Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee 37402-2801

Mark O. Medford
Vice President, Engineering & Technical Services

January 12, 1996

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

Dear Sir:

In the Matter of) Docket Nos. 50-327 50-390
Tennessee Valley Authority) 50-328 50-391

DEPARTMENT OF LABOR CASE NOS. 92-ERA-19 AND 92-ERA-34

This letter and its enclosures respond to your letter dated December 8, 1995, regarding the Secretary of Labor's (SOL) Decision and Order of Remand in the case of Randolph Frady v. Tennessee Valley Authority and the potential violations of 10 CFR 50.7 which are being considered by the NRC. By agreement with the NRC staff, four days were added to TVA's 30-day response deadline, extending the time of response to January 12, 1996.

As I discussed with Messrs. Mark Lesser and Bruno Uryc of the NRC staff, TVA strongly disagrees with those portions of the SOL's decision which held that TVA discriminated against Mr. Frady and will petition for a review of the decision by the United States Court of Appeals for the Sixth Circuit. Enclosure 1 discusses the bases for TVA's disagreement with the SOL's decision.

TVA also examined the events which resulted in Mr. Frady's complaint over four years ago and the recent SOL decision to determine whether there was any evidence of a chilling effect on employees' willingness to raise safety concerns. Based on our reviews and analysis of the various measures used to monitor the work environment, we have determined that the circumstances of this case, including the SOL's recent decision, did not result in any such chilling effect. Enclosure 2 provides the results of our analysis.

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Enclosure 3 explains TVA's position on the potential violations of NRC regulations and also discusses why escalated enforcement is unwarranted in this case. Any questions regarding this matter may be directed to me at (423) 751-4776.

Sincerely,

Mark O. Medford

Subscribed and sworn to before me
this 12th day of January 1996

Carol L. Hamill
Notary Public

My Commission Expires Sept 8, 1999

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Bases for TVA's Disagreement With the Secretary of Labor

Randolph Frady is a former quality control inspector who was employed by TVA at Watts Bar Nuclear Plant (WBN) and Sequoyah Nuclear Plant (SQN). In November 1990 Mr. Frady received a reduction in force (RIF) notice effective January 1991. He filed a complaint with the Department of Labor (DOL) under Section 210 of the Energy Reorganization Act (ERA) in January 1991 regarding that RIF. A settlement of the complaint was reached in June 1991, which provided, among other things, for Mr. Frady to be placed in TVA's Employee Transition Program (ETP) for a period of up to six months to allow him to find another job. ETP was a TVA program designed to assist TVA employees such as Mr. Frady to find other employment both outside and inside TVA. The agreement further provided that if at the end of six months, Mr. Frady were still in ETP and had not found a job, his employment at TVA would end.

Mr. Frady filed three ERA complaints, on August 21 and September 24, 1991, and January 21, 1992, which are the subject of Case Nos. 92-ERA-19 and 92-ERA-34. In those complaints, he alleged that TVA had discriminated against him in violation of the ERA by not hiring him for one of the 14 positions within TVA for which he had applied. His specific complaint was that TVA had not selected him because he had previously raised safety concerns. The DOL's Wage and Hour Division investigated and denied all three complaints after finding that there was no evidence to substantiate any of his claims.

In addition to the DOL investigations, TVA's Office of Inspector General (OIG) investigated each of the 14 instances of nonselection which Mr. Frady claimed to be discriminatory. In reports issued on November 21, 1991, and March 17, 1992, the OIG found that none of Mr. Frady's claims could be substantiated.

Mr. Frady appealed the decisions of the DOL's Wage and Hour Division, and his complaints were consolidated for a hearing before a DOL Administrative Law Judge (ALJ) in September 1992. Sixteen witnesses testified over two days at the hearing, during which, as stated by the ALJ, "[t]he parties at that time exhaustively litigated the issues and had every opportunity to be heard, to present evidence, and to examine and cross-examine witnesses" (Recommended Decision and Order (RDO) at 2). At the close of Mr. Frady's presentation of evidence, the ALJ dismissed Mr. Frady's claims concerning eight of the nonselections. The ALJ issued an RDO on January 22, 1993, finding that none of the remaining six nonselections were discriminatory and that Mr. Frady had failed to demonstrate, either by direct or circumstantial evidence, that he was not hired for the positions at issue because of his past protected activity. Accordingly, the ALJ recommended that the Secretary of Labor dismiss the complaints.

