Tennessee Valley Authority, Post Office Box 2000, Spring City, Tennessee 37381-2000

Richard T. Purcell
Site Vice President, Watts Bar Nuclear Plant

AUG 0 7 1998

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

Gentlemen:

In the Matter of) Docket No. 50-390
Tennessee Valley Authority)

WATTS BAR NUCLEAR PLANT (WBN) - UNIT 1 -DEPARTMENT OF LABOR (DOL) CASE NO. 97-ERA-53 (CURTIS C. OVERALL V. TENNESSEE VALLEY AUTHORITY)

This responds to NRC's July 17, 1998, letter to J. A. Scalice asking that TVA describe the bases for its appeal of an Administrative Law Judge's (ALJ) recommended decision and order (RDO) to the DOL's Administrative Review Board (ARB) in the subject case.

Enclosure 1 to this letter describes the principle reasons why we believe the ALJ's RDO is fundamentally flawed and should be rejected by the ARB. In sum, TVA was able to show by clear evidence that the employment actions taken with respect to Mr. Overall were done so for legitimate business reasons. TVA was also able to show that the decision to eliminate Mr. Overall's position was made well before he engaged in any protected activity. In addition, the ALJ made several wrong judgments, including how TVA handled an ice condenser-related problem evaluation report, without any basis in the record.

A001

Enclosure 2 contains a copy of the brief TVA submitted to the ARB on July 9, 1998. This brief describes, in detail, each of the errors in fact and law made by the ALJ and asks the ARB to issue a final

decision in favor of TVA. As requested by NRC, we will send you any future TVA filings made to DOL regarding this case.

Enclosure 3 lists the commitment identified in this letter. We appreciate the opportunity to provide this information to you.

Sincerely,

R. T. Purcell

cc (Enclosures):
Mr. Luis A. Reyes
Regional Administrator, NRC Region II
Atlanta Federal Center
61 Forsyth St., SW, Suite 23T85
Atlanta, Georgia 30303

Mr. James Lieberman, Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

NRC Resident Inspector
Watts Bar Nuclear Plant
1260 Nuclear Plant Road
Spring City, Tennessee 37381

Mr. Robert E. Martin, Senior Project Manager
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

ENCLOSURE 1

TVA appealed the recommended decision and order (RDO) of the Administrative Law Judge (ALJ) for the following principle reasons:

1. The ALJ failed to consider the legitimate, nondiscriminatory reasons behind the decision to eliminate Mr. Overall's position at WBN and, later, to terminate his employment at TVA.

During the course of the hearing before the ALJ, TVA established that Mr. Overall occupied a maintenance specialist position within the WBN Technical Support organization from 1989 to 1994. Mr. Overall's job was tightly focused on the ice condenser system. He did not hold an engineering degree, he did not have the required training to be responsible for any systems other than the ice condenser, and he was not assigned to back up any of the engineers within his section with regard to any other nuclear steam supply system. Mr. Overall also turned down suggestions from his supervisors to return to school to obtain the additional courses necessary to support a determination of engineering degree equivalency. As WBN Unit 1 neared completion of construction activities, efforts were put in place to transition to an operating workforce and consolidate work tasks. Mr. Overall's position was one of 19 positions slated for elimination within the Technical Support organization. Insofar as Mr. Overall's position was concerned, his lack of an engineering degree and limited area of expertise severely limited options and opportunities for the work which he could be assigned. Based on TVA's previous operating experience with respect to ice condenser systems -- Sequoyah Nuclear Plant (SQN) Units 1 and 2 had one systems engineer responsible for both ice condensers -- the decision was made that there would not be sufficient ice condenser work at WBN to support a full-time position devoted solely to that system. As such, the decision was made to eliminate Mr. Overall's position and to assign the ice condenser to a degreed engineer who would be able to work with other systems and handle a broader range of responsibilities.

Changes in staffing levels within the Technical Support organization, including the elimination of remaining non-degreed positions, were announced in an August 1994 meeting. On September 15, 1994, Mr. Overall received an "at risk" notice that his job had been targeted for surplus and that he may be assigned to TVA's Services organization effective July 3, 1995.[1] The other 18 affected Technical Support employees received similar notices.

In early June 1995, Mr. Overall received a call from TVA Services soliciting him for a job, and Mr. Overall applied on a Services job on June 16, 1995. However, given the remaining amount of work necessary to complete the turnover of the ice condenser system to Operations, Mr. Overall's employment within Technical Support was extended to

[1] TVA Services was an organization created to afford those subject to reductions in force (RIF) with an opportunity to continue their TVA employment by providing their skills to organizations company-wide or even outside of TVA on a short or long-term contract basis. The management and organizational structure of TVA Services was entirely separate and distinct from WBN or TVA Nuclear.

September 18, 1995, beyond the July date provided for in his "at risk" notice. Mr. Overall was officially transferred to Services on September 18, 1995.

As a Services employee, Mr. Overall was no longer an employee of WBN or TVA Nuclear, and his continued employment was dependent upon his ability, with the support of TVA Services, to market his skills either within or outside of TVA. When he was not able to adequately do so, Mr. Overall, along with his entire work group within the Services organization, was eliminated as part of Services' larger reduction in force (RIF) in September 1996.

Insofar as Mr. Overall's reduction in force from TVA's Services organization was concerned, the record is clear that none of the WBN supervisors who made the decision to eliminate Mr. Overall's WBN position had any input in the decisions not to hire Mr. Overall for any WBN-related work, as both SQN and WBN elected to perform their ice condenser-related work with their own employees. Moreover, the Services manager who did decide to terminate Mr. Overall's services did not know that Mr. Overall had ever raised any nuclear safety concerns.

The ALJ also made a determination that Mr. Overall was discriminated against when he was not "recalled" to work during a 1997 outage at WBN. This finding also has no basis in the record. The testimony was clear and straightforward that a contractor performed the outage work, and that a TVA manager took the initiative to make the contractor aware of Mr. Overall's interest in helping with the ice condenser related work. However the contractor decided to use its own workforce instead of adding staff. Neither of the WBN supervisors who had earlier decided to eliminate Mr. Overall's position had anything to do with, or were in a position to influence the contractor's decision.

In view of the above, TVA made a clear case in establishing the legitimate business reasons behind its decision to terminate Mr. Overall's employment. Nonetheless, the ALJ disregarded, and in some cases misinterpreted, the evidence when he concluded that TVA discriminated against Mr. Overall. This result is especially disconcerting given the fact that Mr. Overall's WBN supervisors made a special effort to encourage Mr. Overall to broaden his skills and do what they believed would be necessary for him to remain employed at WBN.

2. The ALJ erred in concluding that TVA's decision to eliminate Mr. Overall's position was linked to his engaging in protected activity.

The fact that Mr. Overall was involved in a protected activity when he initiated a problem evaluation report (PER) linked to the ice condenser was never in dispute. Nor was there any dispute that Mr. Overall's position was placed at risk and he was transferred to Services, and that he was later RIF'd from Services. However, the plain facts are that Mr. Overall did not initiate the PER until

April 1995, the decision to eliminate Mr. Overall's position was made in August 1994, more than six month's prior to his initiating the PER, and that decision was never revisited.

