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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Ann Marshall Young

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 ASLBP No. 01-791-01-CivP EA 99-234 June 26, 2003

INITIAL DECISION

Appearances

Maureen H. Dunn, Esq., General Counsel, Thomas F. Fine, Esq., Assistant General Counsel, Brent R. Marquand, Esq., John E. Slater, Esq., Barbara S. Maxwell, Esq., Harriet A. Cooper, Esq., and Edward J. Vigluicci, Esq., Knoxville, Tennessee, and David A. Repka, Esq., and Kathryn M. Sutton, Esq., Washington, D.C., for Tennessee Valley Authority, Licensee

Dennis C. Dambly, Esq., Jennifer M. Euchner, Esq., and Susan S. Chidakel, Esq., for the United States Nuclear Regulatory Commission Staff

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Pending before us is a proceeding in which the Tennessee Valley Authority (TVA or Licensee) is challenging a civil penalty of $110,000 imposed on it by the NRC Staff (Staff). The civil penalty was premised upon an alleged violation by TVA of 10 C.F.R. § 50.7, Employee protection, based on TVA's assertedly having not selected Mr. Gary Fiser, a former TVA employee, to a competitive position in 1996 due, at least in part, to Mr. Fiser's having engaged in protected ("whistle blowing") activities.

For reasons set forth below, the majority of the Licensing Board (Administrative Judges Bechhoefer and Cole) finds that the Staff has demonstrated, by a preponderance of the evidence, that Mr. Fiser's non-selection was motivated to some degree as retaliation for engaging in protected activities--including his having filed two complaints of discrimination before the Department of Labor (DOL) concerning his treatment at TVA for attempting to raise nuclear safety issues (albeit in a manner not conforming to the prescribed internal procedures

for raising such safety concerns), and his contacting (along with two other TVA employees) a U.S. Senator concerning TVA employees raising safety issues. (As we shall explain, copies of the letter to the U.S. Senator were also sent to NRC officials, so as to constitute a whistle-blowing complaint before the NRC.) We therefore conclude that a violation of 10 C.F.R. § 50.7 has occurred and that the civil penalty should be sustained in part.

We are, however, mitigating the amount of the civil penalty imposed. In determining the civil penalty, the Staff properly relied on policies and procedures set forth in the NRC's Enforcement Policy, NUREG-1600, General Statement of Policy and Procedure for NRC Enforcement Actions (Rev. 3), 64 Fed. Reg. 61,142 (Nov. 9, 1999) (see Staff Exh. 170).[1] NUREG-1600 itself provides for mitigation of civil penalties in certain circumstances. See, e.g., 64 Fed. Reg. at 61,144, 61,154-55, 61,156, and 61,157.

Briefly, our reasons for mitigation are as follows. First, TVA had what appeared to it as seemingly significant performance-oriented reasons that apparently played a large part (although not the sole part) in its non-selection of Mr. Fiser for the position he was seeking. As set forth in greater detail below, his non-selection came about in the context of a massive 1996 reorganization in which, because it was changing from a construction mode for several reactors to an operating mode for all of its reactors, TVA was forced to eliminate and/or modify the duties of many--indeed, thousands--of employees. See, e.g., [TVA's] Posthearing Proposed Findings of Fact and Conclusions of Law (Dec. 20, 2002) [hereinafter TVA FOF], ¶¶ 2.12-2.14. Mr. Fiser was one of those employees.

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[1]A list of exhibits entered into evidence, as well as those offered but not accepted into evidence, is attached as Appendix A to this Decision. Exhibits are referenced according to the sponsoring party, i.e., Joint Exh., TVA Exh., and Staff Exh. Some exhibits were admitted in a redacted form, eliminating home addresses, dates of birth, and social security numbers of named employees. Those exhibits are referenced in Appendix A as "redacted."

Additionally, as the Nuclear Energy Institute (NEI) observes in a brief filed amicus curiae (Brief Amicus Curiae of the Nuclear Energy Institute (Mar. 1, 2002) [hereinafter NEI Brief] at 23 & n.14), TVA appears not to have been provided adequate notice (at least at the time of the non-selection of Mr. Fiser in 1996) of NRC's interpretation of 10 C.F.R. § 50.7 as including adverse actions motivated in any part (not necessarily a substantial part) by an employee's engagement in protected activities. Accordingly, although TVA's actions with respect to Mr. Fiser were not entirely appropriate, we are nonetheless reducing the civil penalty imposed by the Staff from $110,000 to $44,000.

A. Procedural Background

On February 7, 2000, the NRC Staff issued to TVA a Notice of Violation and Proposed Imposition of Civil Penalty (NOV) in the amount of $110,000. The NOV was premised upon TVA's non-selection of Mr. Fiser to a competitive position due, in part, to Mr. Fiser's having engaged in "protected activity," as proscribed by 10 C.F.R. § 50.7. See Joint Exh. 47. According to the Staff, Mr. Fiser in 1993 filed a discrimination complaint with the DOL in which he alleged that TVA had discriminated against him, in part for raising nuclear safety concerns related to his activities as Chemistry and Environmental Superintendent at the Sequoyah Nuclear Power Plant. The complaint, inter alia, listed three separate technical activities with respect to which Mr. Fiser claimed discrimination. See Staff Exh. 34, Letter from Gary Fiser to Carol Merchant, DOL (September 23, 1993).

In 1996, Mr. Fiser filed another discrimination complaint with the DOL in which he asserted that TVA's posting of the job he was seeking (incident to a Reduction in Force (RIF)) likewise discriminated against him. See Staff Exh. 37, Letter from Gary Fiser to Carol Merchant, DOL (June 25, 1996). In that letter, Mr. Fiser, inter alia, claimed disparate treatment vis-a-vis at least one other employee who retained his position.

TVA responded to the NOV by letters dated January 22, 2001, and March 9, 2001. In its January 22, 2001 response, TVA denied the violation and protested the proposed civil penalty. It claimed that both the reorganization of TVA in 1996, which eliminated the position of Chemistry and Environmental Protection Program Manager, Operations Support, and the selection of individuals to fill new positions, were made solely for legitimate business reasons and not in any part taken as retaliation for Mr. Fiser's engagement in protected activities. See Letter from Thomas McGrath to Luis Reyes, Region II Administrator (Jan. 22, 2001); Letter from John A. Scalice to Dr. Frank Congel, Office of Enforcement (Mar. 9, 2001). (TVA, although denying the significance of the alleged protected activities, as well as the extent of Mr. Fiser's participation in those activities, concedes that Mr. Fiser's 1993 and 1996 complaints to DOL, as well as a letter he (and two others) wrote to Senator James Sasser, with copies to two NRC officials, were in themselves protected activities (see [TVA's] Prehearing Brief (March 1, 2002) at 11; TVA FOF ¶ 4.4; [TVA's] Reply to the Staff's Findings of Fact and Conclusions of Law (March 7, 2003) at 95 [hereinafter TVA Reply FOF]). TVA deems the protected activities in which it concedes Mr. Fiser engaged–presumably the two DOL complaints and the Sasser letter--to be "insignificant." TVA Reply FOF at 95. The Board hereby rejects that characterization--any employee's participation in a protected activity is in our view a significant matter.

In its supplementary response to the NOV, dated March 9, 2001, TVA referenced comments submitted to the NRC Discrimination Task Force by a former member of NRC's Office of Enforcement (OE), to the effect that NRC has lowered the threshold for taking enforcement action for discrimination. It claimed that NRC's policy fails properly to consider a licensee's position that adverse actions taken against employees were done for "legitimate

business reasons." TVA points to the former OE staff member as being involved in the escalated enforcement action (civil penalty) proposed in this proceeding.[2]

Subsequently, the NRC Staff rejected TVA's explanations and, on May 4, 2001, issued an Order Imposing Civil Monetary Penalty. 66 Fed. Reg. 27,166 (May 16, 2001); see Joint Exh. 53, Letter from William F. Kane to Mr. J. A. Scalice (May 4, 2001). On June 1, 2001, TVA filed a timely appeal and request for an enforcement hearing.[3] On June 26, 2001, this Licensing Board (consisting of Judge Charles Bechhoefer, as Chairman, and Judges Richard F. Cole and Ann Marshall Young, as members) was established to preside over this proceeding. 66 Fed. Reg. 34,961 (July 2, 2001). By Memorandum and Order (Granting Request for Hearing and Scheduling Telephone Prehearing Conference), dated June 28, 2001, this Board granted TVA's hearing request and scheduled the first of what ultimately would be five telephone prehearing conferences. On the same day, June 28, 2001, the Board issued a Notice of Hearing. 66 Fed. Reg. 35,467 (July 5, 2001).

Telephone prehearing conferences were conducted on July 19, 2001, November 14, 2001, January 9, 2002, February 5, 2002, and April 9, 2002.[4] In addition, a telephone status

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[2]At the outset, we note that, absent a demonstration of personal bias, a licensee would have no grounds for raising or challenging the beliefs of regulators (including the members of this Licensing Board). That being so, we must reject TVA's supplemental response irrespective of the accuracy of the allegations. We will, of course, address whether the Staff's enforcement action in this proceeding adequately reflects the allowance for legitimate business reasons as justification in whole or in part for an adverse employment action against an employee.

[3]Letter from Mark J. Burzynski, Manager, Nuclear Licensing, TVA, to Secretary, NRC, titled "TVA–Request for an Enforcement Hearing" (June 1, 2001).

[4]See Prehearing Conference Order (Telephone Conference, 7/19/01), dated August 1, 2001 (unpublished) [hereinafter Aug. 1, 2001 Order]; Second Prehearing Conference Order (Telephone Conference, November 14, 2001), Nov. 28, 2001 (unpublished); Third Prehearing Conference Order (Telephone Conference, January 9, 2002), Jan. 30, 2002) (unpublished) [hereinafter Jan. 30, 2002 Order]; Fourth Prehearing Conference Order (Telephone Conference, February 5, 2002), Feb. 13, 2002 (unpublished); and Fifth Prehearing Conference Order (Confirming Matters Addressed at April 9, 2002 Telephone Conference), Apr. 17, 2002

(continued...)

conference was conducted on July 8, 2002. During those conferences, the Board, inter alia, outlined requirements and established schedules for discovery, for filing of summary disposition motions,[5] for requesting subpoenas, for filing proposed witness and exhibit lists,[6] for filing motions in limine, and for hearing dates. Discovery formally commenced on July 19, 2001 (see Aug. 1, 2001 Order at 2-3), and extended until January 22, 2002 (see Jan 30, 2002 Order). A Notice of Evidentiary Hearing was issued on March 25, 2002, setting forth the initial dates and location for the evidentiary hearing. See 67 Fed. Reg. 15,252 (Mar. 29, 2002).

Evidentiary hearing sessions were held in Chattanooga, Tennessee on April 23, 24, 25, 26, and 30, 2002; May 1, 2, 3, 6, 7, 8, and 9, 2002; June 11, 12, 13, 14, 17, 18, 19, and 20, 2002; and in Rockville, Maryland on September 9, 10, 11, 12, and 13, 2002. The evidentiary record was closed 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), Oct. 24, 2002 (unpublished) [hereinafter Oct. 24, 2002 Order]. As requested by both parties and approved by the Board (see id. at 6-7, but see n.8 infra), proposed findings of fact and conclusions of law were filed simultaneously by both

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[4](...continued)
(unpublished) [hereinafter Apr. 17, 2002 Order].

[5]TVA filed a Motion for Summary Decision on February 1, 2002. The Staff filed its response to TVA's Motion for Summary Decision on February 20, 2002. TVA filed a reply in support of its Motion for Summary Decision on March 1, 2002 (to which the Staff objected). By Memorandum and Order dated March 21, 2002, the Licensing Board permitted the filing of TVA's reply but denied the Motion for Summary Decision. LBP-02-10, 55 NRC 236 (2002). The Board determined that the Staff was relying upon several independent bases for its position and that a genuine dispute of material fact existed, warranting an evidentiary hearing.

[6]TVA and the Staff each filed proposed witness and exhibit lists on March 29, 2002. The Staff filed a supplemental witness list on April 9, 2002. A listing of witnesses who testified in this proceeding appears in Appendix B to this Decision. TVA filed supplemental exhibit lists on April 2, 2002, April 4, 2002, April 18, 2002, May 28, 2002, and August 22, 2002. The NRC Staff filed supplemental exhibit lists on April 15, 2002 and September 6, 2002, and a revised document list on September 9, 2002.

parties on December 20, 2002,[7] and responsive findings and conclusions were filed simultaneously on March 7, 2003.[8]

B. Governing Legal Principles

The civil penalty imposed by the Staff that TVA is challenging is premised on an alleged violation by TVA of 10 C.F.R. § 50.7, Employee protection. That section, inter alia, prohibits NRC licensees, such as TVA, from taking an "adverse action" against an employee, such as Mr. Fiser, based upon his involvement in certain protected activities that include, but are not limited to:

> [§ 50.7(a)(1)] (i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section[9] or possible violations of requirements imposed under either of those statutes;

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[7]NRC Staff's Findings of Fact and Conclusions of Law Concerning [TVA's] Violation of 10 C.F.R. 50.7 (Dec. 20, 2002) [hereinafter Staff FOF]; TVA FOF. Each of these filings was presented in both hard copy and electronic (e-mail) form. Citations in this opinion to those documents will reference the pages and/or paragraph numbers as they appear in the hard copy forms. Further, on January 21, 2003, the Staff refiled certain pages of its proposed findings in order to correct typographic errors in certain transcript citations appearing on those pages.

[8]NRC Staff's Response to [TVA's] Posthearing Proposed Findings of Fact and Conclusions of Law (March 7, 2003) [hereinafter Staff RESP FOF]; TVA REPLY FOF. The Licensing Board initially had scheduled responsive findings to be filed on February 28, 2003, see Oct. 24, 2002 Order at 6, but on February 20, 2003, the Board granted TVA's unopposed motion (see [TVA's] Unopposed Motion for an extension of time (Feb. 20, 2003)) to extend the time for filing of responses for both parties to March 7, 2003. Both parties timely met that deadline.

On March 14, 2003, the NRC Staff forwarded to the Board and parties a copy of an opinion of the United States Court of Appeals for the Sixth Circuit, dated March 6, 2003, which affirmed a Department of Labor ruling on which the Staff had relied both in its Staff FOF and its Staff RESP FOF. TVA v. Sec'y of Labor (Curtis Overall, Intervenor), 59 Fed. Appx. 732, 2003 U.S. App. LEXIS 4166 (6th Cir. Mar. 6, 2003). The Staff advised that it only became aware of this decision after it had filed its Staff RESP FOF on March 7, 2003. Although an unpublished decision, given the fact that TVA, as a party to that proceeding as well as this one, became aware of the Sixth circuit opinion, we hereby accept the Staff's March 14, 2003 filing as a supplement to its Staff RESP FOF.

[9]Those statutes are (1) the Energy Reorganization Act (ERA) of 1974, as amended, and (2) the Atomic Energy Act (AEA) of 1954, as amended.

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employee for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text[;]

(v) Assisting or participating in, or is about to assist or participate in, these activities.

The section goes on to provide remedies for purported violations:

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the [DOL]. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the [DOL]. The [DOL] may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a) . . . of this section by a Commission licensee . . . may be grounds for---

. . . .

(2) Imposition of a civil penalty on the licensee . . . .

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations. . . .

. . . .

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the [DOL] pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

10 C.F.R. § 50.7 (2002). The foregoing protected activities closely parallel those included in Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (Section 211). The remedy sought by the Staff for the purported violation is that authorized by 10 C.F.R. § 50.7(c)(2), calculated in accordance with the NRC's Enforcement Policy, NUREG-1600 (see Staff Exh. 170).

In determining the proper scope and coverage of this provision, as well as its applicability to actions taken (or not taken) by TVA with respect to Mr. Fiser, we are guided by the legal analyses submitted by TVA and the Staff, respectively.[10] In addition, we granted the March 1, 2002 motion of NEI to file a brief in support of TVA's challenge to the civil penalty in this case as amicus curiae.[11] NEI filed its Brief on March 1, 2002.[12] NEI's participation in this proceeding has been limited to legal interpretation; it has not participated in the development of any factual material (although, in its brief, it has assumed that certain facts sought to be established by TVA are in fact true.) We have considered NEI's analyses, as well as TVA's and the Staff's, in reaching our legal conclusions herein.

The parties differ markedly on the appropriate interpretation of the above-cited provisions of 10 C.F.R. § 50.7, particularly as they may impact the NOV and the Order Imposing Civil Monetary Penalty in this proceeding. The Commission itself, in its statement of considerations for 10 C.F.R. § 50.7, indicates that the section incorporates not only authority derived from Section 211 but also requirements stemming from NRC's enforcement authority

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[10]See TVA FOF, passim, particularly ¶ 13.10; TVA Reply FOF, passim, particularly pp. 92-131; Staff FOF ¶¶ 2.6-2.9, 3.1-3.13; Staff RESP FOF ¶¶ 2.1-2.6, 2.27, 3.1-3.18.

[11]See Apr. 17, 2002 Order at 1 (Tr. 203). Transcripts of various prehearing conferences, as well as the evidentiary hearing, are numbered consecutively. The evidentiary hearing commenced on April 23, 2002. Tr. 262.

[12]This brief was filed in both hard copy and electronic (e-mail) form. Citations in this opinion to this brief will reference the hard-copy pages.

under Subsections 161(c) and (o) of the Atomic Energy Act (AEA) of 1954, as amended, 42 U.S.C. §§ 2011 et seq. See Whistle Blower Protection for Employees of NRC-licensed Activities, 58 Fed. Reg. 52,406, 52,410 (Oct. 8, 1993). TVA and NEI, however, portray § 50.7 as constituting-–indeed, as being limited to--NRC's embodiment of Section 211. According to TVA, precedent developed under Section 211 (or its predecessor, Section 210[13]) "is particularly persuasive as to the legal standards applicable in this section 50.7 proceeding." TVA FOF ¶ 13.2. Further, according to TVA, "[w]here, as in Section 211, Congress has entrusted the administration of a remedial scheme to an agency (DOL) for addressing employment discrimination, another federal agency (NRC) has no authority to extend that scheme by providing new remedies or imposing new burdens on the regulated parties." TVA FOF ¶ 13.4.

TVA and NEI claim that the Section 211 standard is to be applied in a uniform manner by the NRC and the DOL. Referencing Supreme Court decisions applying Title VII of the Civil Rights Act of 1964, they assert that the "'comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent' that the scheme not be modified by the addition of new rights or remedies." TVA FOF ¶ 13.4 (citing Northwest Airlines v. Transp. Workers Union, 451 U.S. 77, 93-94 (1981)). They characterize the NRC Staff's enforcement of 10 C.F.R. § 50.7 as departing from the legal standard "mandated by Congress under Section 211." NEI Brief at 2.

For its part, the Staff acknowledges that the standard it is using for determining whether a violation of § 50.7 has taken place differs in some respects from the Section 211 and DOL standards. The Staff standard takes into account not only requirements imposed by Section

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[13]As set forth by the Secretary of Labor, Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992. Zinn v. University of Missouri, Case No. 93-ERA-34 and 93-ERA-36, 1996 DOL Sec. Labor LEXIS 8, at 1 n.1.

211 and DOL regulations and interpretations but also requirements stemming from NRC's enforcement authority under Subsections 161(c) and (o) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 et seq. The Staff observes that the AEA enforcement authority with respect to at least some protected activities was in effect long before the enactment of Section 210 or 211 and was not superseded or limited by the subsequent enactment of those sections. Indeed, during the Congressional debate on Section 210 (which later became Section 211), Senator Hart, Manager of the legislation in the Senate, stated:

> [The] new section 210 . . . is not intended to in any way abridge the [NRC's] current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty . . . .

124 Cong. Rec. S15,318 (daily ed. Sept. 18, 1978). See Staff FOF ¶ 3.3.

Thus, the AEA provided the Commission with authority to take action against a licensee (as in this proceeding) but it did not include a personal remedy for an employee subjected to discrimination. Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 138, 144 (1979). Section 210 (later, Section 211) filled that gap. See Staff FOF ¶ 3.3; but see NEI Brief at 9.

After reviewing the positions of both parties (as well as that of NEI, which parallels TVA's position), we conclude that the DOL interpretations of Section 211 are not statutorily binding upon the NRC but, as pointed out by the Staff, may be taken as guidance only. See Staff FOF ¶ 3.10; NRC Staff's Response to [TVA's] Motion for Summary Decision (Feb. 20, 2002) at 28; see also Tr. 14 (Prehearing Conference, July 19, 2001). Further, as a result of our view of the derivation of the standards for interpreting 10 C.F.R. § 50.7, we reject TVA's claim that the Staff (through its reliance upon standards other than DOL standards) has found discrimination where none in fact exists.

What difference does the use of differing standards have on the proceeding before us? The parties have pointed to essentially two significant differences. First, and most important, in

a dual motive case such as this one (where an adverse action may have been premised both on the employer's legitimate reasons as well as on the employee's protected activities), is the degree to which protected activities must be involved to be deemed a contributing factor in the adverse action.

TVA and NEI assert that the Staff is departing from a statutorily mandated interpretation by permitting discrimination to be considered when it is merely a contributing factor, although not the primary or even a substantial reason, for a discharge or other adverse personnel action. Looked at from another point of view, TVA and NEI decry the NRC's standard for showing that a legitimate reason for a personnel action was not merely a pretext to cover up discriminatory conduct: i.e., that the legitimate reason must constitute the sole basis for the adverse action. TVA would have us adopt the standard under § 211 and DOL regulations to the effect that an adverse action must be directly or substantially premised upon an employee's participation in protected activities to constitute discrimination under 10 C.F.R. § 50.7. Further, TVA and NEI would require the Staff to employ probative evidence, not merely inference drawn from circumstantial evidence, to demonstrate that a legitimate reason for an adverse action was merely a pretext for discrimination. See TVA FOF ¶ 1.11 at 9; NEI Brief at 16.

We conclude that, under the interpretation of 10 C.F.R. § 50.7 as being derived both from the AEA and from Section 211, the principle asserted by TVA and NEI in this instance (see NEI Brief, at 20), stemming from Section 211 alone, to the effect that "[r]elief may not be ordered [to the employee] . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity" (citing 42 U.S.C. § 5851(b)(3)(D)), is not applicable to the threshold issue of whether an employer has violated § 50.7 but only to the follow-on consideration of whether the employee is entitled to some relief. That question is not before us in this proceeding--the NRC Staff is not here seeking to provide any relief to Mr. Fiser for his

alleged discharge. Here, the sole question at issue is whether TVA violated 10 C.F.R. § 50.7 by basing to any degree its failure to retain Mr. Fiser as an employee on his involvement in one or more protected activities.

Construction of 10 C.F.R. § 50.7, to prohibit any discriminatory conduct, even though not necessarily a substantial part of a reason for an adverse personnel action, is consistent with NRC's traditional manner of construing its enforcement authority. Under NUREG-1600, the NRC enforcement policy in effect at the time of issuance of the NOV in this proceeding (64 Fed. Reg. at 61,164-65; see Staff Exh. 170), violations of 10 C.F.R. § 50.7 are categorized into four severity levels. The higher the severity level, the more severe the penalty.

