McGrath. Tr. p. 482, l. 17 (McGrath's previous experience was that it was permissible to place an employee in a new position if that position was similar to a position they had held and had recently been eliminated.) The prior statements by Boyles also indicate that he considered the fact that McArthur had held a position similar to the RadChem Manager position before as relevant to his determination that McArthur could noncompetitively transfer into the RadChem Manager position. *See* Staff Brief at ¶ 2.217.

2.168. TVA continues to maintain that McArthur's Technical Programs Manager position description is interchangeable with the RadChem Manager position description because the

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[39] TVA also claims that the Staff engaged in a "selective analysis" and disregarded evidence which conflicted with agency conclusions. TVA Brief at fn. 19, *citing Universal Camera Corp. v. NLRB*, 340 U.S. 747 (1951) and *NLRB v. Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983). This is a perplexing argument in light of TVA's repeated disregard in its posthearing brief for conflicting evidence presented at hearing. There is no evidence that the Staff has disregarded conflicting evidence. TVA's argument appears to be that if the Staff disagrees with TVA's version of events, and determines that TVA witnesses lack credibility, then it must be disregarding conflicting evidence. The Board rejects this argument as absurd. The Staff, and this Board, are entitled to consider and reject conflicting evidence as lacking credibility or as rebutted by other evidence in the record. Such a rejection is not a selective analysis, as TVA claims.

positions are "substantially similar." TVA Brief at ¶ 12.3. It is astonishing that TVA continues to cling to this argument in the face of clear testimony and documentary evidence to the contrary. The Staff explained in detail the non-interchangeability of the two positions in paragraphs 3.91 through 3.95 of its Brief. The Board finds the Staff's arguments both persuasive and supported by ample evidence, as even a cursory review of the two position descriptions reveals that they are interchangeable in neither duties nor minimum qualifications. *See* Staff Exhs. 100 and 101. Additionally, TVA's determination that McArthur had rights to the position was not made by following TVA policies interpreting OPM regulations, as Boyles admitted that he used an inaccurate and out-of-date position description and that he did not compare the minimum qualifications of the positions. Tr. p. 3778, l. 16; p. 3930, l. 20. The Board also notes that there is no evidence that a comparison of management functions is more important than a comparison of technical qualifications when making a competitive level determination on a senior management position. To the contrary, a review of TVA personnel policies indicates that senior management positions are subject to the same requirements as technical positions, and that HR has no additional leeway with respect to management positions.

2.169. The Board rejects TVA's attempts to insinuate that Grover would not have been a qualified minority for purposes of a waiver into the RadChem Manager position. A review of the minimum qualifications of the RadChem Manager position indicates that Grover would have met those qualifications, and thus would have been eligible for a waiver under TVA policy. *See* Staff Exh. 101, p. 3.

2.170. Finally, TVA argues that the noncompetitive transfer of McArthur into the RadChem Manager position does not establish that the PWR Chemistry position should not have been posted for competition, or that Fiser was subject to disparate treatment, especially in light of the posting

and competitive selection of other Nuclear Operations Support positions.[40] TVA Brief at ¶ 12.3. TVA missed the relevant point: the fact that different standards were used in making the determination on the RadChem Manager than were applied to the determination on the PWR Chemistry position supports a finding of disparate treatment. Which standard was the appropriate standard to use is irrelevant to the disparate treatment analysis (although relevant to other aspects of the case). The relevant factor is simply that the standards were different, and that TVA asserted no rational or legitimate business explanation for the difference in the standards applied. TVA has also failed to introduce evidence that the other Nuclear Operations Support positions advertised for competition were similarly situated to Fiser, whereas the Staff has introduced sufficient evidence to establish that McArthur was similarly situated. Staff Brief at ¶¶ 2.138-2.152; 3.48-3.58. The Board concludes that the evidence supports a finding that Fiser was subjected to disparate treatment and that this justifies an inference of discrimination.