In addition, there was no evidence that Mr. Overall was in any way singled out for any adverse treatment, as many employees were placed at risk in 1994 and 1995. Most telling was the fact that all of the non-degreed specialized positions in the Technical Support organization were eliminated in this same timeframe. In fact, TVA was able to show that Mr. Overall received arguably better treatment than some of the other "at risk" Technical Support employees since not everyone had their transfer date to Services extended as he did.

TVA was also able to show that the processing and closure of the PER was accomplished in accordance with standard practice. The PER was properly transferred from the Technical Support organization to the WBN Engineering organization in July 1995 after it became apparent that the problem principally involved a metallurgical and civil engineering question and not a systems engineering matter. Contrary to the ALJ's determination that PER was transferred as a ploy to remove Mr. Overall from the PER, TVA provided clear, undisputed testimony that such transfers were not rare events and that it was not at all uncommon for the initiator of a PER to be uninvolved with its closure. It is also instructive that Mr. Overall did not complain at the time the PER was transferred to WBN Engineering, nor did he raise any concern about the PER when he participated in turning over the ice condenser system when plant systems were being turned over to WBN Operations. The fact was that the PER was not taken from Mr. Overall. Rather, it was properly transferred to and closed out by the correct organization without the need for any further involvement of Technical Support personnel.

3. The ALJ made several wrong judgments without any basis in the record.

In order to draw together the many circumstances and amount of time leading to the eventual termination of Mr. Overall's employment, the ALJ constructed an extensive conspiracy which involved a variety of managers within a variety of organizations. While such a construct makes for an intriguing story, the record fails to support such a conspiracy.

A key part of the ALJ's conspiracy theory involved the interplay of several TVA organizations as well as a contractor's involvement in disposing of the ice condenser PER. Already discussed above are the actual circumstances which lead to the PER's transfer, including the fact that Mr. Overall never made a claim that the PER was transferred to remove it from him either at the time or later. However, the ALJ cites a broad coverup of significant safety hazards which was somehow linked to an organized scheme to remove Mr. Overall from WBN. The record fails to support the ALJ's determination.

In order to achieve this conspiratorial result, the ALJ ties together several organizations within TVA's Fossil & Hydroelectric Power organization, TVA Nuclear's corporate organization, TVA Nuclear's WBN site organization, as well as a nuclear steam supply system (NSSS) vendor/contractor, and imputes knowledge to a variety of managers and technicians without any support in the record. For example, the ALJ cites the involvement of TVA Nuclear's Chief Metallurgical Engineer in directing the issuance of an incomplete report by TVA's Central Laboratory Services to avoid questioning by NRC investigators. Such a conclusion is completely unsubstantiated by the record. The evidence presented at trial showed that the first metallurgical report was issued by Central Laboratory, an organization entirely separate from TVA Nuclear. In that report, several statements were made which could not have been based on any laboratory findings and which seemed to be based on assumptions about information not available to the Central Laboratory. This conclusion was supported by a further review of the report by TVA Nuclear's Chief Metallurgical Engineer, a TVA Nuclear corporate employee with no supervisory or reporting responsibility to the WBN site. After this problem was brought to the Central Laboratory's attention, it concurred without any pressure to do so and reissued the report limiting its conclusions to the pertinent points. Nothing in the record suggested that either TVA Nuclear's Chief Metallurgical Engineer or Central Laboratory had any involvement in a coverup to keep information from NRC, had any motive whatsoever for doing so, or had any connection to Mr. Overall, his WBN supervisors, or Mr. Overall's employment situation.

Another part of the conspiracy involved the highly qualified NSSS contractor/vendor which designed and built the entire WBN ice condenser system. This contractor performed an analysis of that system's operability and concluded that given the nature of the problem identified in the PER, the ice condenser would remain operable under accident conditions. However, the ALJ casts the report as superficial and inaccurate since it did not arrive at the same conclusions that Mr. Overall, a non-degreed/non-licensed engineer, thought it should have. The ALJ further casts doubt on the report's usefulness because Mr. Overall's former Technical Support manager was unable to explain the statistical analysis performed by the contractor to determine its operability. As was explained above, however, the PER was transferred from Technical Support organization to WBN's Engineering organization, which had the design responsibility, technical background and expertise to deal with the issue and which was responsible for assessing the contractor's report and closing out the PER. In this case, there simply is no credible evidence of any involvement in a coverup conspiracy.

Further, and very importantly, there is no evidence in the record whatsoever to indicate that anyone was in any way involved in a coverup to avoid NRC questioning about the ice condenser system in order to obtain an operating license. The ice condenser PER was handled in accordance with TVA's PER process, was reviewed for reportability in accordance with NRC regulatory requirements, and was properly dispositioned. There was absolutely no testimony or evidence

that such PER was handled any differently than the many PERs which were generated, addressed, and closed out in this timeframe.[2] Nor was there any evidence whatsoever that the NRC was in any way concerned about the manner in which TVA examined the ice condenser issues, either at the time of WBN licensing or thereafter in December 1996 when, according to Mr. Overall's testimony, he contacted the NRC about the ice condenser problems.[3] As such, the ALJ's determination that any sort of coverup was involved is completely unsubstantiated.

4. The ALJ erred in determining that the main claim of Mr. Overall's complaint was timely filed.

The record in the case clearly supports the conclusion that Mr. Overall's complaint did not timely challenge the decision to eliminate his position at WBN. The last step in the elimination of Mr. Overall's position occurred in September 1995, long before he filed his initial complaint with the DOL. Mr. Overall did not directly challenge his RIF from Services in September 1996, and a contractor's decision not to hire him in 1997 was not a major part of his case. Moreover, the record contains no proof that anyone in Services or the contractor's organization bore Mr. Overall any ill will. It is also undisputed that neither of Mr. Overall's previous WBN supervisors had anything to do with those decisions.

Section 211 of the Energy Reorganization Act provides that claims filed more than 180 days after the alleged discriminatory event are untimely and must be dismissed. In this case, Mr. Overall's claim about his 1995 transfer from WBN to Services arose more than 180 days before the filing of the January 15, 1997 complaint.

The ALJ's determination that the events leading to Mr. Overall's RIF from Services in September 1996 constituted a "continuing violation" does not stand up to scrutiny. The decision to eliminate Mr. Overall's job was made in August 1994 as part of a general cutback in Technical Support staffing. That decision was not revisited. All 19

---

[2] TVA's standard practice for raising and resolving problems at the time of WBN licensing ran completely counter to any purported scheme aimed at hiding problems. At the time the ice condenser PER was initiated, WBN procedures required PERs to be distributed to NRC's onsite inspectors. Moreover, during these final stages of WBN licensing, it was TVA's practice to meet regularly with NRC inspectors and managers in order to review new problems as they arose, and review the disposition of both new and old problems as they were being closed out. TVA had a series of mechanisms set up to review each and every plant system, its readiness for operability, as well as to examine and resolve any problems that had an impact on operability. The NRC was closely involved in overviewing this startup process, had access to the same information being considered by TVA, and raised questions and concerns as it saw fit in order assure itself that the plant was worthy of a license. It is beyond credible belief that TVA would have been engaged in any coverup of a problem in the atmosphere of open communication and issue resolution that so pervaded the WBN site in this timeframe.