Thus, under Supplement VII–Miscellaneous Matters, where violations of 10 C.F.R. § 50.7 are grouped, Severity Level I (the most serious) includes "[a]ction by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee." Id. at 61,164. Severity Level II includes "[a]n action by plant management or mid-level management in violation of 10 CFR 50.7 or similar regulations against an employee." Id. at 61,165. (Severity Level II also includes "[t]he failure of licensee management to take effective action in correcting a hostile work environment." Id.) Severity Level III includes "[a]n action by first-line supervision or other low-level management in violation of 10 CFR 50.7 or similar regulations against an employee." Id. And, finally, Severity Level IV includes "[d]iscrimination cases which, in themselves, do not warrant a Severity Level III categorization." Id.

What is significant is that any instances of discrimination are condemned, no matter how minor or serious. TVA's statement that the "protected activities in which [Mr. Fiser] did engage were insignificant" (TVA Reply FOF at 95) is thus inconsistent with the requirements of 10 C.F.R. § 50.7 and must be rejected. The seriousness of the violation is to be taken into account only in the penalty assessed.

In that connection, as further explained under Part F of this Decision ("Civil Penalty"), differing base-level penalties are set forth in NUREG-1600 for each severity level, with the NRC afforded discretion to escalate or mitigate the prescribed penalties, as appropriate. Freeing an employer from liability for discrimination if it can demonstrate that it would have taken the same discharge action for legitimate, nondiscriminatory reasons, as permitted under Section 211 and as sought by TVA, is thus inconsistent with NRC's traditional manner of enforcing its own AEA regulations. We accordingly reject that approach. If discrimination is established, the NRC is entitled to impose some sort of remedy, irrespective of any benefits or lack thereof provided to an employee.

The other significant manner in which § 211 standards differ from those under § 50.7 (at least insofar as is pertinent to this proceeding) is in the use of temporal proximity as a basis for an adverse action. TVA and NEI claim that the Staff has exaggerated the importance of temporal proximity to support a finding of discrimination, so that the sufficiency of its evidence does not meet the preponderance of the evidence standard. In that regard, TVA and NEI (by inference) refer to a statement in the February 7, 2000 letter transmitting the Order Imposing Civil Monetary Penalty to TVA that mentions the "temporal proximity between the appointment of [McGrath and McArthur] as Fiser's supervisors and his non-selection in July 1996" as evidence of discrimination. See Joint Exh. 47; February 7, 2000 Letter from NRC to TVA at 3. TVA claims that temporal proximity may only be judged with respect to the time between the protected activity and the non-selection (more than 3 years, assuming the 1993 DOL complaint constitutes the protected activity); that the time would not be suspended during periods when Mr. Fiser had different non-discriminatory supervisors; and, in any event, that temporal

proximity is applicable only when the two events (protected activity and adverse action) are separated by no more than a month or two. TVA FOF ¶¶ 14.5, 14.6; NEI Brief at 16-18.[14]

For its part, the Staff argues that it is not primarily relying on temporal proximity to prove its claims of discrimination, that temporal proximity is not mentioned in the NOV or Civil Penalty Order as a basis for discrimination, and that its mention of temporal proximity in the February 7, 2000 transmittal letter only serves to establish that the discharge action bore some relationship to Mr. Fiser's filing of the DOL complaints and to the appointments of Dr. McArthur and Mr. McGrath as his supervisors. See Staff FOF ¶¶ 2.153-2.155. The Staff adds that "[t]he letter is merely a cover letter transmitting the NOV and proposed Civil Penalty to TVA, and is not part of the NOV." Staff RESP FOF ¶ 2.7. We agree and, accordingly, reject TVA's attempt (TVA FOF ¶ 14.6) to incorporate the cover-letter comments as part of the NOV.

Further, as we held earlier, the cases which require only a short term (one or two months, according to TVA[15]) to establish temporal proximity do so when temporal proximity is the sole basis for the alleged claim of discrimination--clearly not the case here. Indeed, even if the Staff may be deemed to be relying here on temporal proximity, the Staff is relying on several other independent bases to prove discrimination.. See Memorandum and Order (Denying Motion for Summary Disposition), LBP-02-10, 55 NRC 236, 241-42 (2002). And, to reiterate, temporal proximity was used by the Staff only in a contextual sense, to demonstrate that the non-selection was premised to some degree on Mr. Fiser's filing of the DOL complaints

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[14]NEI states that the temporal-proximity reference appears in the NOV, but it then quotes from the transmittal letter. See NEI Brief at 16: "The NOV states that the 'temporal proximity . . ." (citing NOV at 3). The referenced statement does not appear in the NOV but, rather, the cover letter transmitting the NOV. See Joint Exh. 47 (cf. cover letter at 3, with attached NOV.) As the Staff observes, "[t]he issues relevant to this proceeding are those raised in the NOV itself, not those raised in a [cover] letter by the Staff." Staff RESP FOF ¶ 2.7.

[15]See TVA FOF ¶¶ 14.4-14.8.

and the appointments of Mr. McGrath and Dr. McArthur as Mr. Fiser's supervisors. The DOL itself has approved use of temporal proximity in the same context as may have been used by the Staff here. See Zinn v. Univ. of Missouri, 1996 DOL Sec. Labor LEXIS 8 (1996), at 3, 4.[16]

TVA and NEI go on to describe the process in a discrimination complaint in the following way (as to which the Staff does not seem to disagree):

> Once the employee has made out a prima facie case and the employer has articulated legitimate non-discriminatory reasons for its employment decision, the ultimate burden rests with the employee (here the NRC Staff) to prove by a preponderance of the evidence that the employer's proffered reasons were pretextual and that discrimination was a contributing factor in that decision.

NEI Brief at 4; see also TVA FOF ¶ 13.09; Staff FOF ¶ 3.17. Thus, as pointed out in a special Commission-sponsored "Report of Review, Millstone Units 1, 2, and 3," prepared by the Millstone Independent Review Team [MIRT], United States Nuclear Regulatory Commission, dated March 12, 1999 [hereinafter "MIRT Report"], there are four elements for review in discrimination cases:

1. Did the employee engage in protected activity?

2. Was the employer aware of the protected activity?

3. Was an adverse action taken against the employee?

4. Was the adverse action taken because of the protected activity? Id. at 3-4.

In sum, we conclude that the Staff may properly interpret 10 C.F.R. § 50.7 as including any degree of discrimination for protected activities and as permitting consideration of whether an employee's engagement in protected activities in any degree contributed toward an adverse

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[16]The Staff's use of temporal proximity in this proceeding is comparable to the Secretary of Labor's use of that factor in Zinn v. Univ. of Missouri, supra. As the Secretary of Labor observed, "[t]he ALJ also properly concluded that the temporal proximity between Zinn's protected activity, beginning in August 1992 and continuing through the time of the University's refusal in February 1993 to initiate formal consideration of Zinn for promotion . . ., which is the adverse action at issue here, was adequate to support an inference of a causal link between the protected activity and the University's adverse action." 1996 DOL Sec. Labor LEXIS 8 at 10.

personnel action, even though not the primary or even a substantial basis for the action. We proceed now to the facts developed in this proceeding, to determine whether the Staff has demonstrated that, at least in part, Mr. Fiser was not selected for a continuing position with TVA because of he engaged in protected activities. In that connection, however, TVA does not even attempt to show that Mr. Fiser's protected activities did not play a significant role in his non-selection but, rather, denies that Mr. Fiser's engagement in protected activities played any part in its decision not to retain Mr. Fiser as its employee.

C. Findings Of Fact

1. Employment History. Mr. Gary Fiser first was employed by TVA in September, 1987, as a corporate chemistry program manager, following service from 1973-87 in various advancing positions in the chemistry department at Arkansas Nuclear One. Tr. 989-91 (Fiser); see TVA Exh. 24 at HH000030–HH000031. In approximately April, 1988, he assumed duties as a Chemistry Superintendent at TVA's Sequoyah Nuclear Plant. Tr. 991-93 (Fiser); see TVA Exh. 24 at HH000030. During this service, the title of the position was changed to Chemistry and Environmental Superintendent. Tr. 1005 (Fiser); see Joint. Exh. 31, Staff Exh. 44. Mr. Fiser's initial supervisor in this position was Mr. Ron Fortenberry. Tr. 992 (Fiser). Shortly thereafter, Mr. Fortenberry was replaced as Mr. Fiser's supervisor by Mr. Steve Smith, the Sequoyah Plant Manager. Tr. 993 (Fiser). Under both titles of the position, beginning in 1989, Mr. Fiser's supervisor was Mr. Bill Lagergren, Operations Manager at Sequoyah. Tr. 999-1000, 1006 (Fiser).

On January 6, 1989, Mr. Fiser received a performance evaluation with respect to his position as Sequoyah Chemistry Superintendent. See Joint Exh. 30. The evaluation was signed by Mr. Steve J. Smith, the Sequoyah Plant Manager, and rated Mr. Fiser's overall performance as "adequate." In most areas, Mr. Fiser was rated as "adequate," although in several he was rated as a "solid" performer (one step higher than "adequate") With respect to

his strengths, the report stated that Mr. Fiser "has a strong technical understanding of the chemistry area; additionally he has considerable experience in this area." Joint Exh. 30, at Section 4. With respect to areas of needed improvement, Mr. Smith commented that "Mr. Fiser must become more aggressive in the performance of his duties." Id. Mr. Fiser disagreed with this evaluation because, in his view, it had been based upon a poor evaluation by INPO that had been largely completed prior to Mr. Fiser's becoming Sequoyah Chemistry Superintendent. Tr. 2438 (Fiser).

Mr. Fiser's next performance appraisal was signed by Mr. Bill Lagergren on September 18, 1989. He commented that "Mr. Fiser's performance for FY88 was adequate and improved to solid performance through the first three quarters of FY89." See Joint Exh. 31. The evaluation noted continuing "weaknesses in aggressiveness and communication skills." Id. It added that "[f]ollowing specific discussions and coaching in these areas, I have noted improvements, although not to the degree I would have expected." Id.

Mr. Fiser's appraisal for the Fiscal Year ending September 30, 1990, was also signed by Mr. Lagergren, on November 7, 1990. See Staff Exh. 44. He was rated "high" in all areas. Id. at 3, 3a. The appraisal stated that "Gary's management performance has been very good. He can succeed into a corporate chemistry management position. Would need to gain detailed systems knowledge to go further at plant but has the ability to do so." Id. at 1.

In April or May, 1991, Mr. Fiser was rotated to the position of Outage Manager for Unit 1, Cycle 5, and Unit 2, Cycle 5. See Staff Exh. 45; Tr. 2272-73 (Fiser). He claims that, in that position, he retained no further responsibilities with respect to Chemistry and Environmental Superintendent. Tr. 1008, 2275 (Fiser).

Mr. Fiser's appraisal for FY 1991, signed by Mr. Lagergren on September 30, 1991, covered both Mr. Fiser's service as Chemistry and Environmental Superintendent and his service as Outage Manager. See Joint Exh. 32. He was rated highly with respect to chemistry

duties: “Very organized and has potential to perform at a higher management level than Chemistry Superintendent. Will rotate to Outage Manager position for U1C5 and U2C5 outages to observe leadership skills outside of his area of expertise.” Id. at 1. With respect to Outage Management, however, the appraisal included a caveat: “Is having difficulty operating independently outside the chemistry area. Is not using the authority of his position as an Outage Manager effectively. Will be given feedback and performance will be monitored during the outage.” Id.

In January 1992, Mr. Fiser returned to his position as Sequoyah Chemistry and Environmental Superintendent, under a new supervisor, Mr. Pat Lydon. Tr. 1015, 2273 (Fiser). According to Mr. Fiser, during his absence in outage management from the Spring of 1991 to January 1992, several problems had arisen in the chemistry program. His rotation to outage management was cut short (covering only one of the two outages that he had been expected to manage, that of Unit 1, Cycle 5) when he was called back to chemistry by Mr. Lagergren to help resolve some of the problems that had arisen in his absence, as to which inquiries had been made by the Nuclear Safety Review Board (NSRB).[17] Tr. 1015, 1017 (Fiser); Joint Exh. 27 at 2. Apparently the NSRB had been advised by Bill Jocher, the corporate chemistry manager, that the chemistry group at Sequoyah was “out of control.” Tr. 2591 (Fiser). The problems facing the chemistry group at that time included an alleged failure to generate many of the chemistry trending plots. Tr. 1015-16 (Fiser),

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[17]In accord with the facilities’ technical specifications, TVA has established separate NSRBs for its three operating facilities, Browns Ferry, Sequoyah, and Watts Bar. Their primary function is the safety oversight of the plants’ operations. Tr. 385, 386 (McGrath). The NSRB for each facility typically meets quarterly for two days, with a briefing by plant managers on emerging issues and subcommittee meetings on the first day, and a full board meeting with discussion of action items on the second day. Tr. 387-89 (McGrath). Mr. McGrath served as Chairman of the NSRBs for all three facilities, beginning in 1989 and ending in 1997. Tr. 376, 379, 380 (McGrath). Mr. McGrath served in several positions at the same time he was NSRB manager, except that in 1995 (through 1997) his sole position was as NSRB manager. Tr. 381 (McGrath).

From March 1992 to November 1992, Mr. Fiser was rotated from his position as Chemistry and Environmental Superintendent at Sequoyah to the position of Acting Corporate Chemistry Manager, in the corporate office at TVA headquarters. Tr. 2273-74 (Fiser). This rotation was intended to last for a year (Tr. 1028 (Fiser); see Joint Exh. 43), after which Mr. Fiser was supposed to return to Sequoyah (Tr. 1032 (Fiser)).

The Staff asserts that the NSRB Manager, Mr. Thomas McGrath, recommended to the Sequoyah plant management that Mr. Fiser should be removed from Sequoyah. See Staff RESP FOF ¶ 2.88. Mr. McGrath denies that claim. Tr. 918-19 (McGrath). However, evidence contained in tape-recorded conversations as corroborated by the statement by Dr. McArthur to the TVA OIG that Mr. McGrath wanted Mr. Fiser removed from his Sequoyah Chemistry Superintendent position is more credible than Mr. McGrath's categorical denial. See Joint Exh. 27; Staff Exh. 168; Joint Exh. 24. As the Staff points out, "[i]t is unlikely that McGrath would admit to something which evidences discriminatory intent on his part when he is accused of discrimination." Staff RESP FOF ¶ 2.88. The Board hereby finds that Mr. Fiser's removal from Sequoyah Chemistry in 1992 was motivated at least in part by Mr. McGrath's objections.

At the time of Mr. Fiser's rotation to the corporate chemistry department, the corporate chemistry manager (Bill Jocher) was rotated to Sequoyah. Tr. 1025, 2630 (Fiser). In his corporate chemistry assignment, Mr. Fiser's supervisor was Dr. Wilson C. McArthur. Tr. 1025,1039 (Fiser); Tr. 1414 (McArthur); Joint Exh. 33.

Mr. Fiser was not uniformly successful in performing his corporate chemistry assignment. His employee appraisal for the fiscal year ending September 30, 1992 (Joint Exh. 33), executed by Dr. McArthur and approved by Dan R. Keuter, the "next higher manager," reached an overall rating of "adequate" (out of a possible high or low for each activity) and indicated many substantial accomplishments, both in his service at Sequoyah and in his subsequent service (beginning in March, 1992) as corporate chemistry manager. Among other

matters, with respect to Sequoyah the appraisal states that "[t]here have been no Chemistry related findings by INPO [Institute of Nuclear Power Operations] for SQN. THIS IS A RECORD FOR SQN." Joint Exh. 33 at 1 (capitals in original). There is also one seemingly negative comment, pertaining to Mr. Fiser's service as corporate chemistry manager:

> Gary has attempted to manage the Chemistry Group under the cloud of the previous manager's strong influence. This has been a difficult task. Efforts to bring this group into full cooperation has been slow and the technical leadership needs attention. This has been a difficult experience by an individual that has performed well in some other efforts (U1C5 Outage Management Team at SQN).

Id. at 2.

Furthermore, at approximately the same time as that appraisal (September 4, 1992), Dr. McArthur was advised by Dan Keuter that, notwithstanding Dr. McArthur's high rating of Mr. Fiser's performance, Mr. Fiser was to get no pay enhancement for the forthcoming fiscal year. Tr. 1042 (Fiser).[18] Mr. Fiser explained that he had been told by Dr. McArthur that Dan Keuter was blaming Mr. Fiser for all the various chemistry problems that had arisen at Sequoyah. Tr. 1048 (Fiser). On November 16, 1992, Mr. Fiser learned from Dr. McArthur that Rob Beecken, Sequoyah Plant Manager, and Jack Wilson, Sequoyah Vice-President, did not want Mr. Fiser to return to Sequoyah. Tr. 1091, 2617 (Fiser); Joint Exh. 27 at 6.[19]

Effective November 23, 1992, Mr. Fiser was demoted from Acting Corporate Chemistry Manager to a position of Acting Program Manager in the Corporate Chemistry organization. Tr. 1420 (McArthur); Tr. 1096, 2274 (Fiser); Staff Exh. 90. Mr. Fiser was first advised of this demotion in early November, 1992, by his then-supervisor, Dr. McArthur. Tr. 1047 (Fiser).

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[18]Dr. McArthur explained that TVA had annual increases of small amounts (2 or 3%) plus annual pay increases or bonuses tied to performance, paid in addition to the small annual increase. Tr. 1417-18 (McArthur). It was the pay increases or bonuses that Mr. Keuter is said to have wished to deny to Mr. Fiser.

[19]Mr. Fiser was so advised by Mr. Wilson on November 21, 1992 and by Mr. Beecken on December 9, 1992. See Tr. 1092 (Fiser).

According to Mr. Fiser, the demotion was directed by Joe Bynum, then a Vice President in the nuclear power organization. Tr. 1047 (Fiser).

In April, 1993, shortly after his demotion to program manager in the corporate chemistry organization, Mr. Fiser received a "surplus" notice (i.e., a predecessor to a Reduction in Force (RIF) notice), from the position of Sequoyah Chemistry and Environmental Superintendent, transferring him to the employee transition program, where employees facing "surplus" notices were transferred so that they could seek other employment at TVA or elsewhere. Tr. 1097, 1100 (Fiser); see Joint Exh. 59. While in the employee transition program in July 1993, Mr. Fiser interviewed for several jobs at TVA, including the Sequoyah chemistry manager position that he had occupied previously. Tr. 1102-04 (Fiser). During this period, Dr. McArthur offered to help Mr. Fiser secure a position at TVA and elsewhere, and for that reason was considered an ally by Mr. Fiser. Tr. 1120-21 (Fiser).

Mr. Fiser claims that he was offered the Sequoyah chemistry manager position in July, 1993 by Charles Kent and Ken Powers but that the offer was withdrawn shortly thereafter after Charles Kent discussed the matter with Dr. McArthur (who discussed it with Joe Bynum and Dan Keuter[20]). Tr. 1105-09, 1111, 2342-43, 2346 (Fiser). Mr. Fiser recalled that he was informed by personnel in the employee transition program that the Sequoyah chemistry job was "blocked at the highest level." Tr. 1112 (Fiser). According to Mr. Fiser, although he previously had viewed Dr. McArthur as an "ally," he lost confidence in Dr. McArthur when he became aware that Dr. McArthur had "torpedoed" the Sequoyah Chemistry offer, telling Charles Kent that corporate management did not think highly of Mr. Fiser's managerial skills and past performance. Tr. 2342-47 (Fiser). As stated by Mr. Fiser, "this man [Dr. McArthur] can look you right in the face and tell you one thing, and do another." Tr. 2347 (Fiser).

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[20]Mr. Fiser claimed that both Joe Bynum and Dan Keuter had previously been involved in his removal from Sequoyah Chemistry.

The Licensing Board here notes its agreement with the characterization, as the Staff observes, that "McArthur would tell an employee one thing, and then do the opposite behind his back." Staff FOF ¶ 2.199. We find that the conflict between Dr. McArthur's early position as an "ally" of Mr. Fiser (including his offer to help Mr. Fiser seek alternate TVA employment) and his later action preventing Mr. Fiser from being hired as Sequoyah Chemistry Manager while in the employee transition program adversely affects Dr. McArthur's credibility as a witness. (See also infra, pp. 27-28.)

Several months later, when he had not found another TVA job, Mr. Fiser received a notice RIFing him from the Sequoyah Chemistry position. See Joint Exh. 60. Mr. Fiser was not then occupying that position, however, nor did he return to it thereafter. Tr. 2274 (Fiser). (In fact, following his service in outage management, Mr. Fiser only served as Sequoyah Chemistry and Environmental Superintendent for a few weeks, in January-February, 1992 (id.).) In view of these circumstances, and as part of the settlement of Mr. Fiser's 1993 DOL complaint (see infra, pp. 26-27), the "surplus" and "RIF" notices were subsequently withdrawn. Tr. 3357, 3359, 3363 (Reynolds); see Staff Exh. 110 at 3.

On August 16, 1993, Mr. Fiser and two other TVA employees (Mr. W. F. Jocher and Dr. D. R. Matthews) jointly wrote a letter to U.S. Senator James Sasser of Tennessee, stating that there was a "repressive management structure" within TVA's nuclear power agency that, in fact, made senior managers "fearful of using the corrective action process." See Staff Exh. 29 at 1 (CB000130). The letter went on to state that adherence to an "unwritten rule, 'don't report or document safety related problems, especially those requiring capital dollars to fix', ensures longevity at TVA." Id. It further documents that Mr. Jocher, a manager with 28 years in the industry, had been coerced to resign; that Mr. Fiser had been demoted and surplused after 20 years in the industry; and that Dr. Matthews, an employee at Watts Bar, had been demoted after 20 years in the industry. Id. The letter provides examples of asserted safety-related

problems that each of the three employees had been attempting to correct. The letter advises that Mr. Jocher and Dr. Matthews had each filed DOL complaints concerning TVA's handling of safety questions and that Mr. Fiser was planning to do so in the near future.[21] Copies of this letter were forwarded to NRC officials. Staff Exh. 29 at 7 (CB000136).

In our view, this letter in itself constitutes another "protected activity" in which Mr. Fiser participated. See 10 C.F.R. §§ 50.7(a)(1)(i) and (iv).[22] TVA and the Staff do not dispute this characterization (TVA FOF ¶ 17.2; TVA Reply FOF at 95; Staff Resp. FOF ¶¶ 2.76–2.77) and we so hold.

Some of the problems that were assertedly identified or raised by Mr. Fiser, and included in the letter to Sen. Sasser, were (1) "PASS equipment availability and design problems which limit use of the equipment and contribute to job knowledge problems in this area" (Staff Exh. 29 at 4 (CB000133); (2) problems with the emergency diesel generator seven-day storage tank; (3) a recirculation system that rendered the emergency diesel generator "inoperable" and placed both units at Sequoyah on a Limited Condition of Operation (LCO) (id); (4) process chemistry equipment availability being unacceptably low (many times 50% or less); (5) money budgeted to implement a comprehensive raw cooling water treatment program to preclude corrosion and biological fouling of safety related equipment was "cut from the budget year after year" (id); and (6) the inability of chemistry technicians to draw a reactor coolant

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[21]Mr. Fiser's DOL complaint, referenced earlier in this Decision at p. 3, was filed on September 23, 1993. See Staff Exh. 34.

