

RAS 8464

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/15/04

ATOMIC SAFETY AND LICENSING BOARD

SERVED 09/15/04

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. 04-830-01-R

EA 99-234

September 15, 2004

Memorandum and Order
(Requesting parties' views on remand questions)

In our Initial Decision in this proceeding, LBP-03-10, 57 NRC 553 (2003), this Licensing Board, by majority vote, determined that the Tennessee Valley Authority ("TVA") had violated 10 C.F.R. § 50.7 by discriminating against an employee, Mr. Gary Fiser, on account of his whistleblowing activities (i.e., his engagement in "protected activities.") The Board imposed a civil penalty of \$44,000 on TVA (reduced from the \$110,000 initially sought by the Staff). Judge Young concurred in part and dissented in part, finding that the NRC Staff had not met its burden of proof to show discrimination against Mr. Fiser.

TVA appealed the Board's decision. In a Memorandum and Order dated August 18, 2004, CLI-04-24, 60 NRC ___, the Commission affirmed the Board's decision in part, reversed it in part, and remanded the case to the Board for further proceedings. On September 14, 2004, this Board was established for purposes of these further proceedings. 69 Fed. Reg. ___ (___).

The Commission seeks further findings on the following questions (see CLI-04-24, 60 NRC at ___ (slip op. at 55)):

1. Whether eliminating certain protected activities from consideration (as set forth in CLI-04-24), 60 NRC at ___ (slip op. at 25-47) but explicitly permitting several other protected activities relied on by the Board majority to be considered, requires modification or retraction of the Board's finding that protected activities were a "contributing factor" in TVA's unfavorable personnel actions regarding Mr. Fiser.

2. If the "contributing factor" finding stands, has TVA shown by "clear and convincing evidence" that it would have taken the same actions regarding Mr. Fiser regardless of his protected activities.

3. If the Board finds against TVA on both the "contributing factor" and "clear and convincing evidence" issues, whether and to what extent should the proposed civil penalty of \$110,000 be mitigated.

Parties should address these questions in writing by Friday, October 8, 2004. Parties shall provide explicit citations to the record for any asserted facts relied on in their briefs. Responses shall be filed by close of business Friday, October 22, 2004.

On September 9, 2004, TVA filed a Motion for A Status Conference. It seeks additional briefing by TVA and the Staff concerning the additional proceedings called for by CLI-04-24. In seeking the parties' views on the foregoing questions, the Board has in effect granted TVA's request. After receipt of the briefs, the Board will decide whether a telephonic conference is desirable.

IT IS SO ORDERED.

For the Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
September 15, 2004

[Copies of this Memorandum and Order have been transmitted by e-mail to counsel of record.]

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 MEMORANDUM AND ORDER (REQUESTING PARTIES' VIEWS ON REMAND QUESTIONS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-390-CIVP
50-327/328-CIVP and
50-259/260/296-CIVP
LB MEMORANDUM AND ORDER (REQUESTING
PARTIES' VIEWS ON REMAND QUESTIONS)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of September 2004