



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

January 21, 2003

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In the Matter of
TENNESSEE VALLEY AUTHORITY
Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant,
Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, 3
Docket Nos. 50-390-CivP; 50-327-CivP; 50-328-CivP;
50-259-CivP; 50-260-CivP; 50-296-CivP

Dear Administrative Judges:

As noted in my electronic mail message on January 17, 2003, Counsel for the Tennessee Valley Authority informed the Staff of some problems with transcript cites in the "NRC Staff's Findings of Fact and Conclusions of Law Concerning the Tennessee Valley Authority's Violation of 10 CFR 50.7." A review of the transcripts revealed that the electronic version of the June 20, 2002 transcript that the Staff received had different page and line numbers than the official version of the transcript contained in ADAMS. In order to remedy this problem, the Staff has enclosed those pages of its Findings of Fact which contained citation errors caused by this discrepancy. The enclosed pages contain the correct page and line number citations and should be inserted at the appropriate place in the Staff's Findings of Fact. The following corrected pages are enclosed: 34, 35, 36, 67, 111, 112, 113, 131, and 133.

The Staff has also forwarded copies of these corrected pages to all those listed on the Certificate of Service for the Staff's Findings of Fact. I apologize for any inconvenience this may have caused.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer M. Euchner".

Jennifer M. Euchner
Counsel for NRC Staff

cc w/enclosures: Brent Marquand and John Slater
David Repka

Office of the Secretary
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Adjudication

prepared by the NSRB Chairman that is provided to the TVA Board of Directors and detailed minutes that are provided to the Chief Nuclear Officer. Tr. p. 387, l. 22; p. 388, l. 1.

2.100. The SQN NSRB conducted a quarterly meeting on November 20-21, 1991. Jt. Exh. 3. Present at the Chemistry subcommittee meeting were: Tom Peterson, McArthur, and McGrath of the NSRB; Jocher, the Corporate Chemistry Manager; Fiser, at that time near the end of his rotation on Outage Management from his position as SQN Chemistry Superintendent; and Rob Ritchie, a SQN Chemistry Program Manager. Tr. p. 4702, l. 14; p. 4687, l. 2.

2.101. While Fiser was on rotation in Outage Management, the computers used to generate chemistry trend plots were inoperable and the trend plots were not generated for a period of time. Tr. p. 1016, l. 5, 22. When Fiser discovered that the trends were not being generated, he ensured that the computers were quickly fixed and that the generation of the trends was resumed. Tr. p. 1017, l. 1. According to Ritchie, Jocher and the NSRB thought that the Chemistry program was not performing any trending, rather than simply experiencing a technical difficulty. Tr. p. 4720, l. 5. In reality, the SQN Chemistry organization had been trending a large number of parameters and those trends were sent to Operations and other organizations within the plant. Tr. p. 4719, l. 19.

2.102. At the November 1991 NSRB meeting, Peterson demanded that Fiser draft a procedure that would require the Chemistry program to generate all of the trend plots every day, including weekends and holidays. At some point during the meeting, Peterson got up and left and returned with McGrath. Peterson and McGrath again demanded that Fiser draft a procedure requiring the daily generation of trend plots. Tr. p. 1018, l. 14.

2.103. Fiser informed Peterson and McGrath that he could not comply with their demand to institute a procedure requiring daily trending for a number of reasons. First, Fiser explained to them that he was concerned about what would occur if the computer ever broke again. If the trending was required by procedure and the computer broke, then the Chemistry program would

be in violation of the procedure. Tr. p. 1020, l. 1. Second, Fiser told McGrath and Peterson that incorporating the trending into a procedure would require tremendous overtime by the chemistry technicians who performed the trending, overtime for which Fiser did not have approval. Tr. p. 1021, l. 4. Finally, Fiser was concerned about a potential violation of the procedure because SQN had recently had some problems with procedural violations. Tr. p. 1022, l. 21. When a procedural violation occurs, SQN was required to fill out a corrective action document and ultimately inform the regulatory authority of the violation. *Id.*

2.104. Fiser explained to the NSRB that the Chemistry program was generating the trends about which the NSRB was concerned four days per week, and also was trending the data collected over the weekend. Tr. p. 1024, l. 15. He also reassured them that the Chemistry program would continue to generate the trends and provide them to operations and other plant groups, but that he simply could not put the trending into a procedural requirement. Fiser also told them that he would be able to comply with their demand once the CUP had been approved, and requested the NSRB to assist him in getting the CUP approved. Tr. p. 4358, l. 9, p. 2473, l. 3.