[22]TVA criticizes the Staff for relying on the Sasser letter during the hearing, when it had not been referenced in Mr. Fiser's 1993 or 1996 DOL complaints (Staff Exhs. 34 and 37), or in the September 1999 letter notifying TVA of an apparent violation (Joint Exh. 47), or listed as a protected activity in the September 2001 responses to TVA's first set of interrogatories (TVA Exh. 113 at 1-4). TVA noted that the Sasser letter was first described as a protected activity in a January 24, 2002 response to TVA interrogatories. See TVA FOF ¶ 4.30. Prior to the evidentiary hearing, therefore, TVA had notice of the Staff's reliance on the Sasser letter.

sample from PASS during an accident in under three hours, for the purpose of assessing reactor vessel and fuel conditions.[23]

The letter also stated, with respect to problems on which Mr. Jocher had been working, that he "identified to NSRB a material false statement made to NRC." Staff Exh. 29 at 3 (CB000132). The letter further states that "[a]dditional material false statements may have recently been made by TVA in response to Mr. Jocher's allegation." Id.

Mr. McGrath, who was then NSRB Chairman, testified in this proceeding that he never knew about the "material false statement" allegation. "[N]o one ever brought an issue up to NSRB about TVA having made a material false statement." Tr. 416 (McGrath). He added that that would have been a "big issue." He also testified that he was unaware of the Sasser letter until the discovery phase of this proceeding (in November, 2001). Tr. 415-417 (McGrath). The Licensing Board believes that Mr. McGrath's testimony in this regard, particularly with respect to the advice the NSRB is said to have received concerning a material false statement, along with his denial of contacting management at Sequoyah seeking Mr. Fiser's removal following the trending incident (see supra, pp. 20), reflects adversely on his credibility.

On September 23, 1993, Mr. Fiser filed a complaint with the DOL regarding his RIF and termination notice from TVA. See Staff Exh. 34. As part of this complaint, Mr. Fiser identified a number of safety concerns (some of which had also been included in the letter to Sen. Sasser) where, according to Mr. Fiser, TVA management took steps to interfere with their proper resolution.

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[23]The letter indicated that the Sequoyah Site Vice President, Mr. Jack L. Wilson, sought a more flexible time limit but that the 3-hour limit was set forth in then-current NRC Regulatory Guide 0737 and was supported by representatives of NRC's Office of Nuclear Reactor Regulation (NRR). The Board hereby notes that Regulatory Guides are not regulations but provide guidance as to practices that will be deemed acceptable to the NRC Staff.

Specifically, Mr. Fiser in his 1993 DOL complaint (1) set forth, in detail, a problem that had occurred with respect to radiation monitor set points, asserting that Rob Beecken, then Sequoyah Plant Manager, was angry with him because the problem with the radiation monitor set points had been reported and documented through a Significant Corrective Action Report (SCAR) (id. at AJ000135); (2) identified the filter change-out scenario as one where TVA management (in particular, Mr. Beecken) had problems because of its occurrence and documentation; (3) identified a dispute over NRC's three-hour requirement for conducting PASS analyses; and (4) claimed that in July 1993, while he was in the employee transition program, he had been offered the job of Chemistry Manager at Sequoyah by Charles Kent, Sequoyah RadChem Manager, but that this offer fell through after protests by TVA upper management. Further, in his 1993 DOL complaint, Mr. Fiser noted that the Chemistry Manager position from which he had been surplused had not actually been eliminated but had simply been recreated with a different title. See Staff Exh. 34 at AJ000135. Mr. Fiser also stated that the Sequoyah RadChem Manager, Charles Kent, offered him the Chemistry Manager position in July 1993, but that this offer was later withdrawn because he had a "target" on his back. Id. at AJ000138.

In support of his1993 DOL complaint, Mr. Fiser had tape-recorded--"surreptitiously," according to TVA (see TVA FOF at 32, n.10)--a number of conversations with his co-workers, including supervisors. See Staff Exhs. 168, 169, 178, 179; TVA Exh. 148. These tape recordings commenced in about November, 1992, and were undertaken by Mr. Fiser because he "began to suspect something was awry." Tr. 1050 (Fiser). He later would transcribe some of the recorded conversations, preparing a document entitled "Sequence of Events" (see Joint Exh. 27) that was based on the tapes, notes from his Day Planner, and his memory. Mr. Fiser later used this "Sequence of Events" in support of his 1993 DOL complaint. Tr. 1051-52 (Fiser).

In April 1994, TVA and Mr. Fiser reached a settlement agreement with respect to Mr. Fiser's 1993 DOL complaint. See Joint Exh. 34. As a result, the RIF notice was withdrawn and

Mr. Fiser was placed in a PG-8 position of Corporate Chemistry Program Manager, Technical Support. Ronald Grover was his immediate supervisor and Dr. McArthur his second-line supervisor. Tr. 1820-21 (Grover); Tr. 2290 (Fiser).[24]

After settlement of the 1993 DOL complaint, Dr. McArthur advised Ronald Grover, Mr. Fiser's new supervisor, that Mr. Fiser had begun taping conversations with his colleagues. Tr. 1850 (Grover). Mr. Grover felt that Dr. McArthur was attempting to influence negatively his perception of Mr. Fiser (Tr. 1853 (Grover)), but Dr. McArthur explained that he simply wished to make Mr. Grover aware of the tapes (Tr. 1586 (McArthur)). In any event, Mr. Grover stated to Dr. McArthur that he (Grover) was not concerned with past incidents but preferred to form his own opinion of Mr. Fiser based upon performance in his new position. Tr. 1851 (Grover).

It is unclear what effect, if any, the taping played in Mr. Fiser's continuing employment with TVA. Dr. McArthur at one point stated that he did not feel uncomfortable and was not concerned about having his conversations taped by a co-worker. Tr. 1462, 1682 (McArthur). But at another point he also testified to the contrary, that he found the taping very offensive, and that he could tell when Mr. Fiser was trying to tape conversations with him. Tr. 1586 (McArthur). Dr. McArthur also discussed Mr. Fiser's taping with the site RadChem managers. Tr. 1850-51 (Grover). Further, Mr. Grover testified that, on one occasion, he had asked Mr. Fiser to attend on his (Mr. Grover's) behalf a peer team meeting of the RadChem Managers (Tr. 1855 (Grover); Tr. 2311 Fiser)) and that, during the meeting, Mr. Fiser was asked to leave because the peer team would be discussing sensitive matters and did not wish to do so in Mr. Fiser's presence (Tr. 2313 (Fiser)). Dr. McArthur later told Mr. Grover that the RadChem Managers felt uncomfortable about discussing sensitive matters in Mr. Fiser's presence because of the taping practices. Tr. 1856-57 (Grover).

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[24]As part of the agreement, Mr. Fiser's PG-8 salary was retroactive to October 4, 1993, and he was reimbursed certain expenses attributable to his DOL complaint. Joint Exh. 34 at 2.

With regard to Dr. McArthur's testimony concerning the taping, we note that Dr. McArthur, in response to Staff questioning, appears not to have been disturbed about the practice but that, in response to TVA cross-examination, found it to be offensive. We agree with the Staff that Dr. McArthur's "ability to state different opinions based upon who is asking the question" adversely affects his credibility as a witness. See Staff FOF ¶ 2.200.

In 1994, the corporate chemistry Program Manager position that Mr. Fiser was occupying as a result of the 1993 DOL settlement agreement was itself the subject of a reorganization. The corporate chemistry and environmental organizations were combined into one organization under one manager. See TVA FOF ¶ 5.1; Staff FOF ¶ 2.50. At that time, Dr. McArthur became RadCon Manager, a PG-11 position. Tr. 3794 (Boyles).

In that reorganization, Mr. Fiser was given a surplus notice and required to compete for a new position. TVA acknowledges that, if Mr. Fiser were not selected for a new position, he would have been transferred to TVA Services. TVA FOF ¶ 5.2. Mr. Fiser in fact was selected for one of several PG-8 positions (same grade as his earlier position), that of Chemistry and Environmental Protection Senior Program Manager. Tr. 2290, 2303-04 (Fiser); Staff Exh. 43. Ronald Grover was the selecting official for the Chemistry and Environmental Protection Program Manager positions. Tr. 2302 (Fiser); Tr. 3588 (Grover)). Thus, in the fall of 1994, Mr. Fiser left the position designated in the settlement (which position was then eliminated) and entered into a new position. Whether such transfer was "voluntary," as claimed by TVA (TVA FOF ¶ 5.3), is questionable. At best it was a palliative choice by Mr. Fiser of taking the position or being RIFed (i.e., discharged).[25]

[25]TVA points out that, despite similarities between the 1993, 1994, and 1996 reorganizations, Mr. Fiser opted not to file a DOL complaint in 1994. TVA FOF ¶ 5.6. As the Staff points out, however, the circumstances surrounding each of these reorganizations were different. Staff RESP FOF ¶ 2.95. In particular, in 1994, Mr. Fiser was not dissatisfied with the position to which he was transferred, whereas in 1993 and 1996 he was RIFed. We

(continued...)

At the time of the 1994 reorganization, the intent was for the chemists and environmental specialists to cross train and learn the functions of the other specialization so that each could be proficient in both fields. Tr. 1827-28 (Grover). The four employees selected for these PG-8 positions were Mr. Fiser, Mr. Sam Harvey, and Dr. E.S. Chandrasekaran ("Dr. Chandra"), all chemistry specialists, and Mr. David Sorrelle, an environmental specialist. Tr. 1830.[26] The intent for those employees to become functionally proficient in both areas through exercise of duties in both areas was not effectually realized, however, inasmuch as the three chemists continued to perform 95-99 percent chemistry-related duties in their new positions. Tr. 1885-86 (Grover), 2311 (Fiser), 5036 (Harvey).

In his performance evaluations for fiscal years 1994 and 1995, Mr. Fiser performed satisfactorily in his respective positions of Chemistry Program Manager and Senior Chemistry and Environmental Specialist, both under the supervision of Ronald Grover. See Staff Exhs. 46 (Performance Review and Development Plan, 10/1/93 to 9/30/94) and 47 (Performance Review and Development Plan, 10/1/94 to 9/30/95). For fiscal year 1994, Mr. Fiser exceeded expectations in 8 of the behavioral areas on which he was rated, and met expectations in 3 areas. He received no lower ratings, and his overall evaluation was "meets" expectations. Staff Exh. 46. In fiscal year 1995, Mr. Fiser exceeded expectations in 6 areas and met expectations in 6 areas. He received no lower evaluations in any area, and his overall evaluation again was "meets" expectations. Staff Exh. 47. Neither Dr. McArthur nor Thomas McGrath, then

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[25](...continued)
accordingly find that the differences in the three reorganizations make it eminently reasonable for Mr. Fiser to have elected not to file a DOL complaint in 1994.

[26]A fifth employee, Mr. Jim Mantooth, was selected for a lower-level PG-7 position in that reorganization. Tr. 1830-31 (Grover).

Chairman of the Nuclear Safety Review Board (NSRB),[27] had any input into the foregoing performance evaluations. Tr. 2311 (Fiser).

In October, 1995, Thomas McGrath became Acting General Manager of Operations Support, Mr. Fiser's second-level supervisor. Tr. 429 (McGrath). At the time, Mr. Grover remained Mr. Fiser's direct supervisor. In early 1996, Mr. McGrath informed the managers directly reporting to him--including both Mr. Grover and Dr. McArthur--that the Operations Support group that he headed would be undergoing another reorganization. Tr. 436 (McGrath). The staff reductions accompanying this reorganization could have been spread over four years --indeed, the target for the first year (FY 1997) was a minimum budgetary saving of 17%. Tr. 433-34 (McGrath). (By FY 2001, the target was a budgetary reduction of about 40% (Tr. 434 (McGrath); Tr. 1861 (Grover)). For his part, Mr. Grover recommended that no incumbents lose their jobs during the first year but that an already-vacant position (the Corporate RadChem Manager) be eliminated. Tr. 1862 (Grover). Mr. McGrath's position prevailed. He directed Mr. Grover to prepare a plan that eliminated all but two Chemistry Manager positions. Tr. 1860 (Grover). The Operations-Support organization thus underwent approximately a 40% budget reduction the first year (FY 1997).

The two surviving Chemistry Manager positions were a PWR Chemistry Program Manager position and a Boiling Water Reactor (BWR) Chemistry Manager position. Tr. 453 (McGrath); Tr. 1699 (McArthur); Tr. 1863 (Grover). On June 17, 1996, Mr. McGrath announced the creation of these positions and also that they would be advertised. Tr. 2339 (Fiser). He further announced that Dr. McArthur had been selected (without advertising) as the RadChem Manager, the selecting official for the new Chemistry Program Manager positions. Tr. 2339-40

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[27]Mr. McGrath became Chairman of the NSRB in late 1989, although he continued to serve in other positions simultaneously. Tr. 376 (McGrath). He remained Chairman of the NSRB until 1997. Tr. 380 (McGrath).

(Fiser). Reacting to the decisions to select Dr. McArthur (without advertising) as RadChem Manager, and to advertise the PWR Chemistry Program Manager position that Mr. Fiser was seeking to fill, Mr. Fiser on June 25, 1996 filed an additional DOL complaint. See Staff Exh. 37. Five weeks later, Mr. Fiser was not selected for the PWR Program Manager position. See Joint. Exh. 20 at GG000022. As described in further detail below, this non-selection of Mr. Fiser, as well as the non-advertised selection of Dr. McArthur for a position higher in grade from that he officially held earlier, although purportedly carried out under prescribed TVA procedures, was fraught with sufficient errors to raise a reasonable inference that the non-selection was motivated by extraneous reasons, such as the employee's involvement in protected activities.

As a result, Mr. Fiser was given the option of transferring for the remainder of the fiscal year to TVA Services (an option that has been deemed to be an adverse action under Section 211 of the ERA, see Overall v TVA, 97-ERA-50, 97 ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001), aff'd. sub nom. TVA v, Sec'y of Labor, 59 Fed. Appx. 732, 2003 U.S. App. LEXIS 4166 (6th Cir. March 6, 2003)) or resigning his TVA employment, including payment of a generous severance package that TVA was then offering. Joint. Exh. 28. Mr. Fiser opted to resign, to avoid the risk that, if transferred to TVA Services and not offered a suitable job, he would risk losing the salary and severance pay that attended a resignation at that time. Tr. 2374 (Fiser).

2. Nature of Protected Activities. As set forth earlier, in order to demonstrate discrimination on the part of TVA, the Staff must demonstrate that Mr. Fiser engaged in one or more protected activities, that TVA was aware of those activities, and that Mr. Fiser suffered an adverse action for engaging in such activities. That the Staff has succeeded in demonstrating Mr. Fiser's engagement in protected activities is in fact conceded by TVA, which has acknowledged that Mr. Fiser's filing of the 1993 DOL complaint, as well as the 1993 Sasser

letter, and the 1996 DOL complaint, themselves constituted protected activities. The Board agrees with and adopts that conclusion.

Moreover, one or both of the TVA management officials involved in the adverse action against Mr. Fiser clearly had contemporaneous knowledge of Mr. Fiser's 1993 DOL complaint and the 1993 Sasser letter, as well as the 1996 DOL complaint. Dr. McArthur in particular knew of all these activities. See Staff Exh. 31 (Sasser letter); Joint Exh. 24 (1993 DOL complaint); Tr. 1647 (McArthur) (1996 DOL complaint). Mr. McGrath knew of the 1996 DOL complaint and, at the time of the SRB interviews, and prior to the decision concerning the PWR RadChem Manager position, also had knowledge of the 1993 DOL complaint. Tr. 730 (McGrath).

TVA denies, however, that any of the specific safety matters set forth in the DOL complaints or the Sasser letter constitute protected activities on the part of Mr. Fiser. See TVA FOF ¶¶ 4.7, 4.9; TVA REPLY FOF at 95, 98. TVA asserts that Mr. Fiser did not "discover, raise, report, or document" any of those specific issues. TVA FOF ¶ 4.9. For its part, the Staff claims that protected activities include not only the discovery, raising, reporting, and/or documentation of such issues but also participation in their resolution. Staff RESP. FOF ¶ 2.66 (citing Zinn v. Univ. of Missouri, 93-ERA-34, 93 ERA-36, 1996 DOL Sec. Labor LEXIS 8 (1996)). Specifically, Zinn makes it clear that protected activities are not limited to those initially raised, documented, or identified by the complainant. The factual situation in Zinn is analogous to that before us in this proceeding. Accordingly, we regard the Staff's definition of protected activity, which is in accord with the Zinn decision, as more persuasive than TVA's restricted definition and, accordingly, we adopt the Staff's position. Thus, to the extent Mr. Fiser was actively involved in the resolution of a safety-related issue, the Board regards him as being engaged in a protected activity, whether or not he formally discovered, raised, reported or documented such issue.

(a). General considerations: hostile work environment. Before turning to the specific protected activities in which Mr. Fiser claims to have been involved, we address the Staff's assertion that TVA, in general, fosters a work environment hostile toward whistle blowers that discourages workers from attempting to develop or assert or document any protected activities. See Staff FOF ¶¶ 3.125–3.130; Staff RESP FOF ¶¶ 2.17–2.19. That claim appears to the Board to be well founded.

In that respect, Ms. Tresha Landers, an engineering intern who was a co-worker of both Mr. Fiser and Mr. Sam Harvey, testified that people at TVA would talk about workers who filed complaints and thereafter were "out the door," or interns who "had a problem" were subsequently not hired. Tr. 2050-51 (Landers). Mr. Sam Harvey, a witness presented by TVA itself, stated that, prior to 1997, he feared retaliation if he raised issues regarding harassment and intimidation. Tr. 5054-55, 5057 (Harvey). He testified that he had not earlier raised some of the issues in his November 27, 1997 memorandum because he feared retaliation from his supervisors, including Dr. Wilson McArthur. Tr. 5058 (Harvey). And Dr. McArthur himself, in a recorded conversation between himself and Mr. Fiser, acknowledged that TVA has a work environment that is hostile to those who find and document problems or file complaints. See Joint Exh. 27 at 71. Specifically with respect to Mr. Fiser, Mr. Fiser advised Dr. McArthur of his plan to file a DOL complaint concerning his RIF from Sequoyah Chemistry (see discussion supra, p. 26) and was warned by Dr. McArthur against taking such action because people "don't want somebody that is a troublemaker . . . . A lot of companies will not hire you if you have a legal history." Joint Exh. 27 at 80.

Supplementing these statements by various witnesses was that by Mr. Patrick M. Lydon, a former TVA employee, who advised the TVA OIG that he had resigned because he was "disgusted with senior executive management." TVA Exh. 122, OIG interview of Lydon, at 3. Mr. Lydon reportedly stated that TVA was "the most abusive place" he had ever worked. Id.

Mr. Lydon apparently commented that Messrs. Bynum and Beecken would "fire people for effect." Id. (For his part, Mr. Beecken denied knowing the basis for Mr. Lydon's statement. Tr. 4835 (Beecken).)

TVA counters these "hostile environment" arguments by advancing platitudinous assurances both that it is committed to nuclear safety and that it is TVA policy to protect employees from retaliation for raising nuclear safety concerns. To illustrate its commitment to nuclear safety, TVA asserts (TVA FOF ¶ 2.3) that it has adopted, as one of its basic Principles and Practices, a Commitment to Nuclear Safety. Tr. 881 (McGrath); see TVA Exh. 65. TVA further asserts that it has also adopted, as a lower-tier document, a policy entitled TVA Communications Practice 5, Expressing Concerns and Differing Views, which expressly states that employees "found guilty of acts of reprisal, such as acts of intimidation, harassment or discrimination, against an employee because the employee expressed a differing view is subject to disciplinary action, up to and including termination." Tr. 590-91 (McGrath); see TVA Exh. 66.

TVA goes on to claim that its establishment of NSRBs at Sequoyah, Watts Bar, and Browns Ferry "is inconsistent with retaliating against an employee for raising nuclear safety concerns." TVA FOF ¶ 2.5. It adds that NSRBs are not in the plant chain of command and neither issue orders about plant operations nor make personnel decisions. TVA FOF ¶ 2.7. As the Staff observes, however, the NSRBs are mandated by the plants' licenses, i.e., as a technical specification. Through this technical specification, the NRC itself both required that NSRBs be established and set forth a number of the NSRB's duties. See Staff RESP FOF ¶ 2.19 (citing Mr. McGrath at Tr. 592); see also Tr. 379-80 (McGrath). Thus, according to the Staff, the creation of NSRBs should not be viewed as a voluntary commitment by TVA to enhance safety. Staff RESP FOF ¶ 2.19.

Beyond that, the Staff observes that there is no evidence to indicate that TVA has actually imposed any meaningful disciplinary action on those (if any) who are found guilty of whistle blower retaliation. Staff RESP FOF ¶ 2.18. Mr. McGrath was not aware of any. Tr. 883 (McGrath). For these reasons, the Board gives little weight to TVA's testimony (see TVA FOF ¶¶ 2.3–2.7) that attempts to disprove the Staff's claim that TVA fosters a work atmosphere that is hostile to whistle blowers.

(b) Specific Protected Activities. Although the Staff is not relying only on Mr. Fiser's participation in any technical protected activities--its primary reliance is on the letters to DOL or to Sen. Sasser that are conceded by TVA to be protected activities--we nonetheless view those technical activities as necessary adjuncts to the Staff's theory. Active participation in at least one of these issues lends substantive significance to the DOL complaints and the Sasser letter which, in themselves, admittedly constitute protected activities. In other words, active participation would remove any inference that Mr. Fiser was merely "working the system" to attain personal advantages. We thus turn seriatim to a consideration of each of the asserted protected issues, and Mr. Fiser's role with respect to such issues.

(i). Radiation Monitor Set Points. The radmonitor set points issue was the first of the specific issues referenced in the 1993 DOL complaint. The issue was first identified to TVA by NRC through an IE bulletin in 1982, prior to Mr. Fiser's employment by TVA. Tr. 1129, 2641 (Fiser). The bulletin indicated that TVA should account for vacuum (or negative pressure) in a noble gas chamber. Tr. 2641-42 (Fiser).

After Mr. Fiser was hired by TVA in 1987, and assigned to Sequoyah Chemistry in 1988, he inquired (based on his earlier experience with Arkansas Power & Light Co.) whether TVA had taken the bulletin into account and was told that it was "not a problem." Tr. 2642-43 (Fiser). A SCAR ("Significant Corrective Action Report") delineating the problem and the necessary corrective actions was not prepared or issued until Mr. Fiser had left Sequoyah

Chemistry. Tr. 2643 (Fiser). But Mr. Fiser claims that, while at Sequoyah chemistry, he "certainly had a part to play" in identifying the problem (Tr. 1136 (Fiser)) because he "started the questioning process about the way . . . the issue was resolved." Id. "I started the initial investigation" into the problem (Tr. 2644 (Fiser)) by questioning Don Amos, the chemical engineer on the Chemistry staff who worked for Mr. Fiser and had helped answer (albeit incorrectly) the IE Notice in 1982 (Tr. 2647 (Fiser)). Indeed, as part of the TVA Office of Inspector General (OIG) investigation of Mr. Fiser's 1993 DOL complaint, Mr. Fiser indicated to the OIG representative that Don Amos had acknowledged that he had given the "wrong information" to Mr. Fiser about the radiation monitor set points. Staff Exh. 35 at AJ000115.