[3] The NRC performed a review of the specific PER initiated by Mr. Overall associated with the ice condenser system, which included a review of TVA's metallurgical investigation which was documented in both versions of the Central Laboratory Services report, as well as a NSSS vendor/contractor's ice condenser operability analysis. This inspection was documented in NRC Inspection Report 50-390/97-04, sent to TVA on July 7, 1997, and concluded that TVA's actions were adequate.

Technical Support positions were eliminated, and the decision to eliminate them was made by two Technical Support supervisors who had nothing to do with the decision made two years later by another manager to eliminate Mr. Overall's job in Services.

The fact that Mr. Overall, with the support of TVA Services, could not market his service did not constitute a continuing violation. Neither of Mr. Overall's previous supervisors had anything to do with the later decisions not to contract with Services for work at either WBN or SQN.

The same faulty reasoning used by the ALJ to concoct the "strong circumstantial case of intentional discrimination," is used by the ALJ as the basis for his finding of a continuing violation. Without adequate bases in the record, however, both arguments must fail.

Conclusion:

For the principle reasons expressed in this Enclosure 1, and the several reasons discussed in detail in TVA's brief[4] to the ARB contained in Enclosure 2, TVA has asked the ARB to issue a final decision in this case in favor of TVA.

[4]The first complete sentence on the top of page 14 of the brief states that no more screws have been found in the Unit 1 containment since November 1995. On July 17, 1998, after the date the brief was sent to the ARB (July 9, 1998), TVA found 12 additional screw heads in the ice condenser melt tank. This finding is being evaluated and tracked by a corrective action document (WBPER980823). This brings the number of screw heads found to approximately 182 plus the 32 whole screws, out of a total of 194,400 screws in the ice condenser baskets. This small number of additional screw heads does not alter TVA's original conclusion regarding operation of the ice condenser.

ENCLOSURE 2

ADMINISTRATIVE REVIEW BOARD (ARB) BRIEF
ARB CASE NOS. 98-111 AND 98-128
(ALJ CASE NO. 97-ERA-53)

BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF	)	
	)	
CURTIS C. OVERALL	)	
	)	
Complainant	)	
	)	
v.	)	ARB Case Nos. 98-111 and 98-128
	)	
TENNESSEE VALLEY AUTHORITY	)	(ALJ Case No. 97-ERA-53)
	)	
Respondent	)	

RESPONDENT'S BRIEF

STATEMENT

Administrative Law Judge (ALJ) Clement J. Kennington has entered a recommended decision and order (RDO) finding against TVA and a preliminary order on relief and attorney's fees and costs. TVA has petitioned for review of the RDO, while the complainant, Curtis C. Overall, has asked for review of some aspects of the order on relief.

It is TVA's position that the RDO is fatally flawed by constructing an extensive conspiracy to remove complainant from his job, a conspiracy unsupported by the evidence in the record.[1]

---

[1] Hearing testimony will be cited by transcript page number. Depositions admitted for proof will be cited by the witness's name and page number. "CX" will refer to Mr. Overall's exhibits, "RX" to TVA's exhibits, and "JX" to joint exhibits.

The RDO also incorrectly excuses Mr. Overall's admitted untimeliness in seeking to challenge the elimination of his job at TVA's Watts Bar Nuclear Plant (Watts Bar).[2] These and other errors demonstrate that the RDO should be rejected and a final decision in favor of TVA be issued.

According to Mr. Overall and the RDO, TVA decided to eliminate his job because of the issues he raised in an April 1995 Problem Evaluation Report (PER) WBPER950246 (hereinafter referred to as PER 246 or CX23).[3] However, as clearly shown by the record, the decision to eliminate Mr. Overall's job was made months before.

In 1994, Mr. Overall was a Power Plant Maintenance Specialist, SD-4, in the Nuclear Steam Supply System (NSSS) Engineering section of the Watts Bar Technical Support organization, which was headed up by Dennis Koehl, a position he

---

[2] Watts Bar uses a Westinghouse Electric Corporation (Westinghouse) reactor design and consists of two units. However, only one of Watts Bar's units has been completed and is in commercial operation (tr. 245, 594-96). TVA's Sequoyah Nuclear Plant (Sequoyah) uses the same Westinghouse design as Watts Bar. Sequoyah, a two-unit plant, has both of its units in commercial operation (tr. 595-96).

[3] A PER is a formal corrective action document which describes the problem and documents how the problem is analyzed and resolved (JX9, ¶ 13; tr. 89-90). PERs were not rare at Watts Bar (tr. 679-81). In fact, Mr. Overall had initiated earlier PERs, including PERs dealing with issues on the ice condenser system (JX9, ¶ 13; tr. 89-90, 316-17, 809).

had held since 1989 (JX9, ¶¶ 1-2; tr. 593, 765; see also tr. 596-99).[4] Besides the NSSS section, Technical Support had several other sections, all of which focused on system engineering, and a Procedures group (tr. 596-97). Landy McCormick was one of Mr. Koehl's subordinates and was the supervisor over the NSSS section (tr. 263-64, 601-02, 761-62). He had held that position, and had been Mr. Overall's first-line supervisor, since March 1990 (tr. 765). Neither Mr. Koehl nor Mr. McCormick had any supervisory authority outside Watts Bar Technical Support (tr. 264-65, 599-601, 764).

Mr. Overall's job in 1994 was tightly focused on the ice condenser system (CX2 at 2; tr. 247-49, 646-51, 767-68, 771-74). The ice condenser was one of the safety features in the plant (JX9, ¶ 3 (as supplemented); RX1; tr. 23-30, 76-79). The ice baskets, the structures which held the ice, are the components of the system principally at issue here. There are 1944 large metal baskets, each 12 inches in diameter and 48 feet high, which are filled with approximately three million pounds of special ice

---

[4] The TVA pay schedules which are pertinent to this case are the SD schedule and the SC schedule. Both schedules have four pay grades, running from SD-1 to SD-4 and SC-1 to SC-4, respectively (JX9, ¶ 8). At Watts Bar (and elsewhere in TVA), the SD schedule is used for employees who are specialists in certain technical areas but who do not have a four-year degree in an engineering discipline or have not been determined to have the equivalent of such a degree under the applicable standards. At Watts Bar (and elsewhere), the SC schedule is used for employees who have engineering degrees or the equivalent (tr. 602, 604-09).

(*id.*). In the event of a major steam leak, the ice would help lower the temperature and pressure inside the reactor containment to manageable levels. The ice baskets are given additional structural stability by a number of rings placed at intervals along the baskets and at the top and bottom of the baskets. The screws about which so much was said at the hearing hold those rings to the baskets (JX9, ¶ 3 (as supplemented); RX1; tr. 23-30, 76-83). There are nine units in the United States which use this system, three of which are located at TVA (two at Sequoyah, one at Watts Bar) (tr. 244-45; Rathjen dep. at 18-19).