2.105. After Fiser explained to McGrath and Peterson why he could not comply with their demand to institute a procedure requiring daily chemistry trending, McGrath left the meeting. Tr. p. 1023, l. 9. According to Ritchie, the NSRB did not listen to what Fiser had to say about the trending. Tr. p. 4721, l. 7. The NSRB never followed up with Fiser regarding the trending issue, and the SQN Chemistry program continued to generate the trend plots. Tr. p. 1023, l. 22. When Kent assumed responsibility for the SQN RadChem organization in early 1993, the Chemistry organization was still generating the trend plots. Tr. p. 3217, l. 11.

2.106. The executive summary of the minutes informs the TVA Board of Directors of what the significant issues at a particular meeting were. Tr. p. 619, l. 19. Both the minutes for the November 20-21, 1991 NSRB meeting and the executive summary provided to the TVA Board of

Directors indicate that trending was a key issue discussed at that meeting. Jt. Exh. 3, p. CC000093. Tr. p. 885, l. 13.

2.107. Fiser, McArthur, and Ritchie each testified that trending was an important issue at the November 1991 NSRB meeting. Tr. p. 1018, l. 1; p. 1400, l. 6; p. 4722, l. 6. McArthur testified that McGrath was upset about the trending issue and other problems with the Chemistry program at SQN. Tr. p. 1409, l. 13. McArthur also testified that McGrath and Peterson had requested that Fiser institute a procedure requiring daily trending. Tr. p. 1400, l. 19. Only McGrath continues to deny that trending was a key issue at that meeting, despite the fact that he included trending among the key issues in the executive summary he drafted for the Board of Directors. Tr. p. 395, l. 7, 21.

2.108. After this NSRB meeting, McGrath told McArthur that Fiser was not effective as the SQN Chemistry Manager and that he should be removed from that position. Jt. Exh. 27, p. 22; Staff Exh. 168. McArthur told the TVA OIG, during its investigation of Fiser's 1993 DOL complaint, that McGrath left that meeting upset, saying that he would discuss Fiser with Beecken, then the SQN plant manager. Jt. Exh. 24, p. 1. McArthur also told the OIG that soon thereafter, Beecken approached him about instituting a swap between Jocher and Fiser which would send Fiser on rotation to Corporate Chemistry. *Id.* McArthur later told Fiser that McGrath had commented after the NSRB meeting that Fiser should be removed from his position as SQN Chemistry Manager. Jt. Exh. 27, p. 23; Staff Exh. 168.⁹

c. Fiser Letter to Senator Sasser

2.109. After Fiser was reduced in force from his SQN Chemistry Manager position in 1993, he collaborated with Jocher and D.R. Matthews, another TVA employee, in drafting a letter to then-

⁹ Additionally, Dan Keuter, then the Vice President of Operations Services, informed the TVA OIG that McGrath was opposed to Fiser being rotated downtown to the Corporate Chemistry Manager position in 1992. Staff Exh. 177, Exh. 8, p. 1.

the NSRB demanded that Fiser institute a procedure to require trending on a daily basis. Tr. p. 400, l. 25; p. 661, l. 12. McGrath is the only person present at the meeting who testified in this manner. The other three witnesses present at that meeting, Fiser, Ritchie, and McArthur, all stated that trending was a significant issue at that NSRB meeting and that members of the NSRB did request that Fiser institute a trending procedure. Tr. p. 1018, l. 1; p. 1400, l. 6; p. 4722, l. 6. Additionally, McArthur testified that McGrath was upset about the trending issue and other problems with the SQN Chemistry program. Tr. p. 1409, l. 13.

2.194. Documentary evidence also supports the conclusion that trending was a key issue at the November 1991 NSRB meeting, and that McGrath was upset with Fiser after this meeting. The minutes for the November 1991 meeting, which were drafted and compiled by McGrath, indicate that trending was a significant issue discussed at that meeting. Jt. Exh 3, p. CC000093. McGrath testified that the executive summary of the NSRB minutes informs the TVA Board of Directors of the significant issues at that meeting. Tr. p. 619, l. 19. The November 1991 executive summary identifies trending as one of the key issues at that meeting. Jt. Exh. 3; Tr. p. 885, l. 13.

2.195. Additionally, McArthur told the TVA OIG during its investigation of Fiser's 1993 complaint that McGrath left the NSRB meeting very upset and went to speak to Beecken, then the SQN Plant Manager. Jt. Exh. 24, p. 1. McArthur also told Fiser, in one of the conversations Fiser recorded, that McGrath left that meeting and stated that they could not have Fiser in the SQN Chemistry Manager position. Jt. Exh. 27, p. 22; Staff Exh. 168.

2.196. Based on the testimony of Fiser, Ritchie, and McArthur, as well as the documentary evidence, the Board concludes that McGrath's testimony that he was not upset about the trending issue at the November 1991 NSRB meeting is not credible. The Board finds that McGrath was upset about Fiser's refusal to implement a trending procedure and that he sought to have Fiser removed from his position as SQN Chemistry Manager as a result of that meeting.