Mr. Fiser further testified that the radiation monitor set points issue was one of the contributing factors to Rob Beecken's (Sequoyah Plant Manager) displeasure with him (Tr. 1129-30 (Fiser)). Indeed, based on a conversation held with Mr. Beecken on December 9, 1992, Mr. Fiser claimed it is one of the reasons Mr. Beecken did not want him to return to Sequoyah following his scheduled one-year rotation to Corporate Chemistry (Tr. 1129-30, 2638-39 (Fiser)).

During his testimony, Mr. Beecken testified that he was dissatisfied with Mr. Fiser for not having resolved the issue satisfactorily during his (Fiser's) tenure as Chemistry Manager. Tr. 4810 (Beecken). Mr. Fiser apparently advised Mr. Beecken during their December 9, 1992 conversation that he (Fiser) tried to resolve the issue by talking with Engineering about the problem and was told by Engineering that it was correct. Tr. 4811 (Beecken). According to Mr. Beecken, Mr. Fiser stated that "I talked to Engineering and they told me it was correct. But I tried. I raised the issue [with Engineering] 13 times. I tried." Id. But, according to Mr. Beecken, "it didn't happen." Mr. Beecken advised Mr. Fiser that "that's the type of issue that needs to be escalated, moved upwards in the chain of command so that they can interdict and correct those types of problems." Id. Mr. Beecken would have escalated this issue to the OPS

manager or Plant Manager. Tr. 4812 (Beecken). And he criticized Mr. Fiser for not preparing a corrective action document (like the SCAR that was prepared after Mr. Fiser left). Id. Mr. Beecken added that Mr. Fiser was not responsible for identifying the issue but that he (Fiser) had not dispositioned it properly. Tr. 4814-15 (Beecken).

TVA claims that Mr. Fiser did not identify, document, or otherwise raise the issue about the radmonitor set points. TVA FOF ¶¶ 4.12–4.13. And it "strongly disputes" that this matter, inter alia, describes any protected activity in which Mr. Fiser engaged. TVA FOF ¶ 4.7.

The Board agrees that Mr. Fiser did not initially raise the issue before TVA. Nor did he sign the corrective action document (SCAR) that closed the issue. That document was prepared and signed by the technician who had given incorrect information about the issue to Mr. Fiser. But Mr. Fiser also did not let the issue die. He suspected that the issue had not been resolved properly, and he participated in the discussion of salient parts of the issue that eventually led TVA to undertake corrective action. Moreover, he was criticized by management for not having resolved the issue satisfactorily. Mr. Fiser thus may be regarded as at least peripherally raising the issue and preparing TVA for its proper resolution. Furthermore, the criticism that Mr. Fiser did not act properly to resolve the issue does not mean that Mr. Fiser did not participate in its resolution, only that in TVA's view he participated inadequately. This participation is enough for us to conclude that Mr. Fiser was sufficiently engaged in the first of the protected activities that he incorporated into his 1993 DOL letter to warrant his association with such activity, and we do so here.

(ii). Filter change-out scenario. With respect to the second issue in the 1993 DOL letter--the filter change-out scenario--, TVA claims that Mr. Fiser did not identify, document, or otherwise raise this issue. TVA FOF ¶¶ 4.14-4.15. The record reflects that the problem occurred and was documented in July 1991, during the period when Mr. Fiser was assigned to Outage Management. Tr. 2678 (Fiser). An employee in Sequoyah Chemistry (not Mr. Fiser)

discovered that containment radiation monitor valves had not been properly aligned after sampling activities. Staff Exh. 34 at AJOOO136. Thereafter, a SCAR was prepared and placed into the corrective action system. However, Mr. Fiser did not instruct anyone to report this issue. Tr. 2671, 2672 (Fiser). In fact, he conceded that the instructions he claimed to have given were generic instructions given to everyone at the plant. Tr. 2682-83 (Fiser). Mr. Beecken allegedly would have preferred that the problem be resolved without reporting it. But the record fails to demonstrate that Mr. Fiser was anything more than an observer or that he played any part in raising, settling, or reporting this issue (except to DOL) or in resolving the problem. (The record also fails to reflect whether the person who raised and documented the problem was disciplined for doing so.) The issue accordingly does not appear to qualify as a protected activity in which Mr. Fiser actively participated, and we decline to consider it as such.

(iii). PASS analyses. The third of the issues listed in the 1993 DOL complaint (as well as being identified in the letter to Sen. Sasser) was a dispute over NRC's three-hour requirement for conducting Post Accident Sampling System (PASS) analyses. According to the Staff (Staff FOF ¶ 2.115), Mr. Fiser and Mr. Jocher (working together) determined that personnel at the Sequoyah plant could not meet this three-hour requirement, whereas site Vice President Jack Wilson differed in the interpretation of the requirement. Further, after NRC confirmed, upon inquiry from Mr. Jocher, that the regulatory interpretation by Mr. Fiser and Mr. Jocher was correct, TVA conducted tests which confirmed that Sequoyah personnel indeed lacked the ability to meet this requirement. See Staff Exh. 34 at AJ000136.

TVA asserts that Mr. Fiser did not identify, document, or otherwise raise the PASS issue. TVA FOF ¶¶ 4.16–4.19. It claims that the NSRB, not Mr. Fiser, initially raised the question whether Sequoyah personnel could meet the PASS requirements. Tr. 890 (McGrath). According to TVA, the NSRB (at least, its Radiation and Chemistry Subcommittee) first identified the question at its May 22-23, 1991 meeting, where it questioned whether PASS

training of TVA employees recognized time/exposure constraints and recommended more realistic training. See Joint Exh. 1, NSRB Minutes of Meeting No. 132 (May 22-23, 1991) at CC000087-88; Tr. 607 (McGrath). The subcommittee recommended:

> Include proficiency parameters in training to ensure original design criteria can be met in accordance with NUREG-0737. Ensure that the above is performed in the same anti-c's/respiratory protection anticipated for post-accident sampling conditions (A132-6).

Joint Exh. 1 at CC000088. At that time, Mr. Fiser was not in charge of Sequoyah Chemistry but, rather, had been rotated to Outage Management. See supra, p. 18.

With respect to a subsequent NSRB meeting on August 21-22, 1991, the minutes reflect that "Post-Accident Sampling System training concerns have not been addressed and this action item remains open (A132-6)." Joint Exh. 2 at CC000092. At that time, Mr. Fiser was still in Outage Management--indeed, he was not responsible for Sequoyah Chemistry for any period between the initial NSRB directive on the subject and this one.

The PASS problem was considered again by the NSRB at its meeting on November 20-21, 1991. The minutes for that meeting state:

> Post-Accident Sampling Training (A132-6)
>
> The NSRB was concerned that training on the post-accident sampling system did not recognize the time or radiation exposure constraints that exist when collecting and analyzing samples. The NSRB reviewed the site response on this item and discussed it with the Site and Corporate Chemistry managers. It was found that Corporate Chemistry did not agree with the site response, and it remained questionable whether the sampling time requirements specified in the procedure could be met. The NSRB also pointed out that Corporate Chemistry should have been involved earlier with the site in addressing this concern. This item remains open.

Joint. Exh. 3 at CC000095. As indicated above, Mr. Fiser was still in Outage Management at the time of the November 20-21 NSRB meeting, and had been assigned to Outage Management at all times between this meeting and the prior meeting on August 21-22, 1991.

According to TVA, when the NSRB met on February 19-20, 1992, it was dissatisfied that the issue had still not been resolved by Sequoyah Chemistry. (Mr. Fiser had rejoined

Sequoyah Chemistry in January 1992.) There had not, however, been any formal directive for Sequoyah Chemistry to resolve the issue--indeed, only a subcommittee recommendation. The NSRB at its February 19-20, 1992 meeting thus set up an "action item" that would remain open until all shifts could demonstrate that they could meet the requirements. Tr. 677-78 (McGrath); see Joint Exh. 4 at CC000105. Mr. McGrath was NSRB Chairman at that time. Mr. Fiser was with Sequoyah Chemistry for only a week or two of that period, after which he was transferred to Acting Corporate Chemistry Manager in early March 1992.

Putting together the pieces of this puzzle, we infer that, during this brief period, Mr. Fiser (and Mr. Jocher) had their disagreement with Jack Wilson over the applicability of the PASS requirement, and that Mr. Jocher (working with Mr. Fiser), contacted the NRC during this period, getting confirmation that the requirement was in effect. Mr. Fiser and Mr. Jocher at this time also discussed the required PASS testing program and began preparation of appropriate questions. Mr. Fiser was transferred, however, before any of the tests could be administered. Mr. Jocher thus administered the tests and executed the required SCAR on the problem.

We conclude that, under these circumstances, Mr. Fiser was involved and participated to some extent in resolving the PASS question and thus was entitled to be treated as participating in a protected activity. Further, we note that Mr. McGrath, as Chairman of the NSRB, expressed his dissatisfaction with Sequoyah Chemistry, and specifically Mr. Fiser, for not having resolved the question earlier (notwithstanding Mr. Fiser's limited opportunity to do so). Tr. 677-78 (McGrath). We cannot tell from the record whether Mr. McGrath's dissatisfaction was motivated by his perception of a performance deficiency on the part of Mr. Fiser or, instead, by Mr. Fiser's having uncovered a safety issue that Mr. McGrath did not wish to have attributed to the Sequoyah Chemistry organization.

(iv). Diesel Generator Fuel Oil Storage Tank Issue. Another safety problem that Mr. Fiser claims to have identified related to the seven-day diesel fuel tanks at Sequoyah. The

Staff relies particularly on this problem as demonstrating that Mr. Fiser raised or substantially participated in protected activities but was disciplined or retaliated against for doing so. Staff FOF ¶¶ 2.94-2.98.

Mr. Fiser claims to have "found this working with my people" and to have "reported it, filled out the SCAR, . . . and we fixed the problem." Tr. 1146 (Fiser). This problem was not included among those set forth in Mr. Fiser's 1993 DOL complaint, but it was mentioned in the letter to Sen. Sasser as one of the problems with which Gary Fiser was involved:

> Problems with the emergency diesel generator seven day storage tank recirculation system. This finding rendered the emergency diesel generators inoperable and placed both units at Sequoyah in a Limiting Condition of Operation.

Staff Exh. 29 at 4.

The Staff described the problem as follows (Staff FOF ¶ 2.94):

> On August 15, 1989, the four emergency diesel generators at [Sequoyah] were declared inoperable because the diesel generator fuel oil had not been sampled in accordance with [Sequoyah's] Technical Specifications [which incorporated ASTM standards]. TVA Exh. 126 at FI000006. This resulted in SQN entering a Limiting Condition for Operation [LCO] under which SQN had 24 hours to complete the required sampling or to shut down the plant.

See TVA Exh. 126; Tr. 4884 (Burzynski). The mistake related to a chemistry procedure for sampling which, according to the Staff, had been written improperly upon the initial licensing of Sequoyah. Staff FOF ¶ 2.94; see Tr. 4897 (Burzynski).

TVA, through Mr. Mark Burzynski, the site Licensing Manager at Sequoyah from 1986 through the close of 1989 (see Tr. 4863 (Burzynski) and TVA Exh. 139), acknowledged the seriousness of the diesel generator fuel storage tank issue. Tr. 4884 (Burzynski). And TVA did not dispute that Mr. Fiser performed work with respect to resolving the problem--in fact, he was directed to look into the problem and write a CAQ (Condition Adverse to Quality). See TVA Exh. 146. But TVA claimed that the issue was not "identified, raised, or documented" by Mr.

Fiser and, accordingly, that the issue should not be considered a protected activity on the part of Mr. Fiser. TVA FOF ¶ 4.37.

As reflected in the record of this proceeding, the issue was an operating experience item emanating from an event occurring on April 26, 1989, at the Waterford 3 plant (TVA Exh. 146 at FI000248) that was brought to TVA's attention by INPO on August 8, 1989. Tr. 4866, 4869 (Burzynski). On August 14, 1989, T. W. Overlid, TVA's Manager, Nuclear Experience Review (NER), transmitted the item for action or information to the NER Supervisor at the Sequoyah and Watts Bar facilities, respectively. TVA Exh. 145, NER 89-3491 (OE). On the same day, the Sequoyah NER Supervisor sent a CAQ request to the Chemistry Department, where a CAQ was initiated that same day (August 14, 1989) by Don Amos. TVA Exh. 146. The TVA Final Event Report (FER), which recorded both the circumstances giving rise to the problem and the manner in which the question was resolved, was signed by Gary Fiser, as Event Manager, on August 23, 1989. TVA Exh. 147. The investigative team included Don Adams, as the Event Manager, and Don Amos, Wayne Reid, and Vernon Shanks, as Investigators. Id. at FI000262.

A portion of the FER titled "Sequence of Events" reflects that, on August 10, 1989, the problem had actually been brought to the attention of the Chemistry Department, which had been given 10 days to respond to NER 89-3491. Id. at F1000259. The report goes on to state that "[a]t this time chemistry personnel believed that the design allowed recirculation of the tanks, and that the NER did not apply to Sequoyah." Id. (emphasis added). During that evaluation, the Chemistry Department was headed by Mr. Fiser, but the CAQ report (TVA Exh. 146) indicates that Don Amos offered that very evaluation of the item:

> Based on the above sampling and analysis results of all diesel fuel oil on site, the diesel generators are considered operable, and this is considered to be a representative sampling process for the oil in the 7 day tanks. /s/ Don Amos, 8/10/89.

TVA Exh. 146 at FI000249.

There is no indication whether, prior to Mr. Amos rendering that determination, Mr. Fiser had in fact been consulted. Further documentation in the FER indicates that, on August 11, 1989, the day following the Chemistry Department's initial evaluation, the Supervisor, NER, assigned responsibility for this item to G. L. Fiser, for "immediate attention." TVA Exh. 147, Attachment 1, NER Evaluation Form at FI000313. The incident investigation team assigned to evaluate and document the chemistry personnel's earlier conclusion of non-applicability, which included Don Amos but not Mr. Fiser (TVA Exh.147 at FI000262), determined, as of August 14, 1989, that

> each 7-day storage tank was designed with four horizontal cylindrical tanks, side-by-side, approximately 85' long and 6' diameter. These tanks are connected to each other at each end on the top and bottom by a 12" section of pipe. The recirculation was inadequate in that only a portion of the two center tanks were affected.

Id. at FI000259. The FER was signed by Gary Fiser, as Event Manager, on August 23, 1989 (id. at FI000258), but there is no indication whether Mr. Fiser in fact developed the above-cited description of the tanks. Mr. Fiser did not in fact sign the SCAR for this issue. TVA Exh. 146.

In sum, Mr. Fiser did not technically initiate this issue, nor did he sign the SCAR that documented it. But he obviously participated in its resolution. Moreover, Dr. McArthur became aware of this problem in 1993, when he was assigned to investigate several problems raised in the letter to Sen. Sasser (including the PASS problem). See Staff Exh. 31 at BG000288. For these reasons, we are treating this issue as a protected activity in which Mr. Fiser was involved.

Mr. Fiser testified that he was threatened with disciplinary action for his role in not identifying this issue earlier. Tr. 1147 (Fiser). The FER for this issue (TVA Exh. 147) identifies two potential root causes for the issue arising, both concerning the time frames during which the issue should have been recognized: (1) review during design did not consider sampling; and (2) inadequate review of system design during procedure evaluation. Mr. Fiser, of course, was not a part of the initial design review, inasmuch as he was not employed at Sequoyah during

such review. TVA management--particularly Mr. Burzynski, the Sequoyah plant manager--attempted to attribute to Mr. Fiser the responsibility for the failure to detect the problem during surveillance instruction (SI) review prior to Sequoyah's restart in 1988. But Mr. Fiser also was not the superintendent of Sequoyah chemistry during that SI review, which was carried out prior to Sequoyah's restart. Tr. 4926 (Burzynski). In short, TVA's attempt to portray Mr. Fiser as responsible for the adverse effects of this activity and to blame him for those adverse effects may have been an attempt to discipline Mr. Fiser for involvement in this protected activity.

(v). Data trending. The Staff claims that data trending was another protected activity in which Mr. Fiser was involved. Data trending involved the production of histogram plots for different contaminants, and different chemical control analysis on various plant systems, which were produced for the operations department and other plant groups. Tr. 4719 (Ritchie). During the period when Mr. Fiser was on rotation to Outage Management from his position as Sequoyah Chemistry Superintendent, the computers used to generate trend plots became inoperable, and trend plots were not generated for a period of time. Tr. 1016 (Fiser). At the November 1991 NSRB meeting, at which both Dr. McArthur and Mr. McGrath were present, Tom Peterson, a NSRB member, and Mr. McGrath, the NSRB Chairman, demanded that Mr. Fiser, who was in attendance at that NSRB meeting, draft a procedure that would require the Chemistry program to generate all of the trend plots every day, including weekends and holidays. See Tr. 1018-19 (Fiser); Tr. 1687-88 (McArthur); Tr. 4721 (Ritchie).

At that time, except when disabled by computer malfunction, the Chemistry program was generating the trends about which the NSRB was concerned four days per week, and was also trending the data collected over weekends. Tr. 1024 (Fiser). Mr. Fiser advised Mr. Peterson and Mr. McGrath that he could not comply with a daily-trending requirement for a number of reasons. First, and most important, he explained that if the computer were to break again, then, if the trending were required by a procedure, the Chemistry program would be in

violation of the procedure and potentially subject to enforcement action by NRC as a result. Tr. 1020 (Fiser). Second, Mr. Fiser explained that incorporating the trending into a procedure would require tremendous overtime by the chemistry technicians who performed the trending, overtime for which Mr. Fiser lacked approval. Tr. 1021 (Fiser). Finally, Mr. Fiser expressed concern about a potential procedural violation emanating from the proposed trending procedure because Sequoyah had recently had problems with procedural violations, for which a corrective action document would have to be prepared and NRC eventually informed. Tr. 1022-24 (Fiser). Mr. Fiser assured the NSRB members that the Chemistry program would continue to generate trends and that, once the Chemistry Upgrade Program (CUP) was approved, he would be able to comply with the requested daily trending requirement. He had requested the NSRB to assist him in getting the CUP approved. Tr. 2473, 4358 (Fiser).

According to Mr. Rob Ritchie, who also was present for that NSRB meeting, the NSRB did not listen to what Mr. Fiser had told it about trending. Tr. 4721 (Ritchie). The NSRB never followed up with Mr. Fiser regarding the trending issue, and the Sequoyah Chemistry program (following Mr. Fiser's return in January, 1992) continued to generate trend plots, albeit not on a daily basis. Tr. 1023-24 (Fiser). When Mr. Charles Kent assumed responsibility for the Sequoyah RadChem organization in early 1993, the Chemistry organization was still generating trend plots. Tr. 3217 (Kent). As indicated earlier (supra, pp. 19), after Mr. Fiser's return to Sequoyah Chemistry in January, 1992, he was transferred a few weeks later, in March, 1992, to Corporate Chemistry.

TVA treats the data-trending question as a non-issue. It explicitly asserts that trending was not a key issue at the November 1991 NSRB meeting. TVA FOF ¶ 4.25. It cites the proposition that issues of major importance are designated by the NSRB as "action items" and that minutes of the November, 1991 NSRB meeting reflect that data trending was not among the "action items" considered. See Joint Exh. 3. Notwithstanding TVA's attempt to minimize

the significance of the issue of data trending, however, the minutes of the November 20-21 meeting of the NSRB reflect otherwise: They state that, under the "key" item designated as "Site Chemistry Program," a problem that, if not promptly corrected, "could impact plant chemistry control" was that "required data trend analyses were not being performed." Id. at CC000093.

That data trending in the chemistry program continued to remain a problem worthy of note at future NSRB meetings is reflected in minutes of the February 19-20, 1992 meeting where, both in the Executive Summary and in the report of the meeting, again under the key item designated as "Site Chemistry Program," program deficiencies as to which effective corrective action was called for included "trending analyses." See Joint Exh. 4 at CC000101, CC000102.

Further, TVA argues that a refusal to perform data trending constitutes a failure to perform job responsibilities, which is not a protected activity. As the Staff observes, Mr. Fiser never refused to perform data trending but, rather, only refused to institute a procedure requiring daily trending. Staff RESP FOF ¶ 2.72. Further, data trending was not one of Mr. Fiser's formal job responsibilities but, rather, only a recommendation from the NSRB. And although Mr. Fiser refused or declined to initiate a procedure requiring the daily performance of data trending, as requested by the NSRB, he did so for what he regarded as safety-related reasons, i.e., the likely regulatory infractions that could result from such a procedure. For these reasons, although Mr. Fiser did not technically raise this issue--the NSRB did so--we consider Mr. Fiser's involvement in the data trending issue as another protected activity in which he was involved. We so find.

We also note, however, that the proceduralized daily data trending itself could have implications enhancing plant safety. TVA itself describes data trending as productive of "information helpful to safely operate a nuclear plant." TVA FOF ¶ 4.29. These pro-safety

implications of proceduralized data trending lessens the weight we accord to Mr. Fiser's participation in this protected activity.

One further comment about the data-trending issue is in order. Mr. McGrath repeatedly denied that chemistry data trending was an important or significant issue discussed at the November, 1991 peer team meeting (which preceded the NSRB meeting). Tr. 395, 400 (McGrath). He recalled that the issue had been discussed but added that there was "no meeting that I was in where data trending was a big issue with me." Tr. 395 (McGrath) (emphasis added). Finally, he testified that no one from the NSRB demanded that Mr. Fiser institute a daily trending procedure. Tr. 400, 661 (McGrath).

The foregoing opinion expressed by Mr. McGrath is undercut by the testimony of others who attended the NSRB meeting, including Mr. Fiser, Mr. Ritchie, and Dr. McArthur, all of whom indicated that data trending was a significant issue and that members of the NSRB requested that Mr. Fiser institute a trending procedure. Tr. 1018 (Fiser); Tr. 1400 (McArthur); Tr. 4722 (Ritchie). The NSRB minutes of the November, 1991 meeting identified above also reflect that data trending was a key issue, albeit not an "action item." That being so, Mr. McGrath's testimony on this issue does not comport with either the testimony of other observers or the documentary records mentioned above. We judge that such testimony seriously undercuts the credibility of Mr. McGrath as a witness (as claimed by the Staff at Staff FOF ¶¶ 2.193–2.196).