Mr. Overall was not assigned to back up any of the engineers in the NSSS section on any other systems and did not have the required training to be responsible for any systems other than the ice condenser (tr. 246, 772). He turned down suggestions from both Mr. Koehl and Mr. McCormick to return to school to obtain the additional courses to support a determination by TVA Human Resources that he had the equivalent of an engineering degree, despite the reclassification to the SD schedule and the pay raise he would have received (tr. 266-68, 617-19, 664-65, 765-69).[5]

---

[5] TVA Human Resources, not either Mr. Koehl or Mr. McCormick, made the determination whether someone had the equivalent of an engineering degree under applicable TVA and industry standards. Several efforts by Mr. Koehl to obtain a favorable equivalency

By 1994, Watts Bar Unit 1 was nearing completion. As part of the effort to move Watts Bar from a construction organization to an operating organization, Mr. Koehl had to cut his workforce during fiscal year 1995 (tr. 610-12). His efforts included assessing what work might be consolidated with other tasks within Technical Support or eliminated entirely (tr. 612-13, 640-41). He used Sequoyah as an example since it was a "sister" plant to Watts Bar (tr. 594-95, 639). Since Sequoyah was a two-unit plant, and Watts Bar had only one unit being completed, the rule of thumb was that Watts Bar would need 70 percent of the staffing of Sequoyah (due to equipment which was common to both units, a 50 percent factor was not used) (tr. 640).

As part of the process, Mr. Koehl solicited recommendations from his section supervisors, including Mr. McCormick, in the late summer of 1994 (tr. 612-16, 639-42, 775-76). Mr. McCormick had been able to save Mr. Overall's job during the previous cutbacks. However, he was faced with an employee whose job

---

(. . . continued) determination for Mr. Overall had been turned down (tr. 266, 315-16, 607-09, 766-68; JX9, ¶ 9).

The RDO does question (at 6, 17) an equivalency determination and reclassification to SC for another SD schedule employee—John Ferguson (tr. 219, 232, 724-32; CX45). However, Mr. Overall never challenged his own failure to obtain an equivalency determination or Mr. Ferguson's reclassification. In any event, it was clear that Mr. Ferguson was reclassified in an organization other than Technical Support and that Technical Support merely recognized that status when Mr. Ferguson was selected for a position in that organization (tr. 717-19, 724-32).

classification on the SD schedule severely limited the work he could be assigned. In Mr. McCormick's view, Mr. Overall could work on the ice condenser and no other system. Since Mr. Overall was not classified as an SC schedule engineer, he lacked the flexibility Mr. McCormick needed as the workforce in the NSSS section was reduced. Mr. McCormick therefore recommended that Mr. Overall's position be one of the positions slated for elimination (tr. 775-81).

Mr. Koehl accepted Mr. McCormick's recommendation to eliminate Mr. Overall's position (tr. 616, 642). He based his decision on the same considerations as Mr. McCormick, along with his own view that there would not be sufficient ice condenser work at Watts Bar to support a full-time position devoted solely to that system, a judgment based in large part on the fact that Sequoyah, with two operating units and two ice condensers, had only one systems engineer who was responsible for both units (tr. 639-40, 642-48). Thus, Mr. Overall's position was one of 19 positions in Technical Support which were slated for elimination (tr. 610; RX2).

The timing of this decision should be emphasized. The decision to eliminate Mr. Overall's position (and the other 18 positions, for that matter) was made in the late summer of 1994 and was not revisited or changed thereafter (tr. 641-42, 667-70, 786).

The changes in Technical Support's organization and staffing levels, including the elimination of the remaining SD positions, were announced in an August 1994 meeting (JX9, ¶ 10; tr. 252-53, 641-42, 781-82). On September 15, 1994, Mr. Koehl gave Mr. Overall a "Written Notification of Potential At-Risk Status" which told him that his job was "targeted for surplus" and that he may be assigned "to the Services organization effective July 3, 1995" (RX2; tr. 249-50, 654-57; JX9, ¶ 11). The other 18 affected Technical Support employees received similar notices at that time (tr. 610, 654).

Given his uncertain employment future, Mr. Overall welcomed a call from Rich Miller, a supervisor in the Services organization, in early June 1995, soliciting him for a job in Services (tr. 195-97, 295-99, 657-60, 666, 784; RX9). Services was a relatively new organization at TVA. It was not under the supervisory authority of any manager at Watts Bar or in TVA Nuclear (JX9, ¶¶ 26, 27; tr. 350, 365-66, 562-63, 568, 571-72). There was no evidence whatsoever that anyone at Watts Bar had anything to do with Mr. Miller's offer to Mr. Overall.

Due to Mr. Miller's efforts, Mr. Overall applied on a job in Services tailored for him on June 16, 1995, and was formally selected for it on September 25, 1995 (JX9, ¶ 20; tr. 195-97, 295-305; RX10, RX11). Although Mr. Overall did not formally accept the job until October 2, 1995 (JX9, ¶ 20), there was

little doubt as of June 1995 that he was going to leave Watts Bar and take up a new job outside of Nuclear Power (tr. 301).

Mr. Overall was not transferred to Services in July 1995. Instead, Mr. Koehl extended his employment in Technical Support to September 18, 1995, due to the amount of remaining work, as set out in the June 23, 1995, written notice of at-risk status.[6] Some of the other "at-risk" Technical Support employees were not similarly extended (tr. 669-71; JX9, ¶ 12; CX25).[7] Mr. Overall's extension thus came long after he had initiated the PER at issue in this case (tr. 672-74). Mr. Overall was officially transferred to Services on September 18, 1995 (although he

---

[6] Mr. Overall testified that he actually received the June 23, 1995, notice about a week before that date (tr. 187-88; CX24). However, Mr. Koehl explained that the Human Resources organization at Watts Bar generated this notice (and the one used in September 1994) for each affected employee on the day the notices were to be distributed--the date indicated on the notice. Once the notices were prepared, they were given to the responsible managers for distribution to the affected employees. The managers were not given the notices before the date of issue (tr. 671-72).

[7] The RDO (at 16) mentions remarks attributed by Mr. Overall to Howard Cutshaw, a Human Resources officer, and Mr. McCormick about the elimination of his job. Mr. Cutshaw was not a decisionmaker on that matter, and whatever he said has no bearing on this case. The RDO misrepresents Mr. McCormick's testimony, in which he stated that he would not have characterized the decision as a mistake since it was his decision (tr. 789).

remained at Watts Bar under contract through late November 1995) (CX25; JX9, ¶ 20; tr. 674-77, 790-92).[8]

As a Services employee, Mr. Overall was no longer an employee of either Watts Bar or TVA Nuclear (tr. 563-64). His continued TVA employment was dependent on his ability to market his skills (tr. 306-07, 309-10, 568-69, 574-78). His main effort was directed at trying to "sell" his services as an ice condenser specialist to Watts Bar and Sequoyah and the other American ice condenser plants. His sales efforts included one meeting each at Watts Bar and Sequoyah, meetings in which neither Mr. Koehl nor Mr. McCormick participated (tr. 197-98, 357-61, 627-29, 712, 801-03; Rathjen dep. at 32). Both plants decided to do the work with their own employees (Rathjen dep. at 33-34; tr. 576-78, 628-29). There is no evidence in the record that either Mr. Koehl or Mr. McCormick had any role in those decisions (tr. 264-65, 600, 764). Mr. Overall's marketing efforts outside TVA also did not bear fruit (tr. 362, 576-78).