On October 23, 1995, the Secretary issued an order affirming the ALJ's dismissal of the eight nonselections and his findings of no discrimination on three of the remaining six nonselections. However,

the Secretary rejected the RDO on the three remaining nonselections--machinist and steamfitter trainee at WBN, machinist and steamfitter trainee at SQN, and nuclear quality control inspector at SQN. The Secretary then remanded the case to the ALJ to determine the position Mr. Frady should receive and the monetary relief to be awarded. Until the decision by the Secretary of Labor, no investigation or adjudication had found that there was any merit to any of the claims raised by Mr. Frady. TVA strongly disagrees with the Secretary's findings of discrimination. As discussed below, we believe that, as the ALJ correctly found, the evidence in the record clearly showed that Mr. Frady was not selected for these positions for legitimate business reasons which had nothing to do with any protected activity.

1. **Contrary to the Secretary's decision, the ALJ correctly held that Mr. Frady's nonselections were for valid business reasons.** There was ample evidence introduced at the hearing that justified TVA's selections. This evidence was carefully reviewed by the ALJ in making his recommended decision. With all due respect to the Secretary, we believe his findings of discrimination are in direct conflict with the evidence and are based largely on assumptions and inferences that have no real support in the record and indeed are directly contradicted by the testimony.

The WBN and SQN machinist and steamfitter trainee positions. As was the standard practice at the time, the selections for these positions were made by a committee consisting of a TVA management representative and a union representative. A TVA human resource officer acted as secretary to the committee but had no vote. It was the responsibility of the management and union representatives to decide which candidates to interview and then to conduct the interviews, rank the candidates, and make the final selections. At the hearing, there was detailed testimony about the positions and the qualifications of those selected and the selection committee's bases for each of the candidate rankings. Matters such as mechanical aptitude, manual dexterity, and demonstrated "hands on" ability were carefully examined in depth. Even affirmative action considerations were taken into account (transcript at 374-82, 388-95, 541-47).

In concluding that TVA had discriminated against Mr. Frady, the Secretary found that TVA's evidence as to why Mr. Frady was not selected for these positions was not persuasive. Considering the substantial evidence in the record showing the legitimate bases for the selections that were made, we can only assume that the Secretary simply disagreed with TVA's business decisions and therefore felt that TVA's decision had to be based on some improper discriminatory basis. This is simply not enough under the law to support a charge of discrimination, nor is it the role of the Secretary. On the contrary, the issue is not the correctness of the business judgment of the utility but whether its management in fact acted in good faith. The Secretary, in essence, improperly second-guessed the selection committee's individual evaluations of the various job candidates' qualifications, and substituted his own judgment on the relative skills of Mr. Frady and others (order at 20-21).

The Secretary's finding also ignores the fact that the very committee process which was used to make the selections was specifically designed to consider both management's and the unions' views in a fair and objective manner, based only on proper employment considerations. This was not simply TVA's decision. Rather, in each instance, it was a joint decision. Testimony at the hearing pointed to the independence of the union representatives on these selection committees (transcript at 383, 387-388, 549), and their impartial participation in the selection process. Moreover, the union representatives' ratings in both the SQN and WBN selections were consistent with the management representatives' ratings (Respondent's Exhibits 7 and 11, transcript at 171-73), and their final selections were the same as those of management. There was no evidence or finding that any union official involved in the selection process knew of Mr. Frady's protected activity or made any selection decision that was not in good faith or discriminatory. Yet, these same selections and the criteria used were found to be discriminatory by the Secretary with respect to TVA. The evidence shows otherwise.

The SQN nuclear inspector position. The circumstances surrounding the cancellation of the nuclear inspector position at SQN and Mr. Frady's nonselection were clearly presented at the hearing by the responsible SQN quality manager and corroborated by a documented independent manpower study. The record clearly established that, at the time the position was posted, an outside firm was in the process of making staffing recommendations for all of TVA Nuclear's inspection organizations based on an industry-wide review of personnel levels (Respondent's Exhibit 9). Accordingly, TVA management recognized that the position might not be filled depending upon the result of the then unfinished study. After applications for the position were received, the study was completed and a reduced headcount for the SQN quality organization was recommended. The responsible manager, on the basis of the study, felt it would be counterproductive to hire a new employee that would later subject the organization to a reduction in force. Accordingly, he decided to cancel the selection and not fill the position. That decision affected a number of candidates besides Mr. Frady (transcript at 334-38, 344-47, 353-54, and 522).