3. Termination of Mr. Fiser's Employment by TVA. The termination of Mr. Fiser's employment by TVA eventuated from the 1996 reorganization of TVA Nuclear. As explained by TVA, during the summer of 1995, both units at Sequoyah and two units at Browns Ferry had been restarted, and the initial startup of Watts Bar was imminent. Thus, TVA was moving away from being an organization focused on construction and restart to an organization operating five reactors. See TVA FOF ¶ 6.1. In addition, at that time, there was an effort to improve efficiency and to use information from NEI as a benchmark to achieve an effective and

competitive organization. Id. "Throughout the industry, utilities were downsizing." Tr. 1474 (McArthur). With respect to Nuclear Operations Support, the 1996 reorganization eliminated more than 30 positions. Tr. 4009 (Boyles). Twenty positions were recreated at the same time. Compare TVA Exh. 56 (jobs that were eliminated) with TVA Exh. 55 (jobs created at that time). The Board agrees with TVA that, overall, this reorganization was motivated by legitimate business reasons and was not per se intended to discriminate against any individual, including Mr. Fiser.

The details by which this reorganization was carried out, however, raise considerable doubts as to their motivation concerning Mr. Fiser. With respect to the Corporate Operations Support organization, in which Mr. Fiser was serving in 1996, the reorganization was carried out under the supervision of Mr. McGrath, who in October, 1995 became the Acting General Manager of Operations Support.[28] Tr. 429-30, 754 (McGrath); Tr. 1475 (McArthur).

In the winter of 1995 or early spring of 1996, however, prior to the reorganization, there appeared to be a position with Sequoyah Chemistry which Mr. Harvey had sought to occupy. Tr. 4976-77, 5036-37 (Harvey). Charles Kent, plant manager at Sequoyah, admitted that he had a vacancy in the Chemistry organization that had been vacated by an individual who left TVA to work with another utility. Tr. 3080, 3092-93 (Kent). Prior to the hearing, Mr. Kent made similar statements to three different organizations. See Staff Exh. 70 at 1 (TVA OIG); Staff Exh. 72 at 2 (DOL investigator); Staff Exh. 73 at 14 (NRC OI). Later in his testimony, however, Mr. Kent appears to have changed his position by denying that there was any such position on his organizational chart. Tr. 3132 (Kent). In the Board's view, this seeming change in opinion undercuts the credibility of Mr. Kent's testimony. In any event, Mr. McGrath blocked Mr.

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[28]Mr. McGrath never became the permanent Manager of Operations Support. He remained as Acting General Manager until the position was eliminated as part of a 1997 reorganization. Tr. 443 (McGrath).

Harvey's direct transfer to Sequoyah, thus setting the stage for Mr. Harvey's selection during the reorganization for the PWR Reactor Chemistry position and Mr. Fiser's resultant dismissal.

The reorganization involved a five-year reduction plan, with an overall goal of a 40% reduction. Tr. 433-34 (McGrath); see TVA FOF ¶ 6.2; Staff FOF ¶ 2.75. The proposed 40% reduction could have been achieved incrementally (with about a 17% reduction the first fiscal year), or it could have been imposed at the outset, with the entire reduction in the first fiscal year. Mr. Grover testified that, at the beginning of the reorganization, Mr. McGrath instructed those reporting to him to cut a minimum of 17% in the first year, with the 40% to be achieved over 5 years. At the outset of the reorganization, there were five permanent positions in the organization, with one being vacant. Tr. 1859 (Grover). Mr. McGrath apparently expressed the desire to do everything he could to help everybody keep their jobs. Tr. 1865 (Grover). Mr. Grover actually proposed a plan to this effect, which did not require any incumbent to lose his or her position within the first year, eliminating the vacant position from budget calculations. Tr. 1860-62 (Grover); Tr. 1477 (McArthur).

Mr. McGrath reacted to that (and other) proposals by then proposing and adopting a plan making deeper cuts the first year in the chemistry program, limiting the two remaining technician positions to one PWR position and one BWR position, requiring one of the incumbents to lose his position (Tr. 1862, 2199 (Grover)), and promoting Dr. McArthur to a higher-grade supervisory position. He explained that in a reorganization it was better for management to be clear to employees about what was going to happen and then to proceed, instead of stretching out reductions over several years. Tr. 439-440 (McGrath); Tr. 1476 (McArthur).

The reorganization was initially announced to Operations Support personnel following a June 17, 1996 "all hands" meeting at which Mr. McGrath announced a reorganization would take place and that Dr. Wilson McArthur would be the RadChem Manager. Tr. 1481

(McArthur). Mr. McGrath also advised Dr. McArthur that he (Dr. McArthur) would not have to compete for this position. Of the three remaining employees in those positions, only two would be retained (the PWR and BWR positions described above).

(a). Governing Procedures. Procedurally, in a situation where four existing positions were to be transferred to three remaining positions, the RIF procedures prescribed by OPM would be used. TVA presented two policies which govern selections in its nuclear organization, the Personnel Manual Instruction and BP-102, "Management and Specialist Selection Process." See Joint Exhs. 63 and 65. These policies implement the relevant OPM regulations relating to RIFs, which are found at 5 C.F.R. Part 351. Tr. 5376 (Fogleman).

The primary criteria used under these procedures (not counting an allowance for veterans preference) are job interchangeability and length of service. All of the existing positions were PG-8 positions, except the RadCon Manager position occupied by Dr. McArthur, which was PG-11. Tr. 3772 (Boyles). No position description had been created for the RadCon Manager position in which Dr. McArthur was serving at the time of the 1996 reorganization. However, the last position description of record for Dr. McArthur was the PG-8 position of Manager of Technical Programs, which Dr. McArthur had occupied following the 1994 reorganization. None of these incumbents appears to have had prior military service. See TVA Exh. 24 at HH000030-HH000031(Fiser); Tr. 1382-86 (McArthur); TVA Exh. 24 at HH000012-HH000013 (Harvey) and id. at HH000017-HH000018 (Dr. E.S. Chandrasekaran (Chandra)). Mr. Fiser had a greater length of service with TVA (1987-96) than did the others who were candidates for the surviving positions, i.e., Dr. McArthur (1990-96), Sam Harvey (1991-96), and Dr. Chandra (1991-96).

Mr. Fiser thus would have had seniority on the retention register, assuming RIF procedures had been used. Accordingly, using the strict RIF policies and procedures, Mr. Fiser should have been selected for one of the remaining positions.

If the existing and surviving positions are not mutually interchangeable (as claimed by TVA, see TVA FOF ¶¶ 7.0-7.6), then procedures applicable to newly created positions are followed. According to TVA, under Federal regulations as applied by TVA, the incumbents of existing positions did not have retention standing for the new non-interchangeable positions, which would have to be advertised to allow employees to apply and compete for the jobs. TVA FOF ¶ 7.0. We note, however, that Mr. McGrath insisted upon rewriting the existing position descriptions to create new, non-interchangeable positions notwithstanding the virtually identical duties of the existing and new positions.[29]

(b). Differing Procedures (and Disparate Treatment) Applied to Dr. McArthur. As noted earlier, TVA did not apply these governing procedures with respect to Dr. McArthur. Instead, TVA assigned Dr. McArthur (without competition) to the position of RadChem Manager. As explained by Mr. McGrath, TVA had a policy of recognizing an employee's rights to a position where, in a prior reorganization, his position had been discontinued but, later, was recreated. In other words, TVA would recognize the rights of the incumbent of the previous eliminated job to the new position. Tr. 487 (McGrath).

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[29]Mr. Ben Easley, a former HR officer with TVA, testified that, in a RIF situation, positions were different if their duties differed by more than 35%. Tr. 1201, 1285 (Easley). Mr. Ronald Grover, former TVA Corporate Chemistry Manager, testified that positions were different for RIF purposes if their duties differed by more than 15-20%. Tr. 1824, 1884-85 (Grover). Mr. James Edwin Boyles, who in June, 1996 was serving as Manager of Human Resources in the corporate TVA organization (Tr. 3738 (Boyles)), and was Mr. Easley's supervisor, testified that, in comparing positions in a RIF situation, TVA looks to whether a "preponderance of the duties" remains the same. Tr. 3744-45 (Boyles). Although the pre-existing positions included environmental responsibilities and the new positions did not, the environmental responsibilities amounted to less than 5% of the duties of the position. Tr. 1885-86 (Grover). Deletion of those duties from the new positions did not, therefore, amount to a significant enough change to constitute those new positions as newly-created positions subject to competition. As noted by Mr. Grover, the position descriptions for the new PWR and BWR program manager positions did not change the functions that the chemistry program managers had been performing on a day-to-day basis. Tr. 1883 (Grover).

The Department of Human Relations (HR) had initially advised Mr. McGrath that the RadChem Manager position, like others in the new organization, would have to be posted or advertised. Tr. 481-82 (McGrath). At some point thereafter, Dr. McArthur raised with Mr. McGrath the question whether he (McArthur) should be required to compete for the RadChem Manager position, in view of the circumstance that he (McArthur) previously (following the 1994 reorganization) had held the position of Manager of Technical Programs. Dr. McArthur regarded the duties of Manager of Technical Programs and RadChem Manager as nearly identical. Tr. 481-82 (McGrath).

Accordingly, Mr. McGrath referred the question to HR, which responded that Dr. McArthur had "rights" to the new position. Tr. 483 (McGrath). Its reasoning, however, was not that assumed by Mr. McGrath. Rather, HR apparently reasoned that, following the 1994 reorganization, Dr. McArthur was never issued a position description for the job he was then occupying--a technical error by HR itself--and therefore should be considered as still occupying the position of Manager of Technical Programs. Tr. 489 (McGrath). In any event, as part of the 1996 reorganization, Dr. McArthur was appointed to the RadChem Manager position.

The Staff asserts that TVA's treatment of Dr. McArthur in this reorganization represented disparate treatment from that offered to Mr. Fiser. See Staff FOF ¶¶ 3.48–3.58. In contrast, TVA treats Dr. McArthur's situation as essentially unique and denies disparity on the ground that Mr. Fiser was treated like the vast majority of TVA employees. TVA FOF ¶¶ 8.0-8.11.

Whether or not Dr. McArthur's treatment was impermissibly disparate from that offered Mr. Fiser, it was certainly different. Because Dr. McArthur apparently, through an error by HR, was not formally issued a position description following the 1994 reorganization, he was considered as occupying a lower-level position which was his latest position description of record. In contrast, Mr. Fiser, who was forced to leave the position that was the basis of his

settlement of the 1993 DOL complaint as a result of the 1994 reorganization, was not considered to have rights to the PWR Chemistry Manager job that he was seeking in 1996, even though the vast majority of the duties encompassed by that job were the same as those he performed following the DOL settlement. As set forth by the Staff, " 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." Staff RESP FOF ¶ 2.126. Based on the foregoing, we regard Dr. McArthur as one of the "favored few" that TVA wished to designate for a particular remaining position and, to achieve that result, gave him disparate treatment vis-a-vis that accorded to the majority of TVA employees.

(c). Biased Treatment of Mr. Fiser in remainder of reorganization. As carried out by TVA, the 1996 reorganization required filling two positions through competition, the PWR and BWR chemistry management positions. Following Dr. McArthur's selection for the RadChem Manager position, there were three remaining employees who met the minimum qualifications for, and sought to fill, one or either of the Chemistry Manager positions-–Mr. Fiser, Mr. Harvey and Dr. Chandra. Joint Exh. 21 at GG000212; Tr. 1498-99 (McArthur). (Mr. Harvey and Dr. Chandra each was in fact a candidate for both positions, and Dr. Chandra was chosen for the BWR position, for which Mr. Fiser had not been a candidate.) Dr. McArthur, by virtue of his promotion to RadChem Manager, became the selecting official for the two Chemistry Manager positions. Tr. 1493 (McArthur); Tr. 1910 (Grover); Tr. 2916, 2988 (Corey); Joint Exh. 21 at GG000212.

With respect to the PWR position, the selection process included posting of the position, initial evaluation of the qualifications of applicants, conduct of interviews by the Selection Review Board (SRB) of applicants who possessed at least the minimum qualifications for the position, and final selection. When Mr. Fiser learned that the PWR Chemistry Manager position

was to be posted, he quickly filed his 1996 DOL complaint. His theory was that the position should not have been posted, for a reason comparable to the reason Mr. McGrath referred Dr. McArthur's inquiry to HR: that the position Mr. Fiser earlier occupied as a result of the 1993 DOL settlement had been reorganized out of existence in 1994 and that, under his understanding of TVA policy, he should have been regarded as having "rights" to the new position, comparable to Dr. McArthur's having been afforded rights to the RadChem Manager's position. On that basis, Mr. Fiser filed his 1996 DOL complaint on June 25, 1996, prior to TVA's selection of an incumbent to occupy the PWR Chemistry Manager position. See Staff Exh. 37.

The SRB for the Chemistry Manager positions (as well as certain other positions for which interviews were conducted the same day) was selected by Dr. McArthur and approved by both Tom McGrath and the HR department. Tr. 1494 (McArthur), Tr. 2916 (Corey). Initially, Dr. McArthur sought to establish an SRB consisting of the incumbent Chemistry and Environmental Protection Program Managers from three sites–Jack Cox, from Watts Bar; Charles Kent, from Sequoyah; and John Corey, from Browns Ferry. Id. 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. 2916 (Corey). Each of these individuals was a person with whom one of the prospective chemistry managers was or had been working closely in recent years--Jack Cox, with Mr. Fiser; Charles Kent, with Sam Harvey; and John Corey, with Dr. Chandra.

On the morning of the SRB meeting, however, Jack Cox advised Dr. McArthur that he had a conflict with respect to the particular time frame proposed for the SRB questions. Tr. 2874 (Corey); Tr. 3152 (Kent). Dr. McArthur responded by selecting another individual. After considering several from Watts Bar who were not available, Dr. McArthur selected Heywood R. (Rick) Rogers, the Maintenance Support Manager in Nuclear Operations Support at Sequoyah.

Tr. 1495 (McArthur); Tr. 5166-67 (Rogers).[30] TVA presented a long list of Mr. Roger's qualifications to serve on the SRB. See TVA FOF ¶¶ 9.24–9.26. Dr. McArthur explained that, although Mr. Rogers had not recently worked with Mr. Fiser, he had been exposed to Mr. Fiser's work some years earlier, when Mr. Fiser was serving as Chemistry Manager at Sequoyah. Tr. 1497 (McArthur). (Mr. Rogers was not, however, a part of the RadChem organization, either at that time or more recently. Tr. 2883 (Corey).). Dr. McArthur added that he "thought it was a very fair board." Tr. 1497 (McArthur).

However, the Licensing Board concurs with the Staff conclusion that the SRB was "stacked against Fiser in that the RadChem Manager most familiar with his recent work [Mr. Cox] was not included in the process, whereas the RadChem Managers most familiar with Harvey and Dr. Chandra's recent work were on the SRB." Staff FOF ¶ 2.137. Indeed, one of the SRB members, Mr. Kent, the manager from Sequoyah, had made an effort, shortly before the 1996 reorganization, to have Mr. Harvey transferred to Sequoyah because he had performed well at Sequoyah and had good secondary chemistry experience. Tr. 3106, 3137 (Kent). Such a transfer appears to have been blocked by Mr. McGrath, allegedly on the ground that Mr. Harvey could not be transferred to a vacant position without posting it for competition. Tr. 3137-38 (Kent).

Three candidates for the PWR Chemistry Manager's job, Messrs. Fiser, Harvey, and Dr. Chandra, met the minimum qualifications for the job and were interviewed. Tr. 1498-99 (McArthur); Joint Exh. 23 at GG000620. The questions propounded by the SRB to each of the candidates for a particular position (e.g., PWR Chemistry Manager) were identical. The SRB for the PWR Chemistry Manager position asked each candidate the same eight questions,

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[30]Dr. McArthur did not consider rescheduling the SRB meeting to accommodate Jack Cox's schedule because "we were trying to get the selections made" and "it just holds up the organization-–reorganization." Tr. 1496 (McArthur).

chosen by the SRB from a group of 16 questions drafted by Dr. McArthur, together with one additional question drafted by Charles Kent (Tr. 2880, 2899 (Corey)) and added by the SRB on its own. Tr. 1499 (McArthur); Joint Exh. 23 at GG000655. (Similarly, the SRB for the BWR Chemistry Manager position--the same individuals as for the PWR position--asked each candidate the same six questions, chosen by the SRB from the same group of questions drafted by Dr. McArthur for both the PWR and BWR positions; the SRB did not add a question on its own with respect to the BWR position. See Joint Exh. 21 at GG000265 (questions asked Dr. Chandra).)

Not only was the SRB, in its personnel, stacked against Mr. Fiser (as described above), but the particular questions propounded to each candidate for the PWR Chemistry Manager position also focused on the expertise of Mr. Harvey rather than that of Mr. Fiser. Thus, the position description for the PWR Chemistry Manager position called for a candidate who was knowledgeable in the areas of both primary chemistry and secondary chemistry. Tr. 1914 (Grover).[31] Similarly, the position description for the BWR Chemistry Manager position likewise called for both of those areas of expertise, with emphasis on primary chemistry.[32] Primary chemistry concerns "the reactor part of the facility." Tr. 1477 (McArthur). On the other hand, secondary chemistry concerns "the steam generation portion, the steam generators [and the]

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[31]The position description for the Chemistry Program Manager (PWR) called for a candidate to be responsible for providing "technical and programmatic expertise for implementation of the [TVA Nuclear] chemistry program at individual sites" [in particular, Sequoyah and Watts Bar, both PWRs]. Such responsibilities would cover both primary and secondary chemistry problems. In addition, a candidate was to "[f]unction as the [TVA Nuclear] senior technical expert to the sites in the areas of PWR Secondary chemistry control." TVA Exh. 55 at BF001339 (position description of Sam Harvey).

[32]The position description for the Chemistry Program Manager (BWR) position included responsibility for "Primary Chemistry Program & Count Room Support for all [TVA Nuclear] sites." Specifically, the occupant was to function as the TVA Nuclear "senior technical expert to the sites in the areas of BWR chemistry control, PWR Primary Chemistry, laboratory QA/QC, radioactive effluents, and failed fuel action plans." TVA Exh. 55 at BF001272 (position description of Dr. Chandra) (emphasis added).

pressurizers. . . ." Id. The questions asked by the SRB related both to managerial skills and technical skills. Tr. 2859 (Corey); Tr. 3145 (Kent). But none of the questions relating to technical skills was explicitly directed at problems arising with respect to primary chemistry, which was Mr. Fiser's area of greater expertise. They all focused on secondary chemistry (Mr. Harvey's area of expertise) or, generally, managerial expertise. Stated another way, the questions themselves predetermined which of the candidates would likely achieve the better scores.

But in terms of problems that were then extant, there were some in each area of chemistry that the new PWR manager would have to be able to address. According to Dr. McArthur, the biggest problem that the Chemistry Program Manager would have to deal with at that time was on the secondary side, dealing with steam generators. Tr. 1623 (McArthur). But attention also would have to be paid to the primary side, particularly corrosion problems. Tr. 1623-24 (McArthur); Tr. 2929 (Corey). Fuel failures were also a primary chemistry concern at that time. Tr. 2976 (Corey). As acknowledged by Mr. Corey, a member of the SRB, "a primary concern with nuclear safety is containing the radioactivity. And that's a primary chemistry issue." Tr. 2937 (Corey).

TVA offers two bases for the lack of primary-chemistry questions in the examination for the PWR Program Manager position. First, that the incumbent of the PWR Chemistry Program Manager was not supposed to be the primary chemistry expert for any of TVA's sites, that instead the BWR Program Manager position included responsibility for primary chemistry at all TVA sites. TVA FOF ¶¶ 9.29–9.30. And second, that the questions were fair and it was reasonable to expect the selectee for the PWR Chemistry Manager position to know the answers to the technical questions about secondary chemistry. TVA FOF ¶ 9.30. TVA adds that many of the general questions could be answered based on a background of either primary or secondary chemistry.

The Licensing Board rejects these explanations. As spelled out above, the lack of explicit primary-chemistry questions on the PWR examination fails to recognize the extent of primary-chemistry questions that the PWR Manager would be called upon to address. (Parenthetically, the BWR Chemistry-Manager examination likewise failed to include explicit questions relating to primary chemistry. See Joint Exh. 21 at GG000249-GG000250.) Finally, the circumstance that certain general questions could be answered from either a primary or a secondary chemistry background does nothing to undercut the overall bias of the questions in favor of persons with a background in secondary chemistry.

The Staff asserts (Staff FOF ¶¶ 2.186-2.187), and TVA apparently does not dispute (TVA REPLY FOF at 52-53), that at least two of the three members of the SRB (Messrs. Kent and Corey), as well as Dr. McArthur, the selecting official, were aware that, prior to the SRB examination for the PWR Chemistry Program Manager position, Mr. Fiser had filed DOL complaints, the most recent based on Dr. McArthur's posting of the position. Indeed, they were so informed by Mr. Kent, one of the SRB members, approximately 30 minutes before the SRB's examination of Mr. Fiser. Tr. 2879 (Corey); Tr. 3154, 3230 (Kent).

The Staff also claims that Sam Harvey was preselected for the PWR Program Manager position. Staff FOF ¶¶ 2.158–2.163. Here, however, the evidence is mixed. First, Mr. McGrath is said to have refused to transfer Sam Harvey to the Sequoyah site because he wanted to keep Mr. Harvey's expertise in Corporate Chemistry. Tr. 3615, 3619 (Grover); Tr. 3318 (Voeller). Mr. Harvey is also said to have confided by telephone, on June 3, 1996 (prior to Mr. Fiser's and Mr. Harvey's SRB interviews on July 18, 1996), with Dave Voeller, then the Superintendent of Maintenance at Watts Bar (Tr. 3304 (Voeller)), that he (Harvey) would be working more closely with him (Voeller) in the future. Tr. 3316 (Voeller). That would be the case if Mr. Harvey were selected for the PWR Corporate Chemistry position (Watts Bar was a PWR). Mr. Harvey further was said to have stated that he was not being released to be

transferred to Sequoyah because he would be the one retained in Corporate Chemistry. Tr. 3318 (Voeller). Sam Harvey is also said to have stated during the telephone conversation that the SRB interviews would be conducted to "keep it legal" and that "Gary [Fiser] would be the odd man out." Tr. 3319, 3322 (Voeller).[33]

On the other hand, Sam Harvey related the telephone conversation somewhat differently. He said that he told Dave Voeller that he "would either be working with him [Voeller] closer, which I would look forward to, or possibly not at all." Tr. 4978 (Harvey). Mr. Harvey also related a second conversation with Mr. Voeller in which Mr. Harvey clarified the portion of the first conversation indicating that he (Harvey) might not be working with Mr. Voeller. In any event, Mr. Harvey explained that, "if the selection process was equal, all things being equal that based on my technical abilities and what I had delivered over time would come to the forefront in the selection process." Tr. 4982 (Harvey).