Services could not carry personnel into fiscal year 1997 who did not have sufficient contracts to support their positions

---

8 The RDO (at 22) questions the elimination of Mr. Overall's SD position based on the fact that two other Technical Support SD employees were still employed at Watts Bar. The RDO ignores the undisputed testimony that these employees' positions in Technical Support were eliminated, but that they were selected for other jobs in other organizations at Watts Bar (tr. 738-40, 749-50).

(tr. 306-07, 350, 573-76).[9] As a result, Mr. Overall's entire work group was eliminated as part of Services' larger cutback (CX27; tr. 198, 573-75, 578). Mr. McCormick and Mr. Koehl played no role in the decision to RIF Mr. Overall (tr. 578, 710-11, 803), and the Services manager who made that decision did not know that Mr. Overall had raised any nuclear safety concerns (tr. 578). See generally JX9, ¶ 27.

The RDO also found that TVA had discriminated against Mr. Overall when he was not "recalled" to work during a 1997 outage at Watts Bar. This finding further demonstrates the RDO's lack of basis in the record.

The facts are straightforward. The outage work in question was performed by a TVA contractor, Stone and Webster Engineering Corporation (SWEC), not TVA (tr. 630-31, 635). A TVA manager, Ulysses White, took the initiative to make SWEC aware of Mr. Overall's interest in helping work on the ice condenser during the outage (tr. 199-200, 629-34). However, SWEC decided to use its own workforce instead of adding staff (tr. 631, 634). The record shows that neither Mr. Koehl nor Mr. McCormick had

---

[9] The RDO (at 18) refers to Mr. Overall's story about some budget remarks made by a Services manager. However, Mr. Overall never challenged the bona fides of the reasons for his RIF from Services--only suggesting that there was something wrong with the failure of his marketing efforts.

anything to do with SWEC's decision, and were not in a position to do so in any event (tr. 712, 755-58, 804-05).

Much of the hearing was devoted to PER 246. On April 21, 1995, Mr. Overall, with the concurrence of Mr. McCormick and the engineer who was his backup on the ice condenser, initiated the PER after some broken and whole ice basket screws were found in a melt tank (CX23 at 5; tr. 90-91, 98, 103-04, 428, 812-13). While there is no dispute the issue raised in the PER needed to be resolved, the testimony the RDO relies on (at 9; tr. 423, 424) does not establish that either Mr. McCormick or Mr. Koehl saw the matter as a make-or-break issue for Watts Bar.

As part of the analysis of the issue, Mr. Overall enlisted the help of Vonda Sisson, a metallurgical engineer from the Watts Bar Engineering organization, to analyze the screws from the melt tank (JX9, ¶ 16; tr. 468-69). Ms. Sisson sent samples of the screws to TVA's Central Laboratory Services (Central Labs), an organization outside of TVA Nuclear, for testing (JX9, ¶ 19; tr. 468, 505-07). On June 2, 1995, Central Labs issued a report (CX22; tr. 470-71, 483-84, 500, 505).

This first report made several statements which could not have been based on any laboratory findings and seemed to be based on assumptions about information not available to Central Labs, a conclusion supported by a further review of the report by TVA Nuclear's chief metallurgical engineer, Terry Woods, who was

based in Chattanooga (tr. 471-74, 484-86, 495-96, 537, 540-45). Central Labs, after the problems were brought to its attention, concurred and reissued the report limiting its conclusions to those points based on the testing of the screws (CX23 at 26-47; tr. 474-75, 500-01, 509, 511-12, 521-24, 546-47). Neither Mr. Koehl nor Mr. McCormick had anything to do with the review of the initial Central Labs report or the decision to revise and reissue it (tr. 474-77, 484-86, 510-12, 521-24, 546-49, 837). See also tr. 341-42, 468, 505-07, 538-39.

Neither Mr. Koehl, Mr. McCormick, nor Mr. Overall had anything to do with the closure of PER 246 (JX9, ¶ 18; tr. 184, 682-83, 823-24). Mr. McCormick, after the PER's due date had been extended several times, saw that the PER was not a systems engineering problem but had become a metallurgical and civil engineering question, matters best handled by the Watts Bar Engineering organization, not the NSSS section or Technical Support (CX23 at 87-89; tr. 318-21, 821-23; see also tr. 427-28, 478). Accordingly, PER 246 was transferred to Watts Bar Engineering in July 1995, which closed the PER later in 1995 (CX23 at 6, 20-24).

The RDO finds that there was a widespread conspiracy to cover up the problems raised on the PER, a conspiracy involving Technical Support, Watts Bar Engineering, the Central Labs, and

Mr. Woods (at 9-13). While this makes for an interesting story, it lacks any basis in the record.

According to the RDO, Mr. Woods and Central Labs were major participants in the coverup. However, there is nothing in the record to suggest what motive either Mr. Woods or Central Labs would have to do such a thing. To the contrary, the metallurgical issues were resolved without reference to Mr. Overall's employment situation, a matter in which Mr. Woods and Central Labs had no role whatsoever.

The RDO also finds that the PER was transferred to Watts Bar Engineering as a ploy to remove Mr. Overall from the PER, ignoring the fact that Mr. Overall did not complain about the transfer at the time and the undisputed testimony that such transfers were not rare events and that it was not unusual for initiators of a PER to be uninvolved in the closure of that PER (tr. 184, 823-24). The RDO also ignores the fact that neither of the managers involved in the decision to eliminate Mr. Overall's position had anything to do with how the PER was resolved. The PER was closed by Watts Bar Engineering, not Technical Support. Watts Bar Engineering, not Technical Support, decided to rely on the Westinghouse report on the integrity of the ice baskets (CX23 at 49-56, 65-66). Moreover, Mr. Overall offered nothing to show that NRC was dissatisfied with the handling of PER 246. To the contrary, NRC approved of how the ice basket screw issue was

handled at Watts Bar. Also, no more screws, broken or otherwise, have been found in the Unit 1 containment since Mr. Overall left Watts Bar in November 1995 (tr. 230, 237).

The record also shows that Mr. Overall did not raise any concerns about PER 246 when he participated in turning over the ice condenser system to Watts Bar Operations as ready to operate (tr. 684-709; RX15, RX16, RX17). In addition, he said nothing to Mr. McCormick or Mr. Koehl about any concerns he had about PER 246 or the ice condenser system (tr. 330, 412-13, 683, 828). He did not raise any issue with NRC on this matter until mid-December 1996 (RX13; tr. 356-57).

ARGUMENT

I

Introduction

The main issue in this case is the decision reached by Mr. McCormick and Mr. Koehl to eliminate Mr. Overall's job. If this issue was timely raised, which TVA denies, the question then becomes whether those decisionmakers were motivated by Mr. Overall's participation in PER 246. Instead of analyzing that question, the RDO constructs a scheme under which TVA managers from organizations outside Technical Support, Watts Bar, or even TVA Nuclear combined their efforts over a considerable

period of time to terminate Mr. Overall. In order to achieve this result, the RDO imputes knowledge to managers without any support in the record, a procedure rejected by the Secretary. *Bartlik v. TVA*, No. 88-ERA-15 (Dec. 6, 1991). The RDO is based on assumptions and speculation which are not probative and which should not have influenced the decision. *Bartlik v. TVA*, No. 88-ERA-15, *slip op.* at 4, 5, 19-20 and at *passim* (Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996).