The Secretary nevertheless found that the decision not to fill the position was pretextual because TVA later assigned two other inspectors to the SQN plant after the position selection was canceled. We do not think the Secretary properly took into account the independent study or the explanation given for these assignments, which clearly showed that there was no intent to discriminate against Mr. Frady. The two individuals were given the inspector positions solely as a result of legal settlements which are by definition outside the normal course of business, and under the applicable rules cannot be used as the basis for any finding of liability or wrongdoing. Moreover, there is absolutely no evidence in the record that the manager who decided to cancel the selection at issue here had any role in the decision on the assignment of the two individuals who had settled their cases. In fact, the settlement agreements show on their face that they were approved by senior corporate management ten months later. The Secretary likewise failed to take into account any changed circumstances that may have arisen in the ten months that elapsed between the time the selection at issue was canceled and the settlements. Furthermore, contrary to the

Secretary's statement, one of the two individuals was not even assigned to the plant, but rather was assigned to the SQN training center, outside of the responsible manager's organization and not under his supervision. Under these circumstances, there is simply no basis to find that the decision was pretextual.

2. **The evidence shows, and the ALJ correctly found, that Mr. Frady's nonselection was not related to any protected activity.** The responsible managers specifically denied in the hearing that their decisions not to select Mr. Frady were based in any way on his identification of safety-related issues or on his earlier ERA proceeding, and there is no evidence in the record to contradict this. Rather, it is clear from the record that TVA's decision was not based on Mr. Frady's protected activity. This is crucial to a finding of discrimination. The Secretary did not point to any relation between the decision not to select Mr. Frady and his protected activity. Rather, the Secretary, again presumably because of his disagreement with those decisions, found that there was an inference of bias on the part of TVA. In doing so, we think he made some significant errors in his assumptions about the evidence and ignored the clear evidence in the record that directly refutes any such inference.

The WBN and SQN machinist and steamfitter trainee positions. The Secretary has held that without knowledge of the protected activity by the decisionmaker there can be no discrimination. We believe that the clear statements of the witnesses show that no one who participated in the trainee selections had any knowledge of Mr. Frady's protected activity or harbored any hostility toward him. The Secretary based his contrary finding primarily on his belief that the human resource officer possessed some knowledge of, or had at least a strong suspicion of, Mr. Frady's prior protected activity, which somehow played a part in the selection process. This was based on an inference the Secretary drew from the human resource officer's testimony that he knew Mr. Frady had been involved in some sort of settlement in an employment matter (order at 16-17). However, it was the clear and uncontroverted testimony of the human resource officer that he had absolutely no knowledge of Mr. Frady ever being involved in a DOL proceeding or ever having raised any safety concern (transcript at 368-69, 427-30). There also was unrebutted evidence that there were at least four forums, not involving the Secretary or nuclear safety concerns, in which a TVA employee could have entered into a settlement agreement on an employment matter. Indeed, the human resource officer stated that "it could've been any type of settlement" (transcript at 368).

The Secretary also focused on the human resource officer's participation in the selection process. Yet, the Secretary acknowledged that the human resource officer's role was that of a neutral facilitator insofar as the evaluation of the qualifications of the candidates were concerned and that the human resource officer did not participate as a selecting official (order at 30). He thus fails to explain how the human resource officer's knowledge, if any, had any effect on the actual selection of either the WBN or SQN trainee positions. Even if the human resource officer had some knowledge of Mr. Frady's protected activity (which the evidence clearly does not reflect), Mr. Frady himself testified that the human resource officer had only been good to him and that he knew of no

one on the selection committee who was unfavorably disposed toward him (transcript at 142-46).

Insofar as the WBN steamfitter trainee position is concerned, the Secretary's finding in Mr. Frady's favor is contradicted by the Secretary's own statement in the order that "the record indicates no basis for a conclusion that the decision not to interview Frady for that position at WBN was motivated by retaliatory animus" (order at 22, n. 16). Similarly, the Secretary's order regarding the WBN machinist trainee position ignored his own findings which specifically noted that the management representative on the selection committee worked at WBN after the time Mr. Frady had and that the representative thus had no reason to know who Mr. Frady was when he interviewed him (order at 16-17, n. 11). Further, Mr. Frady's counsel did not believe it was worth cross-examining the WBN management representative about his lack of hostility toward Mr. Frady, and Mr. Frady never suggested that the union representative was motivated by any hostility toward him (transcript at 140-41). There likewise is no competent evidence that the SQN management representative was aware of Mr. Frady's protected activity. At most, there was testimony that the management representative had seen Mr. Frady when he worked for the quality control organization at SQN. He testified, however, that he did not know Mr. Frady by name, never knew that Mr. Frady raised a safety concern or could be considered a "nuclear whistleblower," and did not know that Mr. Frady ever raised any complaints to DOL, NRC, or any type of grievance body (transcript at 539-40).