III. CONCLUSIONS OF LAW

3.1. The parties agree that the Staff has the burden to establish by a preponderance of the evidence that the cited violation of 10 C.F.R. § 50.7 and the civil penalty imposed is consistent with the NRC Enforcement Policy. TVA Brief at ¶ 13.1; Staff Brief at ¶¶ 3.132-3.143. Additionally, both parties encourage the Board to look to federal discrimination law and section 211 case law for guidance in determining the appropriate burdens of proof in establishing a section 50.7 violation.[41] TVA Brief at ¶ 13.2; Staff Brief at ¶¶ 3.14-3.17. The parties also concur that the Board

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[40] For the first time, TVA claims that it is possible that HR made a mistake in deciding not to advertise the RadChem Manager position. TVA Brief at ¶ 12.3. This is yet another example of TVA's failure to provide complete and accurate information as required by 10 C.F.R. § 50.9, since TVA has repeatedly and unequivocally stated that it did not err in transferring McArthur into that position without posting it for competition.

[41] TVA attached a 1994 NRC Report as an exhibit to its Brief to support this argument. TVA Brief at fn. 20, *citing* "Review Team Report, Reassessment of NRC's Program for Protecting Allegers Against Retaliation." As the Board has already noted, the evidentiary record in this (continued...)

should apply the burden-shifting analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and that the Staff retains the ultimate burden of establishing discrimination. TVA Brief at ¶¶ 13.8-13.10; Staff Brief at ¶¶ 3.15-3.17.

3.2. Although the Staff and TVA agree on the broad strokes of the applicable law, there are a few significant disputes between the parties regarding both the state of the law and its application to the facts of this case. TVA asserts that the NRC is prohibited from departing from the burdens set forth by section 211 of the ERA because this would amount to altering the statutory scheme by expanding or changing the available relief under that statute. TVA Brief at ¶ 13.4 (citations omitted). TVA fails to explain how a Board decision in this case could result in an alteration of the statutory scheme set forth in section 211. That statute is concerned with providing a personal remedy to the complainant. The Board's ruling in this case will in no way affect a complainant's ability to seek relief, or the type of relief available to a complainant, since the NRC lacks the authority to provide such relief.[42] *See* Staff Brief at ¶ 3.3.

3.3 TVA argues that there is no evidence of discriminatory intent because McGrath and McArthur lacked knowledge of certain of Fiser's protected activities and were not motivated by a discriminatory intent, as required by the law. TVA Brief at ¶ 14.0, *citing Bartlik v. Tennessee Valley Authority*, 88-ERA-15 (Dec. 6, 1991 and Apr. 7, 1993), *aff'd sub nom Bartlik v. U.S. Department of Labor*, 73 F.3d 100 (6th Cir. 1996). The Staff has introduced sufficient evidence, some of which is not disputed by TVA, to establish that both McArthur and McGrath had knowledge of Fiser's various protected activities. *See* Staff Brief at ¶¶ 2.128-2.133; 3.39-3.46. Evidence that both

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[41](...continued)
proceeding closed on October 24, 2002 and consideration of a document not admitted into evidence deprives the Staff of the opportunity to question witnesses about its relevance. The Board therefore refuses to consider this document in its evaluation of the evidence.

[42] Moreover, section 211 clearly distinguishes between the standard for a violation and the standard for a personal remedy. *See* Staff Brief at ¶¶ 3.20-3.23.

McArthur and McGrath made negative statements about Fiser to his immediate supervisor support the Staff's argument that they acted with a discriminatory motive. Tr. p. 1847, l. 15; p. 1850, l. 12; p. 2215, l. 17. TVA introduced no evidence to rebut this argument, other than the blanket denials of wrongdoing by McArthur and McGrath. The Board has little trouble concluding, based upon the evidence in the record, that the Staff has established both that McArthur and McGrath had knowledge of Fiser's protected activities and that there was a causal nexus between his protected activities and the adverse actions taken against him.