The best way to illustrate this is to review the points the RDO uses to establish a continuing violation here (at 29). Nearly all of the points--which are discussed at various places in this brief--have no bearing whatsoever on Mr. McCormick's and Mr. Koehl's August 1994 decision to eliminate Mr. Overall's job.

The RDO offers no explanation why Mr. Woods would want to cover up a problem with the ice basket screws and neglects to mention that Central Labs, an organization outside TVA Nuclear, concurred with the revision to the report. There is no evidence to support the assertion that the PER was transferred to remove Mr. Overall from it--Mr. Overall never made such a claim at the time or later. Mr. Koehl's decision to eliminate Mr. Overall's job was based on Mr. McCormick's recommendation and his good faith assessment, based on Sequoyah's experience, of the amount of ice condenser work needed at an operating plant. Westinghouse issued its report to Watts Bar Engineering. There is nothing in

the record to suggest that Technical Support or Mr. McCormick or Mr. Koehl had anything to do with the review of the Westinghouse report or the decision to rely on it. Again, there is no showing that the Westinghouse report had anything to do with the decision about Mr. Overall's job made months before it was issued. Watts Bar Engineering, not Mr. McCormick or Mr. Koehl, closed the PER, again without any reference to Mr. Overall or his employment situation. NRC was aware of the ice basket screw issue and had no problems with how it was handled. There is no evidence whatsoever that Mr. Koehl had anything to do with the job offer Mr. Overall received from Services. The record is also devoid of substantial support for finding that the RIF from Services was improper, an action in which neither Mr. McCormick nor Mr. Koehl had any role. Mr. Overall was one of a large number of individuals in Services who were let go in September 1996, and he has never challenged the basis for the RIF--only his lack of marketing success which made the RIF necessary. In 1997, SWEC, not TVA, made the decision not to hire Mr. Overall. The work in question was to be performed by SWEC, not TVA. Again, as with so much of this, there is no evidence that Mr. McCormick or Mr. Koehl had anything to do with SWEC's decision.

II

The Main Claim of the Complaint Was Not Timely Filed.

Contrary to the RDO, the record supports the conclusion that the complaint did not timely challenge the decision to eliminate Mr. Overall's position at Watts Bar.[10] The last step in the elimination of his position occurred in September 1995, long before Mr. Overall filed his initial complaint in this proceeding (JX1).

Mr. Overall was familiar with his rights under the ERA and had notice of the time limits in which he had to exercise those rights (tr. 378-79). From August 1994, he was aware that his job was in jeopardy at Watts Bar, receiving two formal notices to that effect, and was concerned enough about job security to welcome the opportunity to seek a job in another TVA organization in June 1995 (tr. 295-305; RX2, RX9, RX10, RX11; CX25). He was

---

10 Mr. Overall did not directly challenge his later RIF from Services, and SWEC's decision not to hire him in 1997 was not a major part of his case. The RDO made some unclear findings on these points (at 18). The record is barren of any proof that anyone involved in those decisions bore Mr. Overall (or had reason to bear him) any ill will at all. It is undisputed that neither Mr. Koehl nor Mr. McCormick had anything to do with those decisions. In similar fashion, the RDO's effort (at 31) to taint Services' RIF decision because the responsible manager spoke to Mr. Koehl on other matters is also without evidentiary basis, since the only proof in the record is that the Services manager made his decision without any input from anyone at TVA Nuclear and without knowledge of Mr. Overall's protected activity (tr. 578).

upset by his situation in the summer of 1995, and knew as of September 18, 1995, that he was no longer a Watts Bar employee, a fact reinforced by his October 1995 acceptance of a job in Services (CX25; tr. 204, 305, 311-15, 563-64; Leigh dep. at 6-8). He knew that his job in Services was not a guarantee of continued TVA employment but would depend on his ability to market his skills (tr. 298-99, 306-07, 309-10, 562-63, 565-68, 657-59). Therefore, no later than September 18, 1995, Mr. Overall had all the information he needed to pursue an ERA claim.

Section 211 of the ERA provides that claims filed more than 180 days after the alleged discriminatory event are untimely and must be dismissed. *Hill v. TVA*, No. 87-ERA-23 (Apr. 21, 1994), *aff'd sub nom. Hill v. United States Dep't of Labor*, 65 F.3d 1331 (6th Cir. 1995); *School Dist. v. Marshall*, 657 F.2d 16 (3d Cir. 1981); *English v. Whitfield*, 858 F.2d 957, 961-62 (4th Cir. 1988). In this case, Mr. Overall's claim about his 1995 transfer to Services arose more than 180 days before the filing of the January 15, 1997, complaint.

The Secretary and the Administrative Review Board have strictly applied the limitations period in dismissing cases involving TVA. *E.g., Guinn v. TVA*, ARB No. 96-187 (Sept. 27, 1996); *Ottney v. TVA*, No. 87-ERA-23 (Apr. 21, 1994); *Ballentine v. TVA*, No. 91-ERA-23, at 2 (Sept. 23, 1992); *Howard v. TVA*, No. 90-ERA-24, at 2 n.2 (July 3, 1991), *aff'd*

sub nom. Howard v. United States Dep't of Labor, 959 F.2d 234 (6th Cir. 1992); *Billings v. TVA*, No. 87-ERA-5, at 3 n.2 (Sept. 25, 1990), *aff'd sub nom. Billings v. Dole*, 936 F.2d 572 (6th Cir.), *cert. denied*, 502 U.S. 990 (1991); *Billings v. TVA*, No. 86-ERA-38, at 8-9 (June 28, 1990), *aff'd sub nom. Billings v. Dole*, 923 F.2d 854 (6th Cir.), *cert. denied*, 501 U.S. 1235 (1991); *Riden v. TVA*, No. 89-ERA-49 (July 18, 1990).

Under Mr. Overall's theory, which the RDO adopted, he did not consider the at-risk notices and his departure from Watts Bar to be adverse actions until he was RIFed from Services. Only at that time did he put all the events together and could see a "continuing violation" of the ERA.

This argument does not stand up to scrutiny. The decision to eliminate Mr. Overall's job was made in August 1994 and was not revisited (tr. 667-68, 786, 789). It was part of a general cutback in the staffing of Technical Support (tr. 610-11). Nineteen positions, including Mr. Overall's, were eliminated in that cutback, a number which did not change (tr. 668, 789-90).[11]

---

[11] Some of the incumbents of those positions either elected to leave TVA or were able to apply on and be selected for other TVA jobs and so were not ultimately subject to transfer to Services, but the positions in Technical Support they once held were abolished (tr. 668, 789-90). The RDO (at 21) confuses the head count Technical Support had to reach during FY 1995 with the number of employees in that organization prior to the final reductions in September 1995.

Therefore, the decision to eliminate Mr. Overall's position was made long before PER 246. In addition, the decision to eliminate his job in Technical Support was made by two individuals--Mr. McCormick and Mr. Koehl. The decision to eliminate his job in Services was made nearly two years later--in July 1996--by another manager. Neither Mr. McCormick nor Mr. Koehl had anything to do with that decision.