There simply is no basis for the Secretary's conclusion, therefore, that any decision about Mr. Frady was related to his protected activity. Instead of relying on competent evidence, the Secretary assumed that the hostility of third parties "was transmitted through the supervisory communication channels" and was manifested in the selection process (order at 31). That sort of speculation and conjecture not only has no support in the evidence but as the Secretary himself has recognized, cannot form the basis for finding a discriminatory motive. Moreover, such a conclusion can be reached only if the testimony of those who directly contradicted any such inferences is totally ignored.

The Secretary's inferences of discriminatory intent also were based on his misunderstanding of the facts. For example, he inferred discriminatory intent from the proximity in time between the nonselections and Mr. Frady's protected activity (order at 23-24). The Secretary measured from June 1991 when the earlier settlement agreement was executed. The activities that were the subject of that agreement, however, were alleged to have taken place "over the years," long before the nonselections at issue here. The Secretary also inferred discrimination from the human resource officer's testimony that none of the selectees were "primed" (order at 27-28, n. 18), and because the human resource officer may have seen Mr. Frady's unfavorable performance appraisal and warning letter which were to have been removed under the terms of a previous settlement (order at 28-29). These inferences are irrelevant because, as the Secretary himself recognized, the human resource officer was not the decisionmaker in the selection process. Further, it is undisputed that no one involved in making the selection saw any adverse personnel documents.

The Secretary also drew a negative inference because the human resource officer's testimony was longer than the management representative's testimony (order at 30). This inference is simply illogical since it fails to take into account that when the management representative was on the stand, counsel for Mr. Frady never suggested that this representative had any knowledge of or hostility toward Mr. Frady, nor does the evidence reflect this anywhere. Since Mr. Frady had already testified about the management representative's lack of knowledge or hostility (transcript at 160-66), there was a very good reason for the relative brevity of his testimony. If anything, this refutes any inference such as that drawn by the Secretary.

The SQN nuclear inspector position. The Secretary's decision on the Sequoyah selection is also flawed. The Secretary's decision again is based solely on inferences of bias and hostility, not on actual testimony or evidence, which in fact directly contradicts any such inferences. For example, the Secretary inferred that the manager was hostile toward Mr. Frady because the manager was aware of an earlier settlement agreement with Mr. Frady (order at 38). It is not proper to infer hostility from a settlement agreement unless there are other significant reasons to support such an inference, none of which are present here. Moreover, the purported hostility was based solely on Mr. Frady's testimony, which for reasons discussed below was not credible. The manager denied having any hostility toward Mr. Frady or that he had any discriminatory intent, and his testimony was specifically found to be credible by the ALJ who heard the testimony at the hearing.

3. <u>The Secretary did not properly resolve conflicts in the testimony or give the requisite deference to the ALJ's credibility findings.</u> The ALJ saw and heard the witnesses, and made specific credibility findings with respect to conflicts in the testimony. The Secretary acknowledges that the trier of fact's credibility determinations are entitled to deference. Nevertheless, based upon his reading of a cold record, the Secretary ignored the ALJ's credibility determination and made contrary findings. Although critical of the ALJ's credibility findings, the Secretary's decision does not provide the explanation for his credibility finding which he states is required. Nor does he provide any explanation to resolve the conflicts in Mr. Frady's testimony which he purportedly credits. The Secretary's own prior decisions hold that where there is conflicting testimony, the agency must reconcile the differing views and explain the basis for the determination that one side is more credible than the other, just as the ALJ did here. Had the Secretary properly addressed the differing testimony here, we think that he would have found TVA's version of events to be more credible and consistent with the other evidence in the record.

The Secretary also simply ignored numerous problems with Mr. Frady's credibility that are reflected in the record. On many occasions, for example, Mr. Frady made accusations against individuals but then was forced to admit on cross-examination that they were without any basis (transcript at 76-78, 83, 85, 90, 94, 95-96, 100-105, 121-22, 125-26, 127-28, 130-38). He was impeached on several points with his own deposition testimony (transcript at 78-81), he was evasive on several

occasions when answering questions (transcript at 81-82, 102, 137-38), and he even contradicted his own testimony on cross-examination (transcript at 160-63). Also, he was not entirely forthcoming about the status of his nuclear certifications (transcript at 106-15, 216-17).

More significantly, the Secretary's finding that Mr. Frady was credible is contrary to his own finding that Mr. Frady suffered no discrimination with respect to a separate selection for a civil inspector position. In that situation, there was a direct conflict in testimony when Mr. Frady stated he provided his resume to a personal acquaintance