3.4. TVA next focuses upon the issue of temporal proximity between Fiser's protected activities and the adverse actions. TVA cites to the Supreme Court's decision in *Clark County School District v. Breeden*, 532 U.S. 268 (2001) for the proposition that temporal proximity must be very close in order to support and inference of discrimination, and that a three to four month period was insufficient to support such an inference. TVA Brief at ¶ 14.4. However, *Breeden* can be distinguished from this case. The plaintiff in *Breeden* was relying upon temporal proximity *alone* to support her discrimination claim, and the Court concluded that "mere temporal proximity" as evidence of causation must be very close.[43] 532 U.S. at 273. The Court did not address how close in time the adverse action must be to the protected activity in cases where temporal proximity is only one piece of evidence to establish causation. The Staff has provided ample evidence, including the disparate treatment of Fiser, other than temporal proximity to support a finding of discrimination. The temporal proximity between Fiser's adverse actions and protected activities simply serves to bolster that other evidence. The Board therefore rejects TVA's argument that *Breeden* compels a finding that there is no temporal proximity between Fiser's protected activities and the adverse actions taken against him.

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[43] Each of the other cases cited by TVA also address the use of temporal proximity alone to establish causation. Just as *Breeden* is inapposite to this case because the Staff relies upon evidence other than temporal proximity, the Board also concludes that these cases are similarly inapposite.

3.5. TVA also claims that the three year lapse between Fiser's 1993 DOL complaint and the 1996 reorganization which resulted in the adverse actions against him negates any inference of discrimination. TVA Brief at ¶ 14.5. TVA cites to a number of cases in which courts held that the distance in time between the protected activity and the adverse action was too long to support an inference of discrimination and raises doubt as to the motives of the retaliator. *Id., citing Evans v. Washington Public Power Supply Sys.*, 95-ERA-52 (ARB July 30, 1996); *Varnadore v. Oak Ridge National Lab.*, 92-CAA-2, 92-CAA-5, 93-CAA-1 (Sec'y Jan. 26, 1996); and *Dillard v. Tennessee Valley Authority*, 90-ERA-31 (Sec'y July 21, 1994). Yet again, if the Staff was relying upon temporal proximity alone, those cases might support TVA's argument. The Board agrees with those courts that have concluded that "the passage of time is not legally conclusive proof against retaliation." *Robinson v. SEPTA*, 982 F.2d 892, 894 (3d Cir. 1993). Since the Staff has introduced ample evidence to support an inference of discrimination even in the absence of temporal proximity, the Board refuses to conclude that any asserted lack of temporal proximity negates that inference.

3.6. TVA cites *Breeden* for a second time to support its argument that temporal proximity should be measured by the time between the employer's knowledge of the protected activity and the adverse action. TVA Brief at ¶ 14.6. TVA claims that it is not aware of any case law which suspends measurement of time while an alleged discriminating official is not in the plaintiff's chain of command.[44] The Staff cited to three cases which support its argument for a suspension of the

[44] TVA also claims that it strains credibility to believe that McArthur and McGrath patiently waited for the opportunity to retaliate against Fiser and that the courts reject such a "waiting-in-the-weeds" argument." TVA Brief at fn. 21. The Staff has not asserted that McArthur and McGrath patiently waited for the opportunity to retaliate. The Staff argues, quite persuasively, that McArthur and McGrath used the opportunity presented by the 1996 reorganization to eliminate Fiser's position and require him to compete for a position for which McArthur did not select him. The case cited by TVA to support its argument can be distinguished from this case. In *Lalvani v. Cook County, Illinois*, 269 F.3d 785 (7th Cir. 2001), the discriminating official had been the plaintiff's supervisor continuously from the time he became aware of the protected activity until the time of

(continued...)

measurement of time where the alleged discriminating official lacks the opportunity to retaliate against the employee. *See* Staff Brief at ¶¶ 3.60-3.62, *citing Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997); *Bowers v. Bethany Medical Center*, 959 F. Supp. 1385 (D. Kan. 1997); and *Richmond v. Oklahoma Board of Regents*, 1998 U.S. App. LEXIS 26600 (10th Cir. Oct. 20, 1998).

3.7. In this case, McGrath was not in Fiser's chain of command until late 1995, therefore he lacked the authority or ability to take an adverse action until that time.[45] TVA claims that McArthur did have the authority and ability to take an adverse action against Fiser prior to 1996, since McArthur was Fiser's second line supervisor briefly in 1994, and "interacted with an SRB that selected Fiser for the Chemistry and Environmental Protection Program Manager position." TVA Brief at ¶ 14.7. The Board notes that, as Fiser's second line supervisor, McArthur did attempt to influence Grover to have a negative opinion of Fiser. Tr. p. 1850, l. 12. Also, TVA's statement regarding McArthur's alleged interaction with the 1994 SRB is misleading, since McArthur did not serve on the panel that interviewed and ultimately selected Fiser. TVA Exh. 24. Tr. p. 1459, l. 5. He therefore could not have caused Fiser's non-selection for that position. The Board thus concludes that the first legitimate opportunity that McArthur had to retaliate against Fiser was after he was named the RadChem Manager in June 1996.

