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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN RESPONSE TO CLI-03-10
REGARDING STANDARDS BY WHICH A LICENSING BOARD
SHOULD MITIGATE A CIVIL PENALTY IN A DISCRIMINATION CASE

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October 2, 2003

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INTRODUCTION

Pursuant to the Commission's request in its Memorandum and Order of August 28, 2003, *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1, Sequoyah Nuclear Plant, Units 1 & 2, Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-03-09, 58 NRC __ (hereinafter "Commission Order"), the NRC Staff ("Staff") now presents its position regarding the standards to be applied by a Licensing Board in mitigating a civil penalty in this proceeding.

BACKGROUND

On July 16, 2003, TVA petitioned for Commission review of the Licensing Board's Initial Decision in LBP-03-01.¹ In the LBP-03-10 Initial Decision, following a 25-day evidentiary hearing, the majority of the Board found in favor of the Staff that a violation of NRC regulations occurred when TVA failed to select Gary Fiser for a position due, in part, to Mr. Fiser's having engaged in "protected activity," as proscribed by 10 C.F.R. § 50.7.² While the Board sustained the violation

¹ See TVA's Petition for Review of Initial Decision in LBP-03-10," dated July 16, 2003.

² See Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, (continued...))

it reduced the civil penalty amount by 60 percent from \$110,000 to \$44,000. See LBP-03-10, 57 NRC __, slip op. at 2. The Board indicated that this reduction was premised upon two grounds; (1) that 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, and (2) TVA appeared 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. See *id.* at 2-3.

The Staff did not object to TVA's Petition,³ and on August 28, 2003, the Commission granted the Petition and requested the Staff brief the question on what standards should be applied by a Licensing Board in mitigating the civil penalty in a discrimination case. See CLI-03-09, 58 NRC __, slip op. at 7. The Staff now presents its position on that question.⁴

DISCUSSION

I. The Board Applied An Inappropriate Standard To Review The Civil Penalty Imposed In This Case

The present proceeding is an enforcement action brought by the Staff against TVA for violation of the Commission's regulations. It is not an action to recover damages on behalf of Fiser. If the regulation in question, 10 C.F.R. § 50.7, was violated by TVA, the penalty for a violation should be sustained. There is no such thing as a partial violation of a regulation; a licensee is either in compliance or it's not. The Board appears to have confused the standard for a violation

²(...continued)
Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), LBP-03-10, 57 NRC __ (June 26, 2003).

³See "Staff's Response to TVA's Petition for Review of Initial Decision in LBP-03-10," dated July 25, 2003, at 2.

⁴The Staff assumes that the Commission is familiar with the Board's decision and the basic facts in this case.

of section 50.7 -- namely that protected activity was a *contributing factor* in or *responsible in part* for taking the adverse action⁵ -- with whether or not there was a violation. Stated another way, if Fiser's protected activity was *responsible in part* for TVA taking actions against him, then a violation occurred -- a complete violation. Thus, it was inappropriate for the Board to mitigate the penalty because the regulation involved proscribes even partial consideration of protected activities. To do otherwise would be the equivalent of cutting a civil penalty for violation of the "two man rule" (10 C.F.R. § 34.41(a)) in half because one man was there.

The Board appears to have employed a "comparative negligence"⁶ type system by placing considerable weight on its conclusion that discriminatory motives were only part of the reasons used by TVA to take action against Fiser and that Fiser's performance was the major reason. The use of such a process for penalty mitigation in this case is inappropriate. As noted above, this is an enforcement action taken by the Staff against TVA. Fiser is not a party to the present proceeding, and the Staff was not partially responsible for TVA's violation. TVA took its actions on its own and should be held fully accountable for factoring Fiser's protected activities into their decision-making process.

II. The Board's Findings Concerning Fiser's Performance Are Contrary To The Record And The Commission's Regulations

The Board's finding that adverse actions against Fiser were predicated in large part on performance issues is contrary not only to the evidence in the record but also to TVA's own admissions that performance played no part in the 1996 decisions which resulted in Fiser's removal

⁵Section 211(b)(3)(C) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851(b)(3)(C). The staff will develop the argument concerning the appropriate standard in considerably more detail in its response to TVA's initial brief on this appeal. However, its position is set forth in detail in the NRC Staff Pretrial Legal Brief, dated March 1, 2002 ("Staff Pretrial Legal Brief").

⁶Comparative negligence is defined as: A plaintiff's own negligence that proportionally reduces the damages recoverable from a defendant. Black's Law Dictionary, Seventh Edition. Thus a plaintiff who was 60 percent at fault would only recover 40 percent of his damages.

from TVA. Tr. 2476:2; Tr. 4388:21; Tr. 4392:8. No witness put forth by TVA testified that Fiser's 1996 or earlier performance played any part in his removal from TVA in 1996. Moreover, as will be more fully developed in the Staff's reply to TVA's principal brief in this case, under 10 C.F.R. § 50.9, TVA was required to notify the Staff of any and all reasons for its actions against Fiser, and TVA's Corporate Licensing Manager acknowledged such at the hearing. Tr. 4944-4945. With TVA having repeatedly stated that performance was not a reason on which it based its 1996 actions involving Fiser, the Board cannot now find that, contrary to Commission requirements, TVA misrepresented its reasons and then credit those misrepresentations as a basis to mitigate the penalty. This would make a mockery of compliance with 10 C.F.R. § 50.9.