His marketing failure while in Services does not constitute a continuing violation. Neither Mr. McCormick nor Mr. Koehl had anything to do with the decision at Watts Bar not to contract with Services for outage work. See tr. 627-29. A comment about some reluctance to use Services employees at Watts Bar was not attributed to either Mr. McCormick or Mr. Koehl and was not linked with the outage work decision (tr. 426-28). As for Sequoyah's decision, neither Mr. McCormick nor Mr. Koehl could or did have any role in Sequoyah's decisions on the matter (Rathjen dep. at 31-34).

The two decisions--elimination of the job at Watts Bar and elimination of the job in Services--were made by different individuals in entirely different organizations at widely separated times. This is not the stuff of a "continuing violation." *E.g., Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 799-801 (11th Cir. 1988).

Finally, *Hill v. United States Dep't of Labor*, 65 F.3d 1331 (6th Cir. 1995), supports a finding of untimeliness. TVA terminated a contract on March 28, 1986. 65 F.3d at 1333-34. A number of the contractor's employees filed a complaint under the ERA on October 16, 1986, tying their complaint to a September 22, 1986, newspaper quote attributed to a TVA consultant. 65 F.3d at 1334. After extensive proceedings, the Secretary adopted a recommended decision dismissing the complaint for untimeliness. 65 F.3d at 1334-35; *see also Hill v. TVA*, No. 87-ERA-23 (Apr. 21, 1994). The Sixth Circuit affirmed the Secretary's decision.

The contractor's employees argued that TVA had concealed the real reasons for terminating the contract until September 1986. Therefore, in their view, TVA's "fraudulent concealment" of its true reasons excused their failure to file a timely complaint. 65 F.3d at 1335.

Both the Secretary and the Sixth Circuit rejected this argument. The Sixth Circuit held as follows:

> This court has stated clearly the requirements imposed on one who relies on fraudulent concealment to avoid the bar of a statute of limitations. In order to succeed, a plaintiff must prove the following: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Dayco [Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)]; . . . .
>
> . . . .

> A deception regarding motive supports application of equitable tolling only where the deception conceals the very fact of discrimination [citation omitted]. Equitable tolling through fraudulent concealment is not warranted where a petitioner is aware of all the essential facts constituting discriminatory treatment but lacks direct knowledge or evidence of the defendant's subjective discriminatory motive [citation omitted]. The critical question is not whether concealment of motives alone constitutes fraudulent concealment, but whether the defendant's alleged fraudulent conduct concealed from the plaintiff facts respecting the accrual or merits of the plaintiff's claim [citation omitted; 65 F.3d at 1335, 1337].

As has been set out previously, Mr. Overall knew that his job was in jeopardy in no later than his September 1995 transfer to Services. He had all the facts necessary for a claim under the ERA, but did nothing until January 1997.

The RDO adopts Mr. Overall's view that he did not realize that he had been discriminated against until his 1996 RIF from Services. Under this theory, he did not "discover" the facts to support his claim until that time. Of course, the "discovery rule" applies to when the employee is informed about the challenged employment decision. *Pantanizopoulas v. TVA*, No. 96-ERA-15 (ARB Oct. 20, 1997), slip op., at 3-4. In this case, Mr. Overall was given the final word about his transfer to Services in June 1995. He knew, or should have known, that his job in Services was not a guarantee of continued employment into the indefinite future but was contingent on his ability to market his skills.

The record also does not support finding the other elements supporting tolling under the *Hill* case. Mr. Overall knew that initiating PER 246 was a protected activity, and according to his testimony, the PER came in for unfavorable comments during a June 14, 1995, meeting (tr. 130-34; but see tr. 477-79, 480-82) and was a matter of some concern to Mr. McCormick in that same time period (tr. 182-83; but see tr. 825, 828). Therefore, he had a basis for suspecting that the decision to eliminate his position was in retaliation for the PER long before January 1997. *Hill*, 65 F.3d at 1337-38.

Nor did he exercise due diligence. *See Hill*, 65 F.3d at 1338-39. He was admittedly concerned about the security of his job after his receipt of the September 1994 notice. He was angered by the June 1995 reiteration of his at-risk status and challenged it, according to his own testimony, with both Mr. Koehl and Mr. McCormick. But again he took no steps to file a complaint under the ERA until January 1997.

III

Mr. Overall Failed To Meet His Burden of Proof.

Contrary to the RDO, Mr. Overall did not meet his burden of proof. The first problem with Mr. Overall's case, which the RDO ignores, arises from his own testimony. He had no tangible proof

that either Mr. Koehl or Mr. McCormick played any role in the decision to eliminate his position in Services (tr. 365) or that either of them had anything to do with the decision by Watts Bar and Sequoyah not to contract with Services (tr. 366-67). The same applies to SWEC's 1997 decision not to hire him (tr. 367-68).

He also cannot overcome the barrier created by his own actions, or lack of action. His first challenge he mounted to the decision to eliminate his position at Watts Bar--an EEO complaint--says nothing about any claim that he had been subjected to adverse personnel actions because he had raised nuclear safety concerns (RX6 at 5-33; RX7). While Mr. Overall could not seek relief for ERA violations in the EEO forum, it is significant that those claims went entirely unmentioned.

By the same token, Mr. Overall said nothing to the NRC about his concerns on the ice basket screws until December 1996 (tr. 356-57; RX13). This reticence falls into the same pattern as his failure to raise any concerns about the ice condenser system when he was turning that system over to Watts Bar Operations in June 1995 (RX15, RX16, RX17; tr. 684-709).

Turning to the merits, there is no dispute that Mr. Overall engaged in protected activity by initiating PER 246 about the ice basket screws. Nor is there any dispute that his position was placed at risk and he was transferred to Services, or that his

position in Services was eliminated in a RIF. However, he did not prove that any of the personnel actions which affected him had anything to do with the PER.

Any purported causal link is broken at several points. In the first instance, Mr. Overall did not initiate PER 246 until April 1995. Mr. McCormick, with Mr. Koehl's concurrence, decided to eliminate Mr. Overall's position in August 1994, more than six months ***before*** his protected activity. His at-risk status did not change after September 1994. Only the effective date of his transfer to Services was extended.

Nor was Mr. Overall singled out for any adverse treatment. Many employees at Watts Bar were placed at risk in 1994 and 1995, including a number of his colleagues in Technical Support. Most tellingly, all of the other SD schedule positions in Technical Support were eliminated in the 1994-1995 timeframe (tr. 604, 642, 782-84). Accordingly, Mr. Overall was treated no differently than similarly situated employees. *Liverett v. TVA*, No. 82-ERA-1, RDO at 9 (Dec. 16, 1981); *aff'd and adopted by the Sec'y* (July 21, 1982), *aff'd*, 711 F.2d 1069 (11th Cir. 1983); *Shah v. General Elec. Co.*, 816 F.2d 264, 268, 270 (6th Cir. 1987); *Reynolds v. Humko Prods.*, 756 F.2d 469, 472 (6th Cir. 1985); *Becton v. Detroit Terminal of Consol. Freightways*, 687 F.2d 140, 141 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). In fact, he received arguably ***better*** treatment than some

of the other "at-risk" Technical Support employees since not everyone had their transfer date to Services extended (tr. 670).