The Board is not entirely persuaded that Sam Harvey's telephone conversations with Dave Voeller prior to the SRB interviews indicate that Sam Harvey was preselected for the Corporate PWR Chemistry Manager position. Nor do they indicate that Sam Harvey was not preselected. They do appear to reflect Sam Harvey's confidence that he had superior qualifications for the job than did Mr. Fiser. The Board expresses no opinion on this subject, although noting that Mr. Harvey had significant technical qualifications, particularly with respect to secondary chemistry. The Board believes, however, that the membership on the SRB, together with questions propounded by the SRB emphasizing secondary rather than primary chemistry issues, and the circumstance that Dr. McArthur was the selecting official, did in effect virtually assure that Sam Harvey rather than Gary Fiser would be selected for the PWR Chemistry Manager position.

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[33]Mr. Voeller advised both Mr. Grover and Mr. Fiser of his telephone conversation with Sam Harvey. Tr. 3320-3321 (Voeller). See also Joint Exh. 36.

In fact, Mr. Harvey received a higher cumulative score (235.7 points) than Mr. Fiser (180.8 points) or Dr. Chandra (235.5 points) before the SRB. Joint Exh. 22 at GG000420, GG000439, and GG000456. Mr. Harvey was selected by Dr. McArthur as PWR Corporate Chemistry Manager. Id. at GG000399.[34] Mr. Fiser was given the option of transferring to the TVA Services staff, effective October 1, 1996 (where he could remain and search for another position throughout fiscal year 1997) or to resign by close of business September 30, 1996, with severance pay together with a lump sum payment of salary throughout fiscal years 1996 and 1997 (ending September 30, 1997), and a lump sum payment for unused annual leave. See Joint Exh. 28. Mr. Fiser reasoned that, if he transferred to TVA Services and thereafter was offered an unsatisfactory TVA position (e.g., at a lower salary, although amounting to at least 80% of his current salary), he would be forced to accept such position or resign at that time, without the benefit of the one-time lump sum payment. Tr. 2370-71 (Fiser). Accordingly, Mr. Fiser elected to resign, effective September 5, 1996. Tr. 2369 (Fiser); see Joint Exh. 29.

D. Licensing Board Analysis of Facts

As noted earlier in this Decision, there are four elements that the Staff must establish to demonstrate that there has been a violation of 10 C.F.R. § 50.7 by TVA. Specifically, the Staff must demonstrate, first, that Mr. Fiser engaged in one or more protected activities; second, that members of TVA management were aware of the protected activity; third, that he was subject to an adverse action; and fourth, that the adverse action was premised at least in part on retaliation for such activities.

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[34]In this selection document, Dr. McArthur refers to Dr. Chandra as the first-ranked applicant for both the PWR and BWR positions. That was incorrect with respect to the PWR position-–Mr. Harvey was in fact the first-ranked candidate for the PWR position, and he was selected for that position. Dr. Chandra was selected for the BWR position. Joint Exh. 22 at GG000398.

In the first place, it is clear to us that, as set forth earlier in this Decision, Mr. Fiser was involved throughout his career with TVA in a number of "protected activities," as contemplated by 10 C.F.R. § 50.7. Among other matters, he filed two discrimination complaints with the DOL and also joined in a letter to Sen. Sasser (with copies to NRC personnel) complaining about TVA's activities that tended to discourage employees from raising such issues. In addition, we find that Mr. Fiser engaged to some extent in several technical protected activities (certain of which were referenced in the 1993 DOL complaint and the Sasser letter), although in some instances only marginally so. Specifically, of the five protected activities described supra at pages 35 through 47 of this decision, we find that Mr. Fiser was sufficiently involved in four of those activities to warrant classification of his actions as "protected activities." See pages 37, 40, 43, and 46-47.

Second, as noted earlier, members of TVA management also were knowledgeable about Mr. Fiser's participation in such activities. Dr. McArthur, in particular, was knowledgeable about the two DOL complaints and the Sasser letter, as well as several of the technical protected activities. Mr. McGrath was knowledgeable about several of the technical protected activities, as well as the 1996 DOL complaint.

Third, Mr. Fiser was also the subject of an adverse action, as contemplated under 10 C.F.R. § 50.7. Although he was given the option to be transferred to TVA Services, that option, as well as the resignation option he actually chose, has likewise been deemed to be an adverse action under the Whistle blower statute (Section 211). See TVA v. U.S. Sec'y of Labor (Curtis Overall, Intervenor), 59 Fed. Appx. 732, 2003 U.S. App. LEXIS 4166 (6th Cir. Mar. 6, 2003). TVA's claim to the contrary (TVA FOF ¶¶ 10.0–10.5) is hereby rejected.

Fourth, the crucial part of the "protected activity" violation is the nexus between the adverse action and discriminatory intent. There is no direct testimony that TVA's dismissal of Mr. Fiser was based, in whole or in part, on retaliation for Mr. Fiser's involvement in protected

activities. Nor would any such "smoking gun" be likely to be available in any proceeding of this type. As set forth in a special report to the Commission on allegations of discrimination with respect to Millstone Power Plant, Units 1, 2 and 3:

> Although all four of the items described[35] above are necessary to make out a case of discrimination under section 50.7, the fourth item [Was the adverse action taken because of the protected activity?] is the most problematic, both generally and in the cases we were asked to review. This is because it is rare that this crucial element can be established by so-called "smoking gun" evidence, i.e., evidence that irrefutably shows the adverse action was pretextual. (The clearest example of such evidence would be an admission by the official of the employer who was directly responsible for the adverse action that he or she took that action against the employee because the employee engaged in protected activity.)
>
> Instead, what usually is available from an investigation into a section 50.7 discrimination allegation is testimony and documentary information, often conflicting, that provides circumstantial evidence of whether an adverse action was taken because an employee engaged in protected activity. Circumstantial evidence is "evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue." Webster's New Collegiate Dictionary 203 (1975). . . . In the context of a discrimination case, relying on circumstantial evidence means that the requisite factual finding that adverse action was taken because of the protected activity would be the product of a reasonable inference drawn from other proven events or circumstances in the case.

MIRT Report at 4-5 (emphasis added).[36] Administrative Judge Alan S. Rosenthal, in a Separate Statement to the MIRT report, drew essentially the same conclusion:

> Unsurprisingly, the difficult assessment concerned the fourth element: whether the required nexus existed between the protected activity and the adverse action. In approaching that question in each case, there was a recognition of the obvious: the fruits of the OI investigation [in the cases under review] would not include any acknowledgment of licensee wrongdoing or, in all likelihood, anything that might constitute direct evidence either in support or in refutation of the alleger's claim. Thus, the determination respecting whether the licensee's proffered explanation for the adverse action was genuine, or instead in whole or in part pretextual, would necessarily

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[35]The four items are set forth supra at p. 16 of this Decision.

[36]The MIRT Report adds: "In so describing what is often the central supporting material in discrimination cases, it should not be supposed that because the information is circumstantial, the cases are somehow rooted in weak or deficient evidence. . . . Indeed, such evidence, often the result of a painstaking exercise in drawing inferences (or more specifically reasonable inferences) based on the factual circumstances that are presented, can be as convincing as the 'smoking gun'." MIRT Report at 5.

> hinge upon the drawing of inferences from evidentiary disclosures that might well be in substantial conflict.

Separate Statement to MIRT Report of Administrative Judge Alan S. Rosenthal at 2. Indeed, the Supreme Court has sanctioned the drawing of inferences of causation based on circumstantial evidence, consisting of numerous circumstances that give rise to an inference of unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Such circumstances are present here. They include (1) the disparate treatment accorded to Dr. McArthur and Mr. Fiser in the 1996 reorganization; (2) the membership makeup of the SRB that was biased in favor of candidates other than Mr. Fiser, particularly Sam Harvey; (3) the propounding of technical questions by the SRB that lacked any focus on primary chemistry, Mr. Fiser's specialty, but included several focused on secondary chemistry, Mr. Harvey's specialty; (4) the virtual preselection of Mr. Harvey by virtue of the personnel makeup of the SRB and the questions asked by the SRB; (5) the statement by Charles Kent, prior to the SRB interview, to John Corey, another SRB member, and Dr. McArthur, the selecting official, of Mr. Fiser's history of filing DOL complaints; (6) the temporal proximity of Mr. Fiser's non-selection and certain of his protected activities, particularly the 1996 DOL complaint; (7) the attempted RIF of Mr. Fiser in 1994 from a position he was not then occupying and which was not in fact being eliminated; (8) the rewriting of position descriptions in 1996 so as to avoid using standard RIF procedures that would have given Mr. Fiser a preferred position to be retained; and finally (9) the expressed warning by Dr. McArthur to Mr. Fiser (in 1993) to the effect that he should not file a DOL complaint because people "don't want somebody that is a trouble maker." See Joint Exh. 27 at 80.

The plethora of career-damaging situations and circumstances to which Mr. Fiser was subjected during the last several years of his career at TVA, described in the record of this proceeding, go well beyond unfortunate circumstances and/or chance. Given these

circumstances, as well as the criticisms by management officials of Mr. Fiser's participation in several of the technical protected activities (such as the PASS controversy and the diesel generator fuel oil tank issue), and reflecting the lack of credibility that attends certain portions of the testimony of Mr. McGrath, Dr. McArthur, and Mr. Charles Kent (all as outlined earlier in this Decision), we conclude that the sum total of these many inferential adverse actions present a pattern of discrimination that was likely orchestrated by persons in authority at TVA to terminate Mr. Fiser's career. It is our view that Mr. Fiser's engagement in protected activities played at least some role in the adverse action taken against him. That being so, TVA has discriminated against Mr. Fiser in violation of 10 C.F.R. § 50.7.

In that connection, we note that, throughout this proceeding, TVA has attempted to expand the arena of non-protected activities and to contract the scope of protected activities. TVA has done so in two ways: (1) by its legal construction of 10 C.F.R. § 50.7 as covering only discrimination identified by Section 211 of the ERA and as excluding discrimination precluded by the AEA; and (2) by narrowly defining what constitutes a protected activity. As described earlier, we have essentially rejected both avenues of TVA's approach.

TVA (and NEI) regard the strict approach to discrimination adopted by the Staff as counter-productive. "A finding of discrimination based on the facts of the present case would have a very real potential for a chilling effect on management--an effect that would be contrary to nuclear safety." TVA FOF ¶ 16.6; see also NEI Brief at 24-25.

We agree that the Staff is adopting a stiff standard for construing 10 C.F.R. § 50.7. We also agree that the Staff is broadly construing the scope of activities covered by that Section. But we disagree with TVA that the Staff's approach would have a deleterious effect on nuclear safety. TVA is essentially saying that a little discrimination is permissible if it enhances the ability of managers to operate their facilities efficiently.

As the Staff has pointed out, relevant evidence of discrimination should not be ignored "simply because it might impact how nuclear managers conduct their business." Staff RESP FOF ¶ 3.16. Further, we fail 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 whistle blowers are protected from retaliation for raising concerns promotes nuclear safety." Id.

E. Conclusions of Law

1. The NRC is authorized under both the Atomic Energy Act and Section 211 of the Energy Reorganization Act to take action against licensees for whistle blower retaliation claims.

2. Violations by a licensee of either Section 211 of the ERA or of the Atomic Energy Act enforcement provisions are subject to civil penalties under Section 234 of the Atomic Energy Act.

3. The appropriate standard of proof applicable to a 10 C.F.R. § 50.7 case is whether the Staff can prove by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an adverse action.

4. Circumstantial evidence of discrimination may be used to establish, by a preponderance of the evidence, that discrimination took place.

F. Civil Penalty

Having found that TVA violated 10 C.F.R. § 50.7 by failing to select Mr. Fiser for a continuing position during the 1996 reorganization, the Staff utilized NRC's Enforcement Policy, NUREG-1600, 64 Fed. Reg. 61,142 (November 9, 1999) [hereinafter "NUREG-1600"] to determine the civil penalty it would impose. Tr. 282 (Luehman); see Staff Exh. 170.[37] The

[37]As set forth in NUREG-1600, "this is a policy statement and not a regulation. The Commission may deviate from this statement of policy as appropriate under the circumstances of a particular case." NUREG-1600, at 61,145.

supplements to NUREG-1600 are used to determine the Severity Level of a violation, and the particular Severity Level depends for the most part on the management level of the discriminating official. Tr. 283, 285 (Luehman). The Staff characterized the violation by TVA as Severity Level II (see NOV, Joint Exh. 47), based on the activities of Mr. McGrath and Dr. McArthur as "plant management or mid-level management" set forth in Supplement 7 to NUREG-1600. (TVA stipulated that Mr. McGrath and Dr. McArthur were senior level management at TVA. Tr. 301 (Luehman).)

Once the Severity Level of a violation is ascertained, the Enforcement Policy calculates the amount of a civil penalty in accord with Tables 1A and 1B of that Policy. Table 1A sets forth base civil penalties based on the type of licensee, its size, and ability to pay. Under that Table, the base civil penalty for TVA is $110,000. Table 1B is then used to adjust the civil penalty based on severity level of the violation. The base civil penalty for a Severity Level II violation by a licensee such as TVA is $88,000 (80% of a Severity Level I violation). Tr. 286, 287, 303 (Luehman); see also NUREG-1600, at 61,150.

Following determination of a base civil penalty for a particular violation, NUREG-1600 authorizes adjustment of the penalty based on factors such as (a) previous escalated enforcement action (regardless of activity area) during the past 2 years or 2 inspections, whichever is longer; (b) whether the licensee should be given credit for actions related to identification; (c) the promptness and comprehensiveness of corrective actions; and (d) whether, "in view of all the circumstances, the matter in question requires the exercise of discretion." NUREG-1600, at 61,151. A flowchart together with descriptive instructions as to the exercise of discretion appears on p. 61,151 of NUREG-1600. Id.; Tr. 287-88 (Luehman). Based on these factors, the base civil penalty may be escalated or mitigated as a matter of discretion. One of the factors on which mitigation may be selected is "the clarity of the requirement [for which a violation has been found]." NUREG-1600 at 61,157. NUREG-1600

also includes the caveat that, "absent the exercise of discretion," the outcome of the assessment process for each violation or problem "is limited to . . . no civil penalty, a base civil penalty, or a base civil penalty escalated by 100%." NUREG-1600 at 61,151 (emphasis added).

In ascertaining that the civil penalty in this case should be $ 110,000, the Staff started with the base of $ 88,000. It determined that the protected activities of Mr. Fiser, including the two DOL complaints, the letter to Senator Sasser, and the technical activities that have been found to be protected activities on the part of Mr. Fiser, together with TVA's discouragement of whistle blowing activities, are of sufficient significance to warrant escalation of the base penalty by 100% (leading to a potential penalty of $ 176,000). The Staff declined to mitigate the penalty for actions by TVA related to identification--indeed, TVA still does not acknowledge that any violation occurred. Nor did the Staff feel that corrective actions by TVA warranted mitigation. Based on the statutory maximum civil penalty of $110,000, the Staff imposed a civil penalty of that amount. The Licensing Board finds that the NRC Staff appropriately applied the guidance in NUREG-1600 in imposing the civil penalty of $110,000.

NUREG-1600 permits adjustments of the civil penalties imposed based on discretion by the NRC. This discretion may be exercised by the NRC Staff or, in a proceeding such as this, by the Atomic Safety and Licensing Board designated to rule on appeals of the civil penalty. 10 C.F.R. § 2.205(f). In this proceeding, the Licensing Board believes that a violation of 10 C.F.R. § 50.7 has occurred. But the failure to retain Mr. Fiser appears to have been premised at least to some degree on TVA's view of Mr. Fiser's work history. Indeed, his protected activities appear to have played a minor role in his failure to be retained. That is sufficient under 10 C.F.R. § 50.7 (although perhaps not so under Section 211). But a manipulation of personnel regulations also appears to have played some role in that result, inasmuch as, if standard RIF procedures had been utilized, Mr. Fiser would have been retained.

Based on all these circumstances, and particularly the small role that protected activities may have played in leading to the adverse action against Mr. Fiser, we believe that the base civil penalty of $88,000 should not have been escalated and that the $110,000 civil penalty should instead be mitigated to $44,000 (one-half the base penalty). This is based in large part on TVA's misunderstanding that, unlike under Section 211, an adverse action premised on violation of the AEA may be based not only where a significant portion thereof is premised on a substantial contribution of the protected activities (as under Section 211) but also where only a small part is premised on an employee's participation in protected activities.

In reaching this decision, the Licensing Board has considered all the evidence submitted by the parties and the entire record of this proceeding. That record consists of the Commission's Notice of Violation and Proposed Imposition of Civil Penalty (NOV), the Commission's Order Imposing Civil Monetary Penalty, the pleadings filed by both parties (TVA and the NRC Staff) and by the Nuclear Energy Institute, as amicus curiae, the oral testimony adduced on the record and the exhibits received into evidence, and the proposed findings of fact and conclusions of law submitted by each of the parties. To the extent they are accepted in whole or in part, such proposed findings and conclusions are reflected by the Board's discussion of the issues and findings set forth above. All issues, arguments, or proposed findings presented by the parties, but not addressed in this Decision, have been found to be without merit or unnecessary to this Decision.

G. Order

Based on the foregoing opinion, including findings of fact, conclusions of law, and the entire record, it is, this 26th day of June 2003,

ORDERED:

1. The Order Imposing Civil Monetary Penalty, dated May 4, 2001 and published at 66 Fed. Reg. 27,166 (May 16, 2001) is hereby sustained, except that the civil monetary penalty of

$110,000 set forth therein is hereby reduced to $44,000, for reasons set forth in this opinion. The Tennessee Valley Authority shall pay the $44,000 civil penalty within 30 days of the date of this Initial Decision, in accordance with NUREG/BR-0254. In addition, at the time of making the payment, the Licensee shall submit a statement indicating when and by what method payment was made, to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738. (A copy of this statement should also be furnished to the Licensing Board.)

2. This Initial Decision is effective immediately and, in accordance with 10 C.F.R. § 2.760 of the Commission's Rules of Practice, shall become the final action of the Commission forty (40) days from the date of its issuance, unless any party petitions the Commission for review in accordance with 10 C.F.R. § 2.786 or the Commission takes review sua sponte. See 10 C.F.R. § 2.786.

3. Within fifteen (15) days after service of this Decision, any party may seek review of this Decision by filing a petition for review by the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of the petition for review is mandatory for TVA to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.786(b)(2).

4. Any petition for review shall be no longer than ten (10) pages and shall contain the information set forth in 10 C.F.R. § 2.786(b)(2). Any other party may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. Such an answer shall be no longer than ten (10) pages and, to the extent appropriate, should concisely address the matters in 10 C.F.R. § 2.786(b)(2). A petitioning party shall have no right to reply, except as permitted by the Commission.

5. Attached to this Initial Decision are the following Appendices:

APPENDIX A: List of Exhibits.
APPENDIX B: List of Witnesses.
APPENDIX C: Transcript Corrections.
APPENDIX D: List of Acronyms and Abbreviations.

THE ATOMIC SAFETY AND
LICENSING BOARD

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

[Copies of this Initial Decision, along with the Separate Opinion of Administrative Judge Young, and Appendices to the Decision, have been transmitted this date by e-mail to counsel for each of the parties.]

Separate Opinion of Administrative Judge Ann Marshall Young, Concurring in Part and Dissenting in Part

I concur with my colleagues, with regard to the four-part test described *supra* at 16, that parts 1 through 3 — involving whether the employee engaged in protected activity, whether the employer was aware of the protected activity, and whether an adverse action was taken against the employee — are met in this case. The central question in this proceeding is, and the outcome turns on, whether "the adverse action [was] taken because of the protected activity." *See id*.

I concur that the evidence presented in this proceeding indicates, by a preponderance, that there was some disparate treatment of Mr. Gary Fiser, and that an atmosphere of hostility to whistle blowers existed at some points in time at TVA. Regarding the former, for example, the posting of the position for which Mr. Fiser and others competed in 1996, while not posting the position filled by Dr. McArthur, shows an inconsistency in how TVA applied its RIF policies and procedures. Regarding the latter, despite testimony from some employees to the effect that filing a DOL complaint is not viewed negatively at TVA, I find that sufficient evidence was presented to establish that, at least at some points in time, this was indeed negatively viewed.

I do not, however, view these facts, in the context of, and/or in combination with, the other evidence presented in this proceeding, as leading to a conclusion that a violation of 10 C.F.R. § 50.7 on the part of TVA was proven *in this proceeding*. Although I agree that it is not necessary to have a "smoking gun" to prove discrimination, and agree that any participation in protected activity is a significant matter, I would find that it has not been shown *by a preponderance of the evidence in this proceeding*, through reasonable inferences drawn from the evidence that was presented, that any disparate treatment of, or adverse action against, Mr. Fiser that did occur was taken *because of* any protected activity. Thus, I would find that

there is insufficient proof to support a conclusion of discrimination or retaliation under § 50.7 in this proceeding. I must therefore dissent from the ultimate decision of my colleagues.

In reaching this determination, three issues on which I differ with my colleagues are particularly pertinent in my analysis: (1) whether "protected activities" include not only "discovering, raising, reporting, and/or documentation of [specific safety issues] but also participation in their resolution," *see supra* at 32; (2) whether sufficient evidence was presented to support a conclusion that Mr. Fiser engaged in any protected activity other than the filing of the two DOL complaints and the letter to Senator Sasser; and (3) whether sufficient evidence was presented to support the ultimate outcome in this proceeding with regard to the required nexus between protected activity and the adverse action(s) against Mr. Fiser, and the resulting penalty assessed against TVA.

Definition of "Protected Activities"

My colleagues adopt the Staff's definition of "protected activity," which includes "participation in [the] resolution" of safety matters, even when one has done nothing to discover, raise, report or document any safety matter. *Id.* I cannot concur with this definition as adopted, as I find it neither falls within a reasonable reading of 10 C.F.R. § 50.7, nor bears any reasonable relationship to the basic nature of activities commonly understood to constitute "whistle blowing" — which is generally considered to bear some indicia of acting to one's own possible detriment *against* the explicit or implicit directives or wishes of the employer, to address safety matters that might not otherwise be addressed. Although there might be circumstances in which participating in resolving a safety issue might place an employee in the position of being a whistle blower — i.e., circumstances in which the employee participates in actually correcting, or attempting to correct, a safety matter *against* the wishes of an employer (and thereby arguably, in effect, "refusing to engage in any practice made unlawful," as provided in § 50.7(a)(1)(ii)) — I do not see that merely participating in resolving a safety matter,

when there is no indication that such participation is undertaken against the wishes of management in order to address safety concerns that might not otherwise be addressed, is in any way encompassed within a reasonable reading of § 50.7 or a reasonable definition of "whistle blowing," as discussed above.

Whether Sufficient Evidence of "Technical Protected Activities"

My colleagues state that they view the "technical protected activities" — which I take as referring to any activity of Mr. Fiser with regard to actual safety issues, apart from filing the complaints and signing the letter to Senator Sasser with two other TVA employees — "as necessary adjuncts to the Staff's theory" in this proceeding. *Supra* at 35. I tend to agree that without any findings of such "technical protected activities" on the part of Mr. Fiser the Staff's case becomes significantly less persuasive. Given my view, however, that mere participation in resolving safety issues, as defined by my colleagues, is insufficient to constitute a protected activity, my analysis of the facts of this case leads me in a different direction than that taken by my colleagues in this case.