3.8. The Staff has established both that McArthur and McGrath acted with a discriminatory intent and that there is temporal proximity between their authority to take adverse

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[44](...continued)
the adverse action. Neither McArthur nor McGrath was continuously in Fiser's chain of command from the time of his protected activities until his adverse actions. They therefore had no choice but to wait until they were in his chain of command for the opportunity to take an adverse action against Fiser.

[45] Although McGrath lacked the authority to take such an action himself, the Board notes that there is evidence that McGrath sought to have Fiser removed from his SQN Chemistry Superintendent position after the November 1991 NSRB meeting. *See* Jt. Exh. 27, p. 22-23; Staff Exh. 168; Jt. Exh. 24; and Staff Exh. 177, Exh. 8, p. 2.

actions and the adverse actions themselves. The Board concludes that the Staff has introduced sufficient evidence to demonstrate a causal nexus between Fiser's protected activities and the adverse actions taken against him.

3.9. TVA argues that there was no discriminatory intent in the decisions whether or not to post the Chemistry and RadChem positions. TVA Brief at ¶ 15.5. TVA maintains that "the decision whether to post new jobs was governed by TVA procedures" and that the competitive level determination "is the sole responsibility of the HR organization." *Id.* Although the decision to post new jobs may have been governed by TVA procedures, the evidence is clear that TVA failed to follow those procedures with respect to the PWR Chemistry Program Manager and RadChem Manager positions. *See* Staff Brief at ¶¶ 2.164-2.171; 3.87-3.99. Additionally, even though the competitive level determinations are made by HR, those determinations are made using position descriptions drafted by management and with guidance from management with respect to the breakdown in the duties listed in those position descriptions. Tr. p. 3423, l. 16. As noted already, a manager can easily manipulate this system in order to ensure that a position is required to posted for competition. Tr. p. 3930, l. 20.

3.10. TVA next asserts that there was no discriminatory intent in Fiser's non-selection for the PWR Chemistry Program Manager position. Specifically, TVA claims that Cox was not excluded from the SRB for any discriminatory reasons, and that Peters' statistical analysis of the ratings demonstrates that knowledge of Fiser's protected activities had no effect on the ratings. TVA Brief at ¶ 15.6. TVA ignores the evidence presented by the Staff which indicates that the entire SRB process was weighted against Fiser. *See* Staff Brief at ¶¶ 2.172-2.185; 3.113-3.123. The Staff has also demonstrated that the statistical analysis by Peters, far from proving that Fiser's

protected activities had no effect on the ratings, instead establishes that the makeup of the SRB had a detrimental effect on Fiser.[46] Staff Brief at ¶¶ 3.72-3.75.

3.11. TVA argues that it is entitled to make business decisions and that the Board does "not sit as super personnel departments to pass on the wisdom or fairness of business decisions." TVA Brief at ¶ 15.8 (citations omitted). The Staff agrees that an employer is entitled to make business decisions based upon legitimate, but unwise or unfair reasons, but the Board retains the authority to determine whether those reasons were influenced, even in part, by improper motives. TVA also argues that conducting a RIF in accordance with established procedures is strong evidence that discrimination has not occurred. TVA Brief at ¶ 15.9. However, as noted above, the evidence is clear that TVA did not conduct the 1996 reorganization in accordance with either OPM regulations or its own personnel policies. *See* Staff Brief at ¶¶ 3.87-3.99. Federal courts have held that a decision based upon such a failure to follow internal procedures is relevant and probative evidence of discrimination. *Floyd v. Missouri Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999). *See also Landry v. St. James Parish School Board*, 2000 U.S. Dist. LEXIS 14141, at 25 (E.D.La. Sept. 20, 2000), *aff'd* 260 F.3d 621 (5th Cir. 2001). The Board therefore concludes that TVA's failure to follow procedures, when considered in conjunction with the other evidence of discrimination, supports a finding of pretext.