3.69. As part of its case, TVA introduced the hearing testimony and statistical analysis of Dr. Cary Peters, a Program Manager for Performance Management at TVA. Through this testimony, TVA was attempting to demonstrate that Fiser's involvement in protected activities had no impact upon his nonselection for the PWR Chemistry Program Manager position. Peters stated that he conducted an analysis of variance (hereinafter "ANOVA") using the following information provided to him by TVA Counsel: the scores given to each of the candidates by each member of the SRB; the candidates' involvement or lack thereof in protected activities; and the knowledge of the SRB members of the candidates' involvement in such protected activities. Tr. p. 4519, l. 4. TVA Exh. 102, p. FB000008.

3.70. In conducting his ANOVA, Peters started with the hypothesis that knowledge of Fiser's protected activities affected his scores by the SRB in a negative manner. Tr. p. 4520, l. 13. Peters' analysis concluded that knowledge of Fiser's involvement in protected activities did not adversely affect his SRB scores, and found that there was a less than five percent probability that this result was caused by chance. Tr. p. 4543, l. 9. TVA Exh. 102. Specifically, Peters relied heavily upon the fact that Rogers, who lacked knowledge of Fiser's involvement in protected activities, gave Fiser lower scores than either Kent or Corey. Tr. p. 4549, l. 15; p. 4551, l. 15; p. 4572, l. 23. Peters testified that he did not consider any other factors when performing his statistical analysis, including the familiarity of the SRB members with the candidates or the possibility of the championing effect. Tr. p. 4534, l. 11. After conducting this analysis, Peters stated that the results "clearly and strongly indicate the ratings Fiser received were most likely not lower because Corey and Kent knew he was involved in a protected activity" Tr. p. 4578, l. 18. See also TVA Exh. 102, p. FB000009.

3.71. Taken alone, Peters' testimony on direct examination could lead the Board to conclude that Fiser's involvement in protected activities had no effect on the SRB process.

However, a review of Peters' testimony on cross examination by Staff Counsel reveals a number of flaws with his analysis.

3.72. Peters claimed during his direct examination that his statistical analysis demonstrated that Corey and Kent's knowledge of protected activities did not affect Fiser's low scores. However, twice during cross examination, Peters acknowledged that he could not draw a statistical conclusion that either Corey or Kent did not give Fiser the lowest score because of his involvement in protected activities. Tr. p. 4626, l. 4.; p. 4680, l. 2. More specifically, Peters twice admitted that he could not state that knowledge of Fiser's protected activities was not one of the reasons that he received a low score from either Corey or Kent or both. Tr. p. 4629, l. 12; p. 4682, l. 5. Additionally, Peters stated that he did not consider whether or not the scores given to Fiser by Rogers had any effect on the final outcome of the interviews because he did not consider that as relevant to his analysis. Tr. p. 4590, l. 1; p. 4639, l. 2. In other words, Peters completely failed to address the issue of whether Corey and Kent, the two SRB members who knew of Fiser's involvement in protected activities, could have controlled the outcome of the interviews by their scores alone.

3.73. During Peters' testimony, the Board posed a number of questions regarding the effect that familiarity or "championing" of a particular candidate could have had on the SRB scores. Peters initially stated that familiarity could have elevated the ratings given by Corey and Kent to Chandra and Harvey, but that he did not consider that as a factor because he felt it was a peripheral issue. Tr. p. 4539, l. 6. However, Peters later acknowledged that a prior working relationship could be a fairly significant determinant and likely would have an impact upon the scores. Tr. p. 4565, l. 16; p. 4616, l. 16. A review of the scores indicates that it is possible, if not likely, that championing had an effect on the scores Corey gave to Chandra and Kent gave to Harvey. Corey gave Chandra (Candidate B) the highest overall score, and scored him highest on eight of the nine questions asked, and scored him the same as Harvey on the ninth question. See

TVA Exh. 102, p. FB 00016. Kent scored Harvey highest overall, and gave him the highest score on seven of the nine questions, the same as Chandra on one question, and lower than Chandra on one question. *Id.* This would indicate that Kent and Corey may have been subtly influenced by the prior work Harvey and Chandra had performed at their sites.

3.74. Upon questioning as to whether the outcome might have been different had the third member of the SRB been a champion for Fiser rather than Rogers, Peters stated that, even if Fiser had a champion, he would have still had the lowest overall score because of the scores he received from Kent and Corey. Tr. p. 4655, l. 16; p. 4659, l. 20. This testimony completely undercuts Peters' conclusion that knowledge of Fiser's involvement in protected activities did not have an effect upon his SRB interview scores. The same individual who earlier claimed that knowledge of Fiser's involvement in protected activity had no impact upon the outcome of the SRB scores thus later admitted that Fiser could not have received the highest score because *the two people with knowledge of his involvement in protected activities* rated him sufficiently low that even a champion for Fiser could not have altered that result.