Another major gap vitiates Mr. Overall's challenge to his RIF. Prior to his receipt of the June 23, 1995, at-risk notice (CX25), he applied for a permanent job in Services--a job which had been created for him--and accepted that position shortly after his transfer (tr. 195-96, 299-301; RX10, RX11). Whatever personnel ties he had with Watts Bar were severed by that change in his employment status (tr. 563-64). From October 1995 until the end of his TVA employment approximately a year later, the personnel decisions which affected Mr. Overall were made by Services management, not Watts Bar management (tr. 573-76, 578). Also, the time lag between the PER (April 1995) and the RIF notice (July 1996) demonstrates the lack of any connection between the two. *Brown v. ASD Computer Ctr.*, 519 F. Supp. 1096, 1117 (S.D. Ohio 1981), *aff'd sub nom. Brown v. Mark*, 709 F.2d 1499 (6th Cir. 1983); *Cooper v. City of N. Olmstead*, 795 F.2d 1265, 1272-73 (6th Cir. 1986); *Evans v. Washington Pub. Power Sys.*, ARB No. 96-065 (July 30, 1996).

In addition, management in Services had no knowledge of Mr. Overall's protected activity at Watts Bar (tr. 578). This lack of knowledge means that Mr. Overall cannot show that his September 1996 RIF had anything to do with his April 1995 PER, a critical element of his case under the ERA. *Bartlik v. TVA*,

No. 88-ERA-15 (Dec. 6, 1991, Apr. 7, 1993), Apr. 7, 1993, dec. at 4 n.1, *aff'd*, 73 F.3d 100 (6th Cir. 1996).

The business decisions made by Watts Bar management in 1994 and 1995 and by Services management in 1996 should not be disturbed through the mechanism of an ERA complaint. *Cf. Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 F.2d 1066 (1987). Even though Mr. Overall engaged in protected activity, that does not obligate TVA to confer special privileges upon him. Rather, his alleged protected activities are irrelevant where TVA's decisionmakers have nondiscriminatory reasons for their actions, as they did here. "Where the employer has a legitimate management reason for taking adverse action against the employee, the employer is not required to hold off such action simply because the employee is engaged in a protected activity." *Ashcraft v. University of Cincinnati*, No. 83-ERA-7, dec. at 18 (Nov. 1, 1984); *Dunham v. Brown & Root, Inc.*, No. 84-ERA-1, rec. dec. at 13 (Nov. 30, 1984), *adopted by the Secretary* (June 21, 1985), *aff'd*, 794 F.2d 1037 (5th Cir. 1986). *See also American Nuclear Resources, Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295-96, (6th Cir. 1998). Thus, the Secretary has held that the elimination of a complainant's position in a TVA RIF was not discriminatory. *Riden v. TVA*, No. 89-ERA-49, at 8-9 (ALJ Feb. 9, 1990), *adopted by the Secretary* (July 18, 1990).

The undisputed evidence is clear that TVA placed Mr. Overall at risk, transferred him to Services, and later eliminated his position in Services through a RIF for legitimate reasons--the reorganization at Watts Bar to meet budgetary constraints and Services' own budgetary constraints. There is simply no evidence that these reasons were a pretext for discrimination.

Several other points need a brief comment. Mr. Overall testified that someone at a meeting called by Mr. Koehl sought to discourage initiating PERs which were not directly related to fuel load (tr. 173-79). His version was uncorroborated (tr. 429). Mr. Koehl and Mr. McCormick made it clear that management at Watts Bar wanted ***all*** issues put on the table to ensure that there were no surprises during the push to put Unit 1 into commercial operation (tr. 677-80, 787-88).

The other point is the thesis accepted by the RDO that Gary Jordan, the degreed engineer who took over the ice condenser system (tr. 213), was essentially performing Mr. Overall's former job with little, if any, change. Of course, the issue is not whether Mr. Koehl ultimately was mistaken; the issue is what information Mr. Koehl had available to him in August 1994. At that time, he was aware that Sequoyah, with two ice condensers in service, had one engineer responsible for both (tr. 639-40; Rathjen dep. at 34-35). Based on the 70 percent rule of thumb used in comparing Sequoyah and Watts Bar (tr. 640), Mr. Koehl had

ample basis to believe that the single ice condenser at Watts Bar did not require an employee dedicated solely to that system. In addition, the evidence shows that Mr. Jordan, as a degreed engineer, can and does provide greater flexibility in assignments than could Mr. Overall (tr. 212-13, 214-15, 220-24, 431, 604-07, 646-48, 771-74, 777-80, 805-07).

The RDO also agreed with Mr. Overall's claim that he had been "black-listed" in some fashion as demonstrated by his failure to be hired by SWEC for outage work at Watts Bar in 1997. However, he presented no evidence that anyone at TVA had anything to do with SWEC's decision. To the contrary, the evidence showed that a TVA employee went to some trouble to make Mr. Overall aware of the opportunity and to get him in touch with SWEC (tr. 629-34). SWEC, not TVA, chose not to hire him, and there was no proof that SWEC did so for impermissible reasons (tr. 634-35).

IV

Mr. Overall's Petition for Review

TVA is of the firm opinion that Mr. Overall's claims are without merit and should be dismissed, thus obviating any issues about the relief he was awarded. However, a few words on his petition for review are appropriate.

The issue of equitable tolling has been dealt with. Mr. Overall's attorney complains about several reductions in his fee. On the travel time matter, the billing records he submitted did not differentiate between travel time and time actually spent in the depositions. It is not inappropriate to hold him to those records. The reduction imposed for post-hearing work was appropriate for the reasons set out in the interim order.

CONCLUSION

Based on the foregoing and the record, the RDO should be rejected and a final order dismissing Mr. Overall's complaint should be issued.

Respectfully submitted,

Edward S. Christenbury
General Counsel

Thomas F. Fine
Assistant General Counsel

Brent R. Marquand
Senior Litigation Attorney

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1499
Telephone No. 423-632-2061

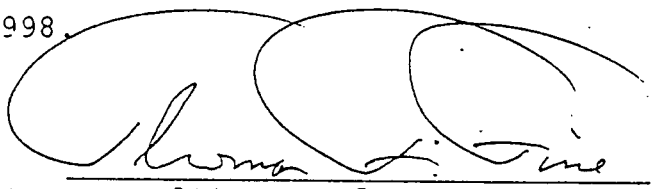
Attorneys for Respondent

000051621

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served on complainant by mailing a copy to Charles W. Van Beke, Esq., Wagner, Myers & Sanger, P.C., 1801 First Tennessee Plaza, P.O. Box 1308, Knoxville, Tennessee 37901-1308; on the Chief Administrative Law Judge by mailing a copy to The Honorable John Vittone, Office of Administrative Law Judges, United States Department of Labor, Suite 400 North, 800 K Street, Washington, D.C. 20001-8002; on the Assistant Secretary, Occupational Safety and Health Division, by mailing a copy to Charles N. Jeffress, United States Department of Labor, 200 Constitution Avenue, NW, Room S2315, Washington, D.C. 20210; and on the Associate Solicitor, Division of Fair Labor Standards, by mailing a copy to Steven J. Mandel, Esq., United States Department of Labor, 200 Constitution Avenue, NW, Room N2716, Washington, D.C. 20210.

This 9th day of July, 1998.



Attorney for Respondent

ENCLOSURE 3

WATTS BAR NUCLEAR PLANT
COMMITMENT LIST

TVA will send any future TVA filings made to DOL regarding this case to the NRC.