The Board cited no testimony that any actions in 1996 involving Fiser were predicated on his performance in the Chemistry and Environmental Protection Program Manager position which he occupied at the time of the reorganization.⁷ This is not surprising since no such testimony or other evidence exists. In fact, with respect to the decision to compete the position rather than follow reduction-in-force ("RIF") procedures, OPM regulations, 5 C.F.R. Part 351, which are binding on TVA, do not allow consideration of an incumbent's performance in a decision on whether the duties of two positions are interchangeable for purposes of determining the rights of incumbents. The decision is strictly based on duties performed -- not on the level of performance of the incumbents. See 5 C.F.R. § 351.404.

With respect to the competitive selection procedures followed for the position which was improperly competed, the record indicates that the performance appraisals were not made available to the Selection Review Board and were not considered by the selecting official as required by TVA procedures. See Jt. Exh. 63; Staff Exh. 134 at 24. Moreover, Fiser's performance

⁷The only testimony concerning Fiser's performance, in the record, pertains to his performance in the 1989-1992 period. There is conflicting evidence with respect to his performance during this period, but there is no evidence that TVA could or did consider such performance in making decisions in 1996.

was rated above that of the selectee on their last two appraisals -- the only performance relevant to the selection at issue -- and TVA management was aware of this fact. Tr. 528:10. Thus, Fiser's superior performance in the relevant time frame can hardly be a legitimate reason for TVA's action, much less a reason to mitigate the penalty.

III. TVA Had Notice Of The Appropriate Standard
At The Time It Violated Section 50.7

As previously noted, the Board also placed significant weight on an NEI observation that TVA did not have adequate notice of the Staff's interpretation of section 50.7 "as including adverse actions motivated in any part (not necessarily a substantial part) by an employee's engagement in protected activities." LBP-03-10, 57 NRC ___ slip op. at 3. Given that TVA has maintained throughout this proceeding that Fiser's protected activities played no part in its action with respect to him,⁸ it is hard to see how they could be disadvantaged by application of such a standard, and it certainly would not appear to be a valid basis on which to mitigate the penalty.

Moreover, both the Board's statement and the NEI observation are at odds with the record. The Staff's position on the appropriate standard to apply in section 50.7 cases is the same standard which TVA and NEI have urged the Board to adopt -- namely the standard applied by DOL under Section 211 of the ERA. Compare NRC Staff Pretrial Legal Brief dated March 1, 2002 at 6-8 ("Staff Pretrial Brief") with Brief *Amicus Curiae* of the Nuclear Energy Institute dated March 1, 2002 at 5-7 ("NEI Pretrial Brief") and Tennessee Valley Authority's Prehearing Brief dated March 4, 2002 at 41. ("TVA Prehearing Brief"). While the Staff believes that the Commission is not bound by DOL decisions, the Staff has consistently said that the appropriate standard in determining whether a violation of 50.7 occurred is whether protected activity was a contributing factor in a

⁸See e.g., Tennessee Valley Authority's Reply to the Staff's Findings of Fact and Conclusions of Law dated March 7, 2003 at p. 4-5; Prehearing Conference Transcript, January 9, 2002, at. 128; TVA Reply to Notice of Violation, January 22, 2001, p. E1-5.

decision to take an adverse action -- the same standard applied by DOL in determining violations of section 211.

The dispute between the Staff and TVA is over whether the standard to be applied to *violations* under section 50.7 should include the section 211 standard applicable to *remedies*. Contrary to the clear language of Section 211 and DOL decisions predating the actions at issue in this case, TVA/NEI wish to incorporate into the standard for what constitutes a violation a separate, and distinctly different, section 211 standard applied in determining whether a DOL complainant who has proven a violation is entitled to a personal remedy. Section 211(b)(3)(C) versus Section 211(b)(3)(D).⁹ The belief of NEI that TVA was somehow misled into thinking a little discrimination was acceptable is not an appropriate basis to mitigate the penalty in this case.¹⁰ If they failed to properly read the statute and case law, they did so at their peril.¹¹ As noted above, TVA has maintained throughout the proceeding that they did not consider Fiser's protected activities in taking any actions. Thus, it is hard to see how they would be harmed by an interpretation of section 50.7 that is consistent with the standard for violations set forth in section 211.

⁹See also *Yule v. Burns International Security Service*, 93-ERA-12 (1994) finding that Burns violated section 211 because Yule's protected activities were a contributing factor in the decision to fire her but that no relief would be ordered because Burns established by clear and convincing evidence that it would have taken the same action in the absence of protected activity.