3.75. Under these circumstances, the Board finds that Peters' testimony and statistical analysis do little to support TVA's argument that the SRB was impartial and fair. Instead, the Board concludes that Peters' testimony regarding a champion for Fiser indicates that Fiser's involvement in protected activities may have had a negative effect upon the scores he received from Corey and Kent.

3.76. The Board would like to address here one additional point regarding a potential legitimate nondiscriminatory reason for Fiser's nonselection for the PWR Chemistry Program Manager position. Throughout this proceeding, TVA has argued that Fiser was a poor performer during his years as the SQN Chemistry Superintendent. While the Board notes that there is significant evidence to rebut that argument, it will not go into detail as to that evidence because it is not relevant to the issues raised by this proceeding. On three separate occasions, TVA Counsel

that Fiser was not treated any differently from McArthur under TVA policies. This argument is completely unsupported by the evidence in the record, and specifically by the testimony of TVA's own witnesses.

3.111. First, and most importantly, McArthur testified that he had no doubt that he was officially placed in the PG-11 RadCon Manager position as a result of the 1994 reorganization, and that his previous PG-SR Technical Programs Manager position had been abolished. Tr. p. 1450, l. 23; p. 1451, l. 12; p. 1484, l. 10. More damaging to TVA's argument, however, is the testimony of Reynolds and Alex Sewell regarding the official personnel systems at TVA. TVA has argued that McArthur was never officially appointed to the RadCon Manager position because he lacked a position description for that position in his personal history record. Both Reynolds and Sewell testified that the PHR is not the governing personnel system at TVA. Reynolds testified that personnel actions at TVA, such as pay actions, promotions or demotions, are documented in the Human Resources Information System (hereinafter "HRIS"). Tr. p. 3349, l. 1.

3.112. Sewell, a witness called by TVA to explain its personnel systems, confirmed that the HRIS was the official statement of employee actions at TVA. Tr. p. 4483, l. 21. Sewell went on to state that the information contained in the PHR was actually copied from the HRIS and that HR relied upon HRIS for maintaining accurate personnel records. Tr. p. 4486, l. 18. Sewell confirmed that Staff Exhibit 99 was an HRIS printout of employee actions taken with regard to McArthur. Tr. p. 4487, l. 1. When asked what governs if the HRIS system contains a personnel action that has not been documented in the PHR, Sewell stated that the information in the HRIS governs. Tr. p. 4489, l. 5. The HRIS for McArthur indicates that he changed from a PG-SR position to a PG-11 position in 1994, and received a promotion back to a PG-SR position in 1996. Staff Exh. 99. Based on this evidence, the Board concludes that TVA's argument that McArthur was not officially appointed to the RadCon Manager position in 1994 is false, and is evidence of pretext.

demonstrate that the SRB members favored the incumbent who worked at their site. A review of the scores given by Corey and Kent indicate that Corey scored Chandra, who worked most frequently at BFN, the same or higher than both Harvey and Fiser for every question rated. Kent scored Harvey, who worked most frequently at SQN, the same or higher than both Chandra and Fiser for every question rated. See TVA Exh. 102, p. FB000016 (Chandra is designated as Candidate B and Harvey is designated as Candidate A on this document). This indicates, at a minimum, that there may have been a subtle bias by Kent and Corey in favor of the Chemistry manager who worked directly at their sites. This also suggests that Cox's absence worked to the detriment of Fiser. As previously noted, this conclusion is supported by the testimony of TVA's own statistical expert, who testified that even if Fiser had a champion on the SRB, he would have lost because the two people with knowledge of his protected activity rated him third. Tr. p. 4655, l. 16; p. 4659, l. 20.

3.116. In addition, Fiser testified that he was concerned about the absence of Cox from the SRB because of Cox's knowledge of his work at WBN. Tr. p. 2365, l. 4. Members of the SRB have testified that they were unimpressed with Fiser's demeanor during the interview, and stated that he could have expressed himself in a stronger manner. Tr. p. 2941, l. 17; p. 3258, l. 15; p. 5231, l. 3. TVA has attempted to explain this demeanor as Fiser tanking the interview in order to support his DOL complaint. A more logical explanation, in light of Fiser's testimony, is that Fiser was disappointed with Cox's absence and felt that the interview process was stacked against him from the start. See Tr. p. 2365, l. 4; p. 2404, l. 19.

3.117. TVA has also argued that, even if Cox had been available to serve on the SRB, that he would have been excluded because he had preselected Fiser for one of the Chemistry positions. McGrath claimed that when McArthur informed him that Cox had a scheduling conflict, that he also informed him that Cox has indicated a bias toward Fiser for one of the Chemistry positions and for another individual for one of the environmental positions, and that this would have disqualified him