I note, with regard to participation in resolving safety issues, that the record in this proceeding includes evidence that management not only supported efforts to resolve safety problems and exhibited concern when they were not addressed with sufficient attention, *see*, *e.g.*, Tr. 4718 (Ritchie); in at least one instance in which Mr. Fiser claimed to have been a major player in discovering the source of a problem and correcting it — the situation with the diesel generator fuel oil storage tanks — another person actually pointed the way to the source of the problem and directed Mr. Fiser how to go about resolving it. According to the testimony of Mark Burzynski, the corporate licensing manager for TVA, borne out by a handwritten memorandum from J. D. Smith, "Manager NRR," dated August 11, 1989, *before* any indication of any meaningful involvement by Mr. Fiser and *after* "chemistry personnel" indicated a belief the NER "did not apply to Sequoyah," *see supra* at 42, it was Mr. Smith who identified this problem, and

specifically directed Mr. Fiser to look, among other things, to "[h]ow was this missed in SI [surveillance instruction] review program," to write a "CAQ/PRO as appropriate," and to "[m]aintain working copy of all chemistry related ASTM [standards]." Tr. 4917-18 (Burzynski); TVA Exh. 128 at FI000080; TVA Exh. 147 at FI000259; *see also* Tr. 4891-92, 4908-10, 4912-13, 4926-36 (Burzynski).

In the face of evidence such as this — indicating that any participation of Mr. Fiser in resolving the diesel generator fuel oil storage tank sampling problem was not done against the wishes of TVA but rather in compliance with specific directions *to* him — I find especially troubling the *absence* of any other testimony corroborating Mr. Fiser's own testimony on his asserted participation in addressing safety concerns, or corroborating that his participation in any activities was of a nature similar to what is generally understood by the term "whistle blowing," or of a nature that would fall within a reasonable reading of the provisions of 10 C.F.R. § 50.7. That he may have been threatened with disciplinary action for in some way being responsible for a problem he may not have caused might, if true, be unfair, but I would not find this to equate to any attempted adverse action based on any protected activity.

In others of the situations in which my colleagues find that Mr. Fiser participated in resolving safety issues, there is no finding that he did anything against management's wishes, other than *not* resolving an issue successfully or adequately, *see*, *e.g.*, *supra* at 37, 40, or refusing to initiate a procedure that might, if *not* followed, subject TVA to a finding of a violation of procedures, *see supra* at 44-47.

In these circumstances, I fail to see any participation in any protected activity in any substantive sense that was actually related to a safety matter in any way reasonably encompassed by § 50.7. Thus, even under the analysis of my colleagues, I would find the "necessary adjuncts of the Staff's theory" to be lacking. Proceeding, however, on the theory that the two DOL complaints and the letter to Senator Sasser — which all parties agree

constitute "protected activity" *per se* — may constitute sufficient protected activity on their own on which to ground a ruling against TVA based on the facts in this proceeding, I analyze in the next section the letter and complaints from this perspective, considering their nature and weight (along with that of other relevant evidence) in determining whether the Staff established by a preponderance of the evidence the required "nexus" between protected activity on the part of Mr. Fiser and adverse actions against him.

Whether Sufficient Evidence of Nexus Between Protected Activity and Adverse Actions To Support Penalty Against TVA

With regard to the letter to Senator Sasser, it appears from the evidence presented that Mr. Fiser signed on to a letter that originated with two other persons who had already filed DOL complaints themselves, only *after* he had been given "surplus" and "RIF" notices that ultimately relieved him of his job in 1993. His surplus notice came in April 1993, and his RIF notice is dated August 13, 1993, three days before the August 16, 1993, letter to Senator Sasser. Although this timing does not suggest that the contents of the letter were in any way untrue, it leaves open the possible reasonable inference that, insofar as Mr. Fiser was concerned, he signed on to the letter of Mr. Jocher and Dr. Matthews only in order to better his chances of regaining his job.

My colleagues find, and I agree, that it was not proven that Fiser himself was involved in discovering, raising, reporting or documenting any of the underlying safety matters discussed in the letter. This lack of proof that Mr. Fiser himself participated in either discovering, raising, reporting or documenting any safety matter — *other than by signing the letter* — might support a finding that he was, in the words of my colleagues, "merely 'working the system' to attain personal advantage," *see supra* at 35, in signing the Sasser letter. I would find this to be a reasonable possibility — just as it is *possible* that Mr. Fiser *was* himself involved in discovering, raising, reporting and documenting safety matters at TVA (notwithstanding my colleagues' and

my findings that this was not proven), and signed the Sasser letter at least in part in a genuine effort to address legitimate safety concerns. Despite the latter scenario being *possible*, however, I would not find such a genuine effort to have been proven *by a preponderance of the evidence* considering the record as a whole, in part *because of* the manifest insufficiency of the evidence to show any involvement on the part of Mr. Fiser in discovering, raising, reporting or documenting actual safety matters, and particularly when this insufficiency is considered in conjunction with the timing of the letter.

The same analysis may be applied to Mr. Fiser's two DOL complaints. The first, in 1993, followed after the Sasser letter, and the same observations made about that letter might also be made about the 1993 DOL complaint — which was settled in 1994 primarily through Fiser being offered and accepting a lower-level, PG-8, position. TVA FOF at 42, ¶ 4.0; Staff RESP FOF at 25-26, ¶ 2.56. The second complaint, in 1996, was filed after the posting for competition of the position that Mr. Fiser felt he deserved by virtue of it being the same position in which he was placed in settlement of his 1993 complaint. Staff. Exh. 37. The timing of the 1996 complaint might support a possible reasonable inference that it thereby put Mr. Fiser in a position of more easily being able to say that any subsequent nonselection of him for the position was done in retaliation for filing the complaint, and that this was the only purpose of the filing. Again, I am not suggesting that the preponderance of the evidence is to the effect that Mr. Fiser was "using the system"; it is quite possible that he was not, and that his 1996 complaint was genuinely based on legitimate concerns, which may earlier have originated in activities of the sort generally understood to constitute whistle blowing protected activities. But, again, in the same vein as above, I also do not find either aspect of the latter scenario to have been proven by a preponderance of the evidence.

With regard to both of the DOL complaints as well as the Sasser letter, I would find, based on the evidence presented at the hearing in this proceeding, that it is just as possible

that each was undertaken in an effort solely to protect Mr. Fiser's job, for non-safety-related reasons, as that each arose out of genuine concerns originating in and thereby relating to whistle blowing protected activities. Thus, although there is no dispute that these constitute *per se* protected activity, I would not find that the evidence preponderates in favor of these being genuine in the sense of clearly having been undertaken in a manner falling within the underlying *purposes* of the whistle blowing law and rules.

In the absence of what I would view as sufficient evidence to support a finding that the Sasser letter and the DOL complaints of Mr. Fiser were genuinely related in some way to discovering, raising, reporting, documenting, or otherwise addressing any safety-related concerns against the wishes of management in a manner that would be encompassed within whistle blowing activity as discussed above, the question remains whether sufficient evidence was presented to establish the required nexus between such *per se* protected activity alone, on the one hand, and the adverse actions against Mr. Fiser, on the other, or to support the penalty assessed against TVA. I would find this to be possible in the right case, with adequate evidence to support such a conclusion, but, *in this proceeding*, I would find that no such nexus has been proven *by a preponderance of the evidence*.

While it is possible that the questionable actions taken by Mr. McGrath, Dr. McArthur, and others, relating to (among other things) posting the position to which Mr. Fiser claimed a right in 1996, arose in part out of his filing of the complaints and signing the Sasser letter, it is also possible that they were based solely on antipathy toward him arising out of longstanding concerns about his competence in his job, particularly with regard to not asserting himself or making sure that problems were solved, along with personal dislike and similar motivations.

For example, his lack of effectiveness as a manager who could, among other things, assure that his staff was sufficiently trained to address chemistry problems and issues, was observed. *See*, *e.g.*, Tr. 4919-23 (Burzynski). Specific perceived weaknesses in his

performance were also identified in writing from early on. Among other things, *see supra* at 17-19, in his January 1989 performance evaluation, it is stated that "Mr. Fiser must become more aggressive in the performance of his duties"; in September 1989 it is stated that "he demonstrated continued weaknesses in aggressiveness and communication skills;" and in September 1991 it is stated that he was "not using the authority of his position as an Outage Manager effectively." Joint Exhs. 30-32.

Moreover, it appears that Mr. McGrath's animosity to Mr. Fiser began in 1991, well *before* the 1993 Sasser letter or either DOL complaint was sent — when, by his own statement, Mr. Fiser "refused" to adopt a procedure to do daily data trending after Mr. McGrath directed him to do this at the NSRB meeting. Tr. 2473-74 (Fiser); *see* Tr. 4704-05, 4708 (Ritchie). Apparently, this incident "set off" Mr. McGrath, *see* Tr. 1404-05, 1409 (McArthur); Staff FOF at 66-67, who from that point on appears to have had a strong dislike of Fiser and viewed him as "not [being] effective." *See* Staff Response FOF at 18-19, ¶¶ 2.41, 2.42, and citations therein; *see also* Tr. 4718 (Ritchie). I would find it likely that this, along with Mr. Fiser's perceived non-aggressive approach to problem-solving in his job, actually played the determinative role in the actions against Mr. Fiser.

Drawing all reasonable inferences from the proof presented, I would also find it at least possible, if not likely, that these motivations were so strong that they overrode any other motivations — including any possible negative ones based on the Sasser letter and the DOL complaints, which in my view are the only protected activity involved in this case. These motivations appear to have been strong enough to prompt significant adverse action against Mr. Fiser *prior to* any of the documents in question being sent, and it appears to me that these factors — personal dislike and performance-based problems — were likely sufficient cause on their own for his superiors to misuse the RIF process to attempt to "get rid of" a perceived poor performer, whom they did not like. Then, when (according to what I would find to be a clear

preponderance of the evidence in the record) Mr. Fiser performed poorly in the interview for the disputed job in 1996, *see*, *e.g.*, TVA FOF at 103-05, and citations to record found therein, responding to questions that even his supporter Jack Cox thought were fair, Tr. 1778-80 (Cox); *see* Staff FOF at 60, ¶ 2.174; TVA FOF at 94-95, ¶ 9.21; *supra* at 55, he thereby provided the final "ammunition" needed in this possible effort to "get rid of" him.

With regard to Mr. Kent's making reference to Mr. Fiser's DOL complaint before the interview, it seems at least as possible as not, based among other things on my observation of Mr. Kent while testifying, that he was sincerely cautioning Dr. McArthur that he should not participate in the interview so as *not* to create any problem vis a vis the complaint. *See* Tr. 2877-79 (Corey), 3154-55 (Kent); Staff FOF at 65-66. It would also seem reasonable to infer the possibility that, indeed, there was a real effort generally at TVA to *avoid* taking any negative action against Mr. Fiser based on the protected activity of his complaints and the Sasser letter.

Regarding the taping by Mr. Fiser, it is very probable that knowledge of his undisclosed taping of conversations contributed to dislike of Mr. Fiser on the part of some at TVA. The Staff suggests that the fact that he used these to support his DOL complaints should be viewed as rendering *them* protected activity, Staff RESP FOF at 37, and also raises questions regarding the sharing of information about the taping against Mr. Fiser's wishes that it remain confidential. *See*, *e.g.*, Staff FOF at 39-41. I would find some connection between the taping and protected activity to be possible. However, the possibility of annoyance or hostility toward Mr. Fiser on the part of persons who learned of themselves or others being taped would also seem to be self-evident *without regard to* whether the taping had any relationship to protected activity. And the same possibility would seem to exist with regard to such persons telling others (whether appropriately or inappropriately) that their conversations with Mr. Fiser had been or might be taped without their knowledge.

In sum, although I would agree the Staff made out a prima facie case of discrimination under § 50.7, and that some of the actions taken by TVA management against Mr. Fiser were questionable, the Staff still bears the ultimate burden of proving by a preponderance of the evidence that discrimination was a contributing factor in the adverse actions against Mr. Fiser, and this is where I find the Staff's case fails. It is certainly possible that discrimination was a contributing factor in the actions against Mr. Fiser. I find it equally possible, however, that such actions were actually based only on performance-related factors together with inappropriate as well as possibly inept management practices and actions, personality clashes, personal dislike and hostility, and related grounds. And, no matter how inappropriately undertaken, when all reasonable inferences are drawn and the possibility of the adverse actions being based only on such grounds is equally as possible as that discrimination based on protected activity played a role in the actions, the necessary conclusion is that the burden of proving some discrimination-related contributing factor, by a preponderance of the evidence, has not been met.

As the Court stated in the case of *Benzies v. Illinois Dept. of Mental Health*, although a "demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, . . . it does not compel such an inference as a matter of law. The judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision." 810 F.2d 146, 148 (7th Cir. 1987). "In other words," as the Supreme Court has stated, " '[i]t is not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination.' " *Reeves v. Sanderson Plumbing Prod*., 530 U.S. 133, 147 (2000) (emphasis in original) (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519); *see also Zinn v. University of Missouri*, 93-ERA-34, 93-ERA-36, 1996 DOL Sec. Labor LEXIS 8 at 11-12 (Sec'y, Jan. 8, 1996); Staff RESP FOF at 11, 29-30. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves*, 530 U.S. at 143 (*citing*

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). I do not find that the Staff has met its burden of persuasion by a preponderance of the evidence in this proceeding.

Conclusion

For the reasons discussed above, I cannot concur with my colleagues in their sustaining of the Order Imposing Civil Monetary Penalty in this proceeding, even with the reduced penalty. Moreover, *in this case* I would find sustaining the Order to create a potential for abuse of the § 211 and § 50.7 protections, for resulting possible erosion of confidence in the process by those with truly legitimate concerns, and for possible counterproductive results as well, to an extent, on the part of management attempting to improve operational and safety performance and best utilize the skills of personnel, as in effect argued by TVA and NEI. *See* NEI Brief at 25; TVA FOF at 136-39. Such results would run counter to and could undermine the purposes of the law governing this proceeding. And without some reasonably realistic common understanding on the part of all concerned — licensees, employees, the public, and the NRC Staff — of what behavior and activities will constitute violations of § 50.7, there could be a significant potential for worse, rather than better, communication about safety issues and resolution of safety problems.

None of the previous discussion is to suggest in any manner that, in appropriate cases, there should be any hesitance to enforce § 50.7 through orders and rulings against licensees, including assessments of significant civil penalties. Nor should my dissent be taken as in any way suggesting that any atmosphere that may exist within TVA that is hostile to whistle blowers is not reprehensible. There is certainly evidence that such an atmosphere has existed, as discussed by my colleagues. If it persists today, it should be changed; indeed, if any such hostile atmosphere were *not* changed, it might well be predicted that other complaints might be brought that could result in additional future charges against TVA.

In this proceeding, however, it is alleged action against Mr. Fiser that is the central issue, not the general atmosphere at TVA with regard to whistle blowers. While such an atmosphere is relevant to the issue of whether actions taken against Mr. Fiser were based on protected activity, the evidence as a whole must preponderate in favor of such a finding in order to rule against TVA, and, as indicated above, I do not find such a preponderance, despite the possibility that this could have occurred. It may be that there were other witnesses who might have corroborated Mr. Fiser's testimony. But they were not called to testify and provide such corroboration. Presentation of testimony uncorroborated by *any* other actual testimony, as Mr. Fiser's was in this proceeding on virtually all of the significant points I discuss above, when there appear to have been possible witnesses who might have corroborated his testimony if true, undercuts the NRC Staff's good work in investigating and otherwise preparing a case for litigation. It also, in this case, if Mr. Fiser was completely accurate in all he said, undercuts *his* credibility in a manner that might be said to be unfair to him.

In my view, in order to foster greater credibility all around in proceedings involving allegations of discrimination against whistle blowers, more, stronger, more substantial, and in some ways more focused evidence than was presented in this proceeding, should be marshaled and presented to support appropriately significant outcomes. All proceedings involving such allegations are, and should be treated as, serious matters warranting close attention, and my dissent should not be taken as endorsing any approach that would minimize in any way their seriousness, in this or any other case. I wish to emphasize my agreement with my colleagues that *any allegation* of discrimination and/or retaliation on the basis of alleged protected whistle blowing activity is a significant matter warranting serious attention and respect, not to be taken lightly or otherwise disregarded, especially by anyone in a position to address it. I am, however, concerned that to find a violation in the absence of a stronger case, clearly establishing by the required preponderance of the evidence standard that such

discrimination or retaliation has actually occurred, may actually diminish the level of meaningful attention and respect accorded the requirements of § 50.7 by employers and employees alike, and thereby potentially compromise safety consciousness in licensee sites. This would be a particularly unfortunate outcome, especially in light of the importance of the NRC mission to protect the public health and safety.

I have endeavored to give this case my close and most serious attention, and despite observing a number of questionable circumstances and recognizing the possibility of there being discrimination as alleged, I find a lack of sufficient evidence under the law and the preponderance of the evidence standard to sustain the Order. I therefore respectfully dissent from the decision of my colleagues.

/RA/

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Ann Marshall Young
ADMINISTRATIVE JUDGE

APPENDIX A

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
ASLBP No. 01-792-01-CivP (EA 99-234)

LIST OF EXHIBITS

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
JOINT EXHIBITS			
1	Sequoyah NSRB Minutes, May 22-23, 1991	613	634
2	Sequoyah NSRB Minutes, August 21-22, 1991	617	634
3	Sequoyah NSRB Minutes, November 20-21, 1991	618	634
4	Sequoyah NSRB Minutes, February 19-20, 1992	640	644
5	Sequoyah NSRB Minutes, May 21-22, 1992	655	655
7	June 10, 1991 memo with May 1991 NSRB Minutes attached	634	639
9	Sequoyah NSRB Minutes, February 19-20, 1992	5707	5708
20	Rick Rogers SRB notebook (redacted)	1289	1322
21	John Corey SRB notebook (redacted)	1289	1322
22	Ben Easley/Milissa Westbrook SRB notebook (redacted)	1289	1322
23	Charles Kent SRB notebook (redacted)	1289	1322
24	January 10, 1994 McArthur TVA OIG Record of Interview	1527	1532
25	January 11, 1994 Kent TVA OIG Record of Interview	3178	3182
26	February 3, 1994 Beecken TVA OIG Record of Interview	4837	4842
27	Fiser Sequence of Events	402	1076
28	Fiser, August 30, 1996 Assignment to TVA Services (redacted)	2368	2369
29	Fiser, September 5, 1996 Resignation (redacted)	2369	2381

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
30	January 5, 1989 Fiser Performance Review	993	999
31	September 18, 1989 Fiser Performance Review	1000	1001
32	September 30, 1991 Fiser Performance Review	1009	1014
33	September 8, 1992 Fiser Performance Review (redacted)	1037	1041
34	Memorandum of Agreement, April 5, 1994	343	355
36	Voeller Day Planner Notes	3321	3325
39	July 12, 1996 Harvey TVA-OIG Record of Interview (redacted)	4998	4999
41	October 29, 1996 Easley TVA OIG Record of Interview	1249	1259
42	July 24, 1995 Fiser Position Description for Chem/Env Manager	747	748
43	March 16, 1992 temporary transfer agreement	1028	1032
44	September 20, 1999 Notice of Apparent Violation	312	321
45	September 20, 1999 Notice of Apparent Violation to McArthur	1539	1541
46	McGrath, September 20, 1999 confirmation of arrangements for closed 0I Enforcement Conference (OI Report 2-98-013)	598	5296
47	February 7, 2000, Notice of Violation and Civil Penalty	294	295
48	February 7, 2000 Notice of Violation to McArthur	1540	1541
49	February 7, 2000 Notice of Violation to McGrath (OI Report 2-98-013)	5294	5296
51	January 22, 2001 McArthur Reply to Notice of Violation	1540	1541
53	May 4, 2001 Order Imposing Civil Penalty	308	309
55	September 25, 1996 Landers TVA OIG Record of Interview	2083	2089

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
58	February 26, 1993 Sequoyah Implementation of Interim Radiological Control and Chemistry Organization	3007	3007
59	April 2, 1993 Fiser Notice of Transfer to ETP	1097	1098
60	August 13, 1993 Fiser Notice of RIF	1119	1120
63	September 30, 1993 BP-102 Selection Policy	841	842
65	May 6, 1987 Personnel Manual Instruction Section 7 - Reduction in Force	1220	1227
66	April 17, 2002, Joint STP Between TVA and Staff	650	651
67	April 23, 2002, Joint Stipulation between TVA and Staff	651	651
TVA EXHIBITS			
4	September 27, 1996, Job Offer to Fiser (CC 35-37)	4298	4302
5	October 31, 1996, declaration of Sam L. Harvey before DOL	4973	4994
9	January 15, 1998, declaration of Fredrick M. Anderson submitted in connection with Fiser's 1996 complaint (CC 286-87)	4087	4096
11	October 31, 1994, memo from Hickman to O.J Zeringue (EE-28-53)	4221	4229
12	January 11, 1994, Investigation Insert (OIG File No. 20-135) (EE 75, 79-82)	3274	3285
13	November 25, 1996, OIG Report of Administrative Inquiry (EE 221-39)	4229	4231
14	June 17, 1996, Sam Harvey Franklin planner note	4995	4997
18	September 6, 1994, memo from R.R. Baron to Zeringue (EE 619-27)	4374	4375
24	Selection Package for VPA No. 6621 (HH 1-198)	1265	1274
26	November 19, 1999, declaration of Sam L. Harvey before NRC OI	4981	4994
27	November 27, 1997, Memorandum, Sam Harvey to W.C. McArthur, "Discrimination and Harassment (sic)"	2129 5032	5034

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
31	August 5, 1996, memo from Zeringue to Grover (Loan Assignment to INPO) (AF 33-36)	765	765
39	February 26, 1999, declaration of Alice L. Greene submitted to OI in connection with Fiser's 1996 DOL complaint (AF 588-740); pp. AF000627-AF000740	4470	4481
48	January 20, 1994, Investigative Insert (OIG File No. 2D-135 (AJ 297-335)	609	613
51	May 22, 1995, OI Report of Investigation (Case No. 2-93-068) (BE 1-12, 17-33, 87-92, 136-37, 224-25)	685	718
55	PDs and VPAs for positions created in NP's 1996 reorganization (BF 1264-1362)	4010	4014
56	June 27, 1995, PD, Gary S. Boles	4013	4014
57	Employee Concerns Programs (ECP) File Closure Summary, July 13, 1993	1583	5709
61	1996, Vacancy Posting System Intent	4023	(4031) (Rejected)
62	Operations Support's organizational overview (BI 1-229)	752	822
65	TVA's Principles and Practices–Commitment to Nuclear Safety (CA 250-51)	587	591
66	Communications Practice 5 Expressing Concerns and Differing Views (CA 253-56)	590	591
70	November 20-21, 1991, Sequoyah NSRB Minutes	633	5710
73	Significant Corrective Action Report (SCAR) No. SQSCA920004 (CG 1-82)	653	655
75	October 1992 INPO Evaluation of Sequoyah Nuclear Plant	TVA Motion dtd 10/7/02	(M&O dtd. 10/24/02) (Rejected)
80	Selected pages from selection package for VPA No. 10249 for Shift Supervisor, PG-5, position (DB 1-3, 70-71, 94, and 120-22)	3237	3244
81	OIG Report re: Ronald L. Grover (OIG File 140-71)	4239	(4243) (Rejected)