¹⁰The Board noted that TVA's position appeared to be that a little discrimination is acceptable if it makes it easier for managers to efficiently operate their facilities. LBP-03-10 at 64.

¹¹NEI cites to actions by one Regional Office resulting from the *Yule* case as an indication that the Staff previously agreed with the position which they espouse. NEI Pretrial Brief fn.13. One isolated example of action by one office does not constitute a pattern and practice which might mislead a licensee. Furthermore, neither NEI nor TVA have indicated that TVA was aware of and relied on the Region's actions in *Yule* at the time of the actions at issue in this case. Finding and citing to actions of the Staff that were unknown to the licensee at the time it acted is no basis to mitigate a penalty.

A further point needs to be made with regard to the Board's statements concerning the alleged change in standard by the Staff. As noted, TVA/NEI have said they consider DOL interpretations of section 211 to be the appropriate body of case law to apply to section 50.7 cases. The Staff has consistently stated that TVA violated section 50.7 when, on the morning of the interviews for the PWR Chemistry Manager position, one of the Selection Review Board members, Charles Kent, announced that Fiser had filed a DOL complaint. Staff Pretrial Legal Brief at 25-26; NRC Staff's Findings of Fact and Conclusions of Law Concerning the Tennessee Valley Authority's Violation of 10 C.F.R. 50.7 dated December 20, 2002, at p. 136-139 ("Staff Findings"). This position was entirely ignored in both the majority and dissenting opinions. However, DOL specifically held, in *Earwood v. Dart Container Corp.* 93-STA-0016 (Secy Dec. 7, 1994), that any improper mention of an individual's protected activities is a *per se* violation. This decision was specifically made applicable to section 211 cases in *Gaballa v The Atlantic Group*, 94-ERA-9 (Secy Jan. 18, 1996). Given that TVA/NEI believe that DOL case law should be applied, it is hard to understand how this clear violation was ignored by the Board in its claim that TVA was somehow surprised by the Staff's position.

TVA has argued that reference to Fiser's protected activity was appropriate to assure that procedures were properly followed and the selection was as impartial as possible. Tr. 2878:1;575-6. This is a specious argument which assumes that TVA does not normally follow its procedures and conduct impartial selections. As at least one Board member recognized during the hearing, Kent's action would likely "poison the well." Tr. 575. Therefore, the Commission should follow the request of TVA/NEI, apply DOL case law -- *Earwood & Gaballa* -- and find that this clear violation obviates any need to consider mitigation of the penalty.

IV. The Appropriate Standard For Mitigation Of A Civil Penalty Is An Abuse Of Discretion By The Staff

In *Atlantic Research Corp.*, 11 NRC 841, 849 (1980), the Appeal Board held that it could substitute its judgement for that of the Staff in determining the appropriate penalty for a violation. That case dealt with a penalty imposed under a system set forth in a Staff manual, which the Appeal Board found instructive but not binding. *Id.* Subsequent to that case, the Commission adopted the first Enforcement Policy in October 1980. The Staff believes that, since it now applies Commission policy in determining penalties, the appropriate standard in reviewing Staff determined civil penalties is whether the Staff has abused its discretion in applying the Commission's policy. If the Staff fails to follow the enforcement policy without adequate justification or the penalty imposed is clearly unreasonable given the circumstances of the case, then the penalty should be mitigated to an appropriate one. Such was not the case here. There were multiple violations of section 50.7. Posting the position when it would have been filled by Fiser under RIF procedures was a violation. Failing to select Fiser under an intentionally biased selection process was a violation. Poisoning the well was another violation. These could have been cited as separate violations and assessed separate civil penalties. The Staff combined them into one cited violation. As noted by the Board, the Staff appropriately applied the Commission's Enforcement Policy. LBP-03-10 at 67.

Under the Enforcement Policy, the base civil penalty was doubled because it was a Severity Level II violation, TVA failed to identify the violation, and TVA failed to take appropriate corrective action. This would have resulted in a penalty of \$176,000. This was reduced to \$110,000, the statutory maximum for a single violation in 1996, thus effectively mitigating the penalty before imposition. Given that a penalty of several multiples of \$110,000 could have been imposed by the Staff, it was entirely inappropriate for the Board to further mitigate the penalty without any finding that the penalty applied was arbitrary or an abuse of discretion on the part of the Staff.

CONCLUSION

For the foregoing reasons, the Staff respectfully submits that the Licensing Board applied inappropriate standards in its decision to mitigate the civil penalty in this case and that its decision to do so should be reversed.

Respectfully submitted,

/RA/

Dennis C. Dambly
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of October, 2003

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) EA 99-234
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO CLI-03-10 REGARDING STANDARDS BY WHICH A LICENSING BOARD SHOULD MITIGATE A CIVIL PENALTY IN A DISCRIMINATION CASE" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 2nd day of October, 2003.

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