3.12. TVA also claims that even if an employer's reasons for the adverse actions are not correct, this does not compel a finding of discrimination. TVA Brief at ¶ 15.10, *citing Benzies v. Illinois Department of Mental Health*, 810 F.2d 146 (7th Cir. 1987). TVA asserts that if its articulated reason for the adverse actions against Fiser are not the true reason, the Staff cannot rely upon the evidence that proves its prima facie case of discrimination, but must introduce

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[46] Peters himself testified that he could not state that neither Corey nor Kent considered Fiser's protected activities when they each rated him third during the interviews. Tr. p. 4616, l. 3; p. 4664, l. 25.

additional evidence of discrimination. TVA Brief at ¶ 13.10, *citing Lovas v. Huntington National Bank*, 215 F.3d 1326 (table), 2000 U.S.App. LEXIS 11840 (6th Cir. May 22, 2000); and *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078 (6th Cir. 1994). TVA fails to note that the Supreme Court explicitly rejected this argument in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court specifically held that proof that an employer's articulated reason for the adverse action is false, combined with the evidence of a prima facie case of discrimination, is sufficient to support a finding of discrimination. *Id.*

3.13. TVA also forgets that 10 C.F.R. ¶ 50.9 applies to NRC proceedings. As the Staff discussed in its Brief, an NRC licensee is required to provide complete and accurate information to the NRC, and does not have the option of withholding a reason simply because it might be "unacceptable under a civil service system." Staff Brief at ¶ 3.100; Attachment B. Additionally, TVA has steadfastly maintained that its articulated reasons for the adverse actions are the only reasons it took these actions, and has also maintained that those actions are correct. Therefore, if the Board concludes these reasons are not true or correct, then the only other reason acceptable under NRC regulations is that TVA discriminated against Fiser.

3.14. TVA then argues yet again that Kent's statement about Fiser's DOL activities prior to the SRB interviews was not discrimination. TVA asserts that the Board should reject the Staff's argument that the statement constitutes discrimination *per se* because the effect would be that an off-hand comment would confer knowledge and therefore establish liability.[47] TVA Brief at ¶15.12. Earlier in its Brief, TVA advocated for the Board to adopt section 211 case law, but here seeks the Board to disregard that law because it does not comport with TVA's theory of the case. The Board will not pick and choose the law on that basis. Those cases that adopt a discrimination *per se*

[47] TVA again seeks to introduce a document not in evidence in order to support one of its arguments, quoting from the NRC Millstone Independent Review Team, Report of Review. Because this document is not in the record as evidence, the Board will not consider it.

standard would not establish liability for an off-hand comment, as TVA suggests. Instead, discrimination *per se* is generally limited to comments made during the course of job interviewing and selection, such as an employment reference or discussions prior to a job interview. The key factor in this case is the timing of Kent's statement. If Kent made the same statement one month prior to the interviews, and before the formal selection process had begun, it would not constitute discrimination *per se*. However, the same statement made 30 minutes before Fiser's interview gives the statement a totally different character, and places it squarely in the discrimination *per se* category.

3.15. TVA's final argument amounts to a plea to the Board not to make a finding of discrimination in this case because such a finding would harm the nuclear industry as a whole. TVA claims that a Board decision in favor of the Staff would be based upon what TVA deems to be weak inferences of discrimination, and that such a decision "would allow the agency to unfairly target managers across the nuclear industry, and would have detrimental impacts on the management of NRC-licensed activities." TVA Brief at ¶ 16.1. TVA based this assertion on its interpretation of the evidence as nothing more than "a few isolated and strained inferences," and argues that a finding of discrimination would result in the removal of all subjectivities in the job selection process. TVA Brief at ¶¶ 16.2-16.4. Additionally, TVA claims that a finding of discrimination based on a manager's knowledge of a complainant's protected activities would encourage managers to be ignorant of safety concerns. TVA Brief at ¶ 16.5.

3.16. Although the Board recognizes that its decision in this case will have some effect upon the nuclear industry as a whole, the Board finds TVA's policy arguments in this vein as irrelevant and improper. The Board refuses to ignore relevant and substantial evidence of discrimination simply because it might impact how nuclear managers conduct their business. The Board fails to see how encouraging nuclear managers to conduct personnel processes in a fair and impartial manner would have a detrimental effect upon the nuclear industry. To the contrary,

ensuring that whistleblowers are protected from retaliation for raising concerns promotes nuclear safety. The Board therefore rejects TVA's argument that a finding of discrimination would have a detrimental effect upon the industry.

3.17. The Board likewise rejects TVA's assertion that the inferences in this case are simply "second guessing of normal, reasonable decisions and judgments or based on a reading of nefarious intent into minor human resource process subjectivities." TVA Brief at ¶ 16.1. Although each piece of evidence, viewed in isolation, could be considered as creating only a weak inference of discrimination, the Board must consider the evidence cumulatively, not in isolation. TVA would have the Board believe that it is only a coincidence that every action taken with respect to the 1996 reorganization had a negative impact upon Fiser and a positive impact upon Harvey. The strength of the evidence introduced by the Staff compels the Board to dismiss that argument.

3.18. Each inference of discrimination and the proof of pretext, when viewed in combination, demonstrates a strong case of discrimination against TVA. These inferences include: the disparate treatment of Fiser as compared to McArthur; the temporal proximity between McArthur and McGrath becoming Fiser's supervisors and the adverse actions taken against him; the preselection of Harvey, as evidenced by McGrath blocking Harvey's transfer to SQN and Harvey's telephone conversations with Voeller; TVA's failure to follow its own selection processes; and the SRB process that was weighted against Fiser, as evidenced by the absence of Cox from the SRB and interview questions that deliberately ignored Fiser's area of expertise. In addition to this evidence of discrimination, TVA witnesses have shown an alarming lack of credibility and a willingness to change their testimony from prior statements in order to support TVA's theory of the moment. Taken as a whole, the evidence clearly and unambiguously demonstrates that TVA discriminated against Fiser.

IV. CONCLUSION

4.1 The Board has reviewed the Posthearing Briefs and Response Briefs filed by both parties, and reviewed the evidence cited in those Briefs. Based on the evidence in the record, the Board reaches the following conclusions.

4.2. The Staff has established a prima facie case of discrimination against TVA. Specifically, the Staff has demonstrated that Fiser engaged in protected activities, that the relevant decision makers were aware of those protected activities, that TVA took adverse actions against Fiser, and that there is a causal nexus between Fiser's protected activities and the adverse actions taken against Fiser. This causal nexus is supported by a finding of disparate treatment of Fiser as compared to McArthur, and the temporal proximity between McArthur and McGrath becoming Fiser's supervisors and the adverse actions taken against him.

4.3. TVA articulated a legitimate, nondiscriminatory basis for the adverse actions taken against Fiser by stating that the competitive level determination on the PWR Chemistry Manager position was made in accordance with TVA policy and that Fiser was not selected for that position because he did not perform well during his interview with the SRB.

4.4. The Staff has demonstrated that TVA's articulated basis for the adverse actions taken against Fiser is a pretext for discrimination. This finding of pretext is supported by the preselection of Harvey for the PWR Chemistry Manager position, TVA's failure to follow its own internal selection procedures, as well as OPM requirements, the bias of the selection process against Fiser, and the failure of TVA witnesses to give consistent, credible testimony to support TVA's articulated basis.

4.5. The Staff has met its ultimate burden of proving that discrimination was a contributing factor in the adverse actions taken against Fiser during the 1996 reorganization. Therefore, the Board finds that TVA has committed a violation of 10 C.F.R. § 50.7.

4.6. The Staff has demonstrated, and TVA has not disputed, that the Civil Penalty was established in accordance with the NRC Enforcement Policy, and is an appropriate Civil Penalty for this violation. The Board therefore concludes that TVA must pay a Civil Penalty of $110, 000 for this violation of Commission regulations.

The above findings are respectively submitted by the Staff.

/RA/
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Counsel for NRC Staff

/RA/
Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
This 7th day of March, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO TENNESSEE VALLEY AUTHORITY'S POSTHEARING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 7th day of March, 2003.

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