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
82	October 6, 2000, memo from Jack A. Bailey to Grover (GB 1063)	2239	2242
83	1996 Retention Registers and RIF Notices, Watts Bar Nuclear Plant (redacted and substituted)	5473, 5475, 5528	(5530) (Rejected) 5732 admitted
84	1996 Retention Registers and Assignments, Watts Bar Nuclear Plant (redacted and substituted)	5473, 5531	5732
85	March 10, 1997 Retention Registers, Watts Bar Nuclear Plant (redacted and substituted)	5473, 5531	5732
86	Watts Bar Nuclear Plant, FY 1997 workforce planning documents and employees' 1997 Retention Registers (redacted and substituted)	5473, 5531	5732
87	Watts Bar employees 1997 RIF Notices (redacted and substituted)	5473, 5532	5732
88	Browns Ferry 1996 employees' Retention Registers (redacted and substituted)	5473, 5533	5732
89	Browns Ferry 1997 employees' Retention Registers (redacted and substituted)	5473, 5533	5732
90	Browns Ferry 1996 employees' RIF Notices (redacted and substituted)	5473, 5534	5732
91	Browns Ferry 1997 employees' 1997 Surplus Notices (redacted and substituted)	5473, 5534	5732
92	Browns Ferry 1996 employees' 1997 Surplus Notices (redacted and substituted)	5473, 5535	5732
93A	Corporate Nuclear employees' Retention Registers (redacted)	5473, 5541	5543; M&O dtd. 10/ /02
93B	Corporate Nuclear employees' Retention Registers (redacted and summarized)	5473, 5541	5543;M&O dtd. 10/ /02
94A	Corporate Nuclear employees' 1996 Surplus Notices (redacted)	5473, 5535	5539;M&O dtd. 10/ /02
94B	Corporate Nuclear employees' 1996 Surplus Notices (redacted and summarized)	5473, 5535	5539;M&O dtd. 10/ /02
95	Corporate Nuclear employees' 1996 Retention Registers (redacted and substituted)	5473, 5537	5736

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
96	Sequoyah employees' 1996 Surplus Notices (redacted and substituted)	5473, 5539	5736
98	Grover's termination letter (GB 1540-42)	2259	2260
99	Grover's DOL complaint (GB 1543-59)	2242	2243
100	Grover's EO complaint (GB 1560-65)	2245	2249
101	Resume of Carey L. Peters (FB 1-7)	4513	4514
102	Peters' Summary & Analyses (FB 8-16)	4540	4580
105	July 25, 1996, memo from David F. Goetcheus to Zeringue	5083	5092
106	TVA's Personal History Record User's Manual (FD 1-75)	4456	4470
107	January 4, 1990, memo from Jim M. Raines to Those Listed re personnel microrecords (FD 76-78)	4455	4470
108	Pages from Tresha Landers' Day Planner (FE 1-22)	2072	2079
109	Sequoyah Nuclear Plant Surplus Notices (1997) (redacted and substituted)	5475, 5540	5736
110	Sequoyah Nuclear Plant Retention Registers (1997) (redacted and substituted)	5475, 5541	5736
111	December 15, 1999, ltr to Anne T. Boland from Mark J. Burzynski and encl. 1 (FG 1-7)	3799	3803
112	TVA's memorandum on the Admissibility of Depositions	972	5719 (non-evidentiary)
113	September 4, 2001, NRC Staff Response to TVA's First Set of Interrogatories	976	1163
114	Ronald D. Grover, March 5, 2001, Notice of Proposed Termination (redacted)		
116	March 29, 1996, Journal Record of Events	2163	2331
117	June 16, 1994, Journal Record of Events	2169	2301
118	June 30, 1994, Fiser Daily Planner	2175, 5719	5720
119	March 25, 1996, Journal Record of Events	2320	2324
120	May 7, 1996, Journal Record of Events	2334	2338

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
121	June 29, 1994, Page from Fiser's Franklin planner	2232, 5719	5720
122	November 14, 1995, Fax from G. Fiser to J. Vorse regarding Additional Supporting Information	2417	2424
123	May 10, 1993, Journal Record of Events	2524	2526
124	May 8, 1996, Fiser's Franklin planner	2774	2775
125	October 1, 1990, TVA Supervisor's Handbook	5377	5379
126	September 18, 1989, Sequoyah Nuclear Plant, Corrective Action Report	4911	4917
128	Memo, Sequoyah Nuclear plant, Nuclear Experience Review (NER)	4917	4879
129	November 24, 1992, Incident Investigation Report, Inadequate Setpoint Calculations for Radiation Monitors	4688	4701
130	August 8, 1991, Incident Investigation Report, Unit 1 Lower Containment Radiation Monitor in service with Inlet Valve Closed	2675	2698
131	OIG Interview with Charles E. Kent	3186	3200
132	Chart entitled "Decision 'To Post' or 'Not to Post'"	4062	4062
133	Organizational Chart, August 1996, Chemistry Program Mgr. (PWR), Chemistry Program Mgr (BWR)	4070	4070
134	Organizational Chart, August 1996, Steam Generator Technology Mgr., Maintenance Support Mgr.	4070	4070
135	June 20, 1994, Page from Fiser's Franklin planner	4292	4293
136	May 10, 1996, Page from Fiser's Franklin planner	4303	4309
138	Resume of Robert J. Beechen	4795	4796
139	Resume of Mark J. Burzynski	4863	4865
140	Resume of David F. Goetcheus	5074	5075
141	Resume of Sam L. Harvey	4970	4974
142	Resume of H. Keith Fogelman	5356	5357

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
144	Resume of Heyward R. Rogers	5164	5164
145	August 14, 1989 Memo transmitting NER Item for Action or Information	4867	4869
146	August 14, 1989, Corrective Action Report re: diesel fuel oil sampling	4876	4882
147	Sequoyah Final Event Report re: diesel fuel oil sampling	4884	4894
148	CD containing December 9, 1992 conversation between Gary D. Fiser and Robert S. Beecken	4812	4814
149	Vacancy Announcement 66-21	5568	5577
150	Form document	4790	4793
151	Fax cover sheet	4790	4793
152	Sam Harvey's notes in response to HR disposition of harassment allegations	5008	5021
STAFF EXHIBITS			
2	TVA OIG Record of Interview of James E. Boyles, July 10, 1996	3976	3984
4	Dept. of Labor (DOL) Personal Interview Statement of James E. Boyles, May 22, 1997	3976	3984
5	DOL Declaration of James E. Boyles, filed January 20, 1998	3976	3984
6	NRC Office of Investigations (OI) Interview of James E. Boyles, October 22, 1998	3976	3984
7	Deposition of James E. Boyles, November 9, 2001	3976	3984
12	Memorandum fm Joseph Bynum re RadCon/Chemistry Environmental Organization at Sequoyah and Browns Ferry, with organizational chart	1704	1706
21	TVA OIG Record of Interview of Ben Easley, October 25, 1993	1248	1259
22	TVA OIG Record of Interview of Ben Easley, July 10, 1996	1246	1259

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
24	Interview transcript of TVA OIG Record of Interview of Ben Easley, October 29, 1996	1250	1259
25	DOL Personal Interview Statement of Ben Easley, December 10, 1996	1248	1259
26	NRC OI Interview of Ben Easley, October 29, 1998	1248	1259
27	Deposition of Ben Easley, November 29, 2001	1250	1259
29	Ltr to Senator James Sasser from Gary Fisher, William, Jocher, and D.R. Matthews, August 16, 1993	415	418
30	Ltr to Senator Sasser from William Hinshaw, II, Inspector General, September 9, 1993	4195	4208
31	Memo from E.B. Ditto to Wilson McArthur re a response to Senator Sasser's ltr, September 22, 1993	1446	1447
32	Ltr to Senator Sasser from William Hinshaw, II, Inspector General, October 22, 1993	4195	4208
33	Ltr to Senator Sasser from George Prosser, Inspector General, April 22, 1994	4195	4208
34	Gary Fiser DOL complaint, ltr to Carol Merchant, September 23, 1993	1126	1144
37	Gary Fiser DOL complaint, letter to Carol Merchant, June 25, 1996 (redacted)	663	669
43	Position Description for Gary Fiser, Chemistry and Environmental Protection Sr. Program Manager, October 17, 1994	744	746
44	TVA Employee Appraisal for Manager and Specialist Employees for Gary Fiser, November 7, 1990	1001	1005
45	TVA Employee Appraisal for Manager and Specialist Employees for Gary Fiser, January 29, 1991	1006	1008
46	Performance Review and Development Plan for Gary Fiser, October 1, 1993 to September 30, 1994	2306	2308
47	Performance Review and Development Plan for Gary Fiser, October 1, 1994 to September 30, 1995	2308	2310

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
49	TVA OIG Record of Interview of Ronald Grover, July 11, 1996	3648	3650
50A	Tape of TVA OIG Record of Interview of Ronald Grover, July 11, 1996	3653	3654
50B	Interview transcript of TVA OIG Record of Interview of Ronald Grover, July 11, 1996	3650, 3653	3654
51	DOL Personal Interview Statement of Ronald Grover, September 27, 1996	3655	3658
52	DOL Deposition of Ronald Grover, January 29, 1998	3659	3663
53	NRC OI Interview of Ronald Grover, December 18, 1998	3659	3663
54	Deposition of Ronald Grover, December 14, 2001	3659	3663
55	Employee Action Reasons for Ron Grover	4079	5723
56	Position Description for Ronald Grover, Chemistry and Environmental Protection Manager, July 24, 1995	4007	4008
60	DOL Personal Interview Statement of Sam Harvey, March 27, 1997	5030	5031
63	Deposition of Sam L. Harvey, III, December 7, 2001	5068	5069
64	Position Description for Sam Harvey, Chemistry Program Manager (PWR), August 5, 1996	745	746
65	Performance Review and Development Plan for Sam Harvey, October 1, 1994 to September 30, 1995	3644	3645
67	Memo from R. Grover to James Boyles re employee harassment and intimidation by Sam Harvey, June 24, 1996	1843	1844
70	TVA OIG Record of Interview of Charles Kent, August 15, 1996	3178	3182
71	Interview transcript of TVA OIG Record of Interview of Charles Kent, August 15, 1996	3178	3182
72	DOL Personal Interview Statement of Charles Kent, April 18, 1997	3178	3182

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
73	NRC OI Interview of Charles Kent, October 22, 1998	3178	3182
74	Deposition of Charles Kent, November 28-29, 2001	3178	3182
84	TVA OIG Record of Interview of Wilson McArthur, July 26, 1993	1527	1532
85	TVA OIG Record of Interview of Wilson McArthur, August 31, 1993	1527	1532
86	TVA OIG Record of Interview of Wilson McArthur, October 1, 1993	1527	1532
87	TVA OIG Record of Interview of Wilson McArthur, February 24, 1994	1527	1532
88	TVA OIG Record of Interview of Wilson McArthur, July 24, 1996	1527	1532
90	Notice of Sam Harvey's reassignment as Acting Corporate Chemistry Manager and Gary Fiser's reassignment to Program Manager in Corporate Chemistry, from Wilson McArthur, November 18, 1992	1096	1096
91	Ltr to Wilson McArthur from O.J. Zeringue, September 6, 1996	1467	1472
93	TVA OIG Record of Interview of Wilson McArthur, October 29, 1996	1527	1532
95	DOL Personal Interview Statement of Wilson McArthur, April 24, 1997	1397	1532
96	DOL Declaration of Wilson McArthur, January 15, 1998	1528	1532
97	NRC OI Interview of Wilson McArthur, April 20, 1999	1527	1532
98	Deposition of Wilson McArthur, December 13, 2001	1527	1532
99	Employee Action Reasons for Wilson McArthur	508	739
100	Position Description for Wilson McArthur, Manager, Technical Programs, April 2, 1990	495	739
101	Position Description for Wilson McArthur, Corporate Radiological and Chemistry Control Manager, June 17, 1996	495	739

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
102	Performance Review and Development Plan for Wilson McArthur, October 1, 1994 to September 30, 1995	518	739
107	Deposition of Thomas McGrath, November 30, 2001	943	955
108	Dayton Herald News Article, “SQN chemistry problems were well known,” June 12, 1994	847, 2294	2297
110	DOL Declaration of Phillip Reynolds, January 20, 1998	3561	3587
111	NRC OI Interview of Phillip Reynolds, December 18, 1998	3586	3587
112	Deposition of Phillip Reynolds, November 8, 2001	3586	3587
115	Deposition of Heyward R. Rogers, November 30, 2001	5211	5238
122	Deposition of Milissa Westbrook, November 8, 2001	4834	5125
124	Vacant Position Announcement for Manager, Radiological Control, closing date August 31, 1994	3815	3821
126	Organizational Chart for Nuclear Power, Technical Support, Operations Support, Technical Programs, 1993	3813	3814
128	TVA Nuclear Corporate 1996 Reorganization Impact on Headcount	445, 5723	5723
130	Organizational Chart for Nuclear Operations, Operations Support, Radiology and Chemistry Control, February 13, 1995	452	742
131	Organizational Chart, Nuclear Operations, Operations Support, Radiology and Chemistry Control, September 17, 1996	455	743
133	Predecisional Enforcement Conference for Thomas McGrath, November 22, 199	3976	3984
134	Predecisional Enforcement Conference for Wilson McArthur, November 22, 1999	1524	1532
135	Predecisional Enforcement Conference for TVA, December 10, 1999	3093, 3976, 4943	3182, 3984, 4943

EXH. NO.	DESCRIPTION	IDENTIFIED	ADMITTED/ (REJECTED)
147	DOL Brief in Support of Respondents Motion for Summary Decision	2384 5330	(2390) (Rejected) 5335 admitted
148	DOL Order Denying Motion for Summary Decision in Gary Fiser v. TVA, April 21, 1998	5330	5335
152	Announcement of Vacancies in the Manager and Specialist Pay Schedule-Revised Selection/Waiver Policy, March 23, 193	3483	3486
154	Revision to Selection/Waiver Policy-Selecting Career Skills Center Employees to Fill Management and Specialist Positions, July 7, 1994	3484-85	3486
160	Record of OIG interview of D. Goetcheus, July 23, 1996	5102	5107
162	Declaration of G. Donald Hickman, April 4, 2002	4193	4208
166	Record of OIG interview of K. Welch, July 29, 1996	329	5724
168	CD (Tape A, Side A/Sec II)	1090	1090
169	CD (Tape I, Side A/Sec II, III, IV)	1113	1119
170	NUREG-1600, Revision of Enforcement Policy, FR dtd November 9, 1999	282	283
173	Ltr from Hickman, Assistant IG, to Fiser, August 10, 1994	2284	2288
174	pp. 628, 630, 631, IG Report re Sorrell, September 25, 1997	4217	4221
174	pp. 721-733, IG Report re Sorrell, September 25, 1997	4233	4234
177	IG Report against chemist, May 22, 1995	985	987
178	Tape	4422	4425
179	Tape	4426	4427
180	OIG letter re: Grover, July 9, 1998	4790	4793

APPENDIX B

LIST OF WITNESSES

Witness	Date	Transcript Pages
Beecken, Robert J.	9/9/02	4794-4862
Boyles, James Edwin	6/17/02 6/18/02	3735-3833 3846-4149
Burzynski, Mark J.	9/9/02	4862-4953
Corey, John	6/12/02	2822-2990
Cox, Jack	5/3/02	1744-1800
Easley, Ben G.	5/1/02	1163-1377
Fiser, Gary	4/30/02 5/8/02 5/9/02 6/11/02 6/19/02	988-1149 2272-2476 2487-2576 2586-2696 2699-2816 4253-4431
Fogleman, H. Keith	9/11/02 9/12/02	5353-5385 5391-5651
Goetcheus, David	9/10/02	5072-5123
Grover, Ron	5/6/02 5/7/02 6/17/02	1805-2034 2096-2267 3587-3734
Harvey, Sam L.	9/10/02	4968-5072
Hickman, George Donald	6/19/02	4153-4252
Kent, Charles E., Jr.	6/12/02 6/13/02	2991-3042 3049-3303
Landers, Tresha	5/7/02	2039-2094
Luehman, James G.	4/23/02	281-320
McArthur, Wilson Cooper	5/2/02 5/3/02	1382-1589 1593-1743
McGrath, Thomas	4/23/02 4/24/02 4/25/02 4/26/02 9/11/02	364-445 449-645 651-847 872-942 5260-5352

Moore, Linda	6/11/02	2696-2699
Peters, Cary	6/20/02	4502-4685
Reynolds, Phillip L.	6/14/02	3342-3582
Ritchie, Robert E., Jr.	6/20/02	4686-4739
Rogers, Heywood R. (“Rick”)	9/11/02	5163-5259
Sewell, Alex L.	6/20/02	4449-4502
Voeller, David	6/13/02	3303-3337
Welch, Katherine	4/23/02	322-364

APPENDIX C

TRANSCRIPT CORRECTIONS

Page	Line	Change	Proposed by Licensee (L);Staff (S):Board(B)
April 23, 2002			
275	25	Change “tough” to “touch”	B
294	9	Change “policy,” to “conference”	B
29	23	Change “know” to “knowledge”	B
307	18	Change “Valley was free, under” to “Valley Authority was free, under the”	B
33	13	Change “change” to “chance”	B
369	14	Change “it” to “I”	B
373	17	Change “as” to “was”	B
374	22	Change “your” to “you”	B
432	4	Add “be” at end of line	B
April 24, 2002			
462	9	Change “on” to “to”	B
478	3	Change “chart says” to “chart that says”	B
480	5	Change “reduce size” to “reduce the size”	B
497	2	Change “the” to “that”	B
497	3	Insert “and” before “security”	B
497	4	Change “and confirm to the” to “to conform to”	B
503	15	Change “essential” to “essentially”	B
504	12	Insert “was” after “I”	B
505	16	Insert “what” after “exactly”	B
506	9	Change “why” to “who”	B
518	21	Change “act” to “about”	B
535	14	Change “your” to “you’re”	B
548	12	Change “SRB” to “Did the SRB”	B
557	22	Change “knowledge” to “knowledgeable”	B
560	13	Insert “in” after “it”	B
565	12	Change “no” to “not”	B
567	4	Change “never” to “play”	B
569	3	Change “Nethr” to “Neither”	B
578	6	Change “don” to “do”	B
625	14	Change “chemistyr” to “chemistry”	B
April 25, 2002			
652	17	Change “aft” to “after”	B
April 30, 2002			
987	6	Change “admitted” to “admit”	B
994	21	Change “performance” to “performer”	B
1010	25	Change “By?” to “B?”	B
1021	16	Change “no” to “not”	B
1030	23	Change “here” to “hear”	B
1089	6	Insert “we” after “why”	B

1110	16	Change “supported” to “reported”		B
1115	5	After “Page 81,” start a new paragraph (on line 6) with “Ms. Euchner:”		B
1118	16	Insert “I” after “Honor,”		B
1119	17	Change “environmental” to “employee”		B
1122	21	Change “pass” to “PASS”		B
1124	1	Change “Selan” to “Selin”		B
1124	2	Change “Selan” to “Selin”		B
1124	3	Change “de Murando” to “deMiranda”		B
1146	7	Change “researched” to “recirculated”		B
May 1, 2002				
1174	16	Change “PTP” to “ETP”		B
1174	21	Insert “complaint” after “DOL”		B
1190	10	Change “9gc” to “‘93"		B
May 2, 2002				
1408	10	Change “out” to “ought”		B
1413	10	Insert “poor” before “performance”		B
1466	25	Change “reall” to “really”		B
1468	19	Change second “to” to “do”		B
1489	10	Change “thgs” to “things”		B
1556	19	Change “befor” to “before”		B
1561	23	Change “sand” to “said”		B
May 9, 2002				
2491	9	Insert “not” after “were”; change “weren’t” to “were”		L
June 11, 2002				
2586	2	Change “part” to “party”		B
2612	23	Change “r. E.” to “R. E. [Ritchie]”		B
2612	24	Change “w.F.” to “W.F. [Jocher]”		B
2619	4	Change “Yo” to “You”	B	
2621	23	Change second “that” to “there”		B
2629	21	Change “say” to “saying”		B
2641	10	Change “Tr.” to “Correct”		B
2686	24	Change “THE WITNESS” to “MR. MARQUAND”		L
2777	1	Change “clicks” to “cliques”		L
2777	3	Change “click” to “clique”		L
June 12, 2002				
2861	19	Change “bds” to “boards”		B
2914	3	Change “new” to “knew”		B
2923	24	Change “rates” to “rated”		B
3002	9	Change “now” to “know”		B

June 13, 2002

3147	23	Change “want” to “what”		B
3149	2	Change “process” to “project”		B
3158	15	Change “quite” to “quiet”		B
3228	5	Change “10201021" to “1020-1021"		B

June 17, 2002

3748	14	Change “By?” to “B?”		B

June 19, 2002

4262	16	Insert “Answer:” before “I wasn’t”		L

September 9, 2002

4795	4	Change “Major” to “Manager”	B	

September 11, 2002

5207	4	Change “VWR” to “BWR”		B
5350	22	Change “stock” to “stack”		B
5357	5	Change “tended” to “tender”		B

APPENDIX D

LIST OF ACRONYMS AND ABBREVIATIONS

AEA	Atomic Energy Act
ANO	Arkansas Nuclear One
ANOVA	Analysis of Variance
ASTM	American Society for Testing Materials
BFN	Browns Ferry Nuclear Plant
BWR	Boiling Water Reactor
CUP	Chemistry Upgrade Project
DOL	Department of Labor
ERA	Energy Reorganization Act
ETP	Employee Transition Program
FY	Fiscal Year
HR	Human Resources
HRIS	Human Resources Information System
IG	Inspector General (TVA)
INPO	Institute for Nuclear Power Operations
LCO	Limiting Condition for Operation
LER	Licensee Event Report
MSPB	Merit Systems Protection Board
NOV	Notice of Violation
NRC	Nuclear Regulatory Commission
NSRB	Nuclear Safety Review Board
OGC	Office of the General Counsel (NRC)
OI	Office of Investigations (NRC)
OIG	Office of Inspector General (TVA)
OPM	Office of Personnel Management
PASS	Post Accident Sampling System
PEC	Predecisional Enforcement Conference
PG	Pay Grade
PHR	Personal History Record
PORC	Plant Operating Review Committee (TVA)
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 Annoucement
WBN	Watts Bar Nuclear Plant

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-390-CIVP,
	)	50-327/328-CIVP and
(Watts Bar Nuclear Plant, Unit 1;	)	50-259/260/296-CIVP
Sequoyah Nuclear Plant, Units 1 & 2; and	)	
Browns Ferry Nuclear Plant, Units 1, 2 & 3)	)	
(Order Imposing Civil Monetary Penalty)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB INITIAL DECISION (LBP-03-10) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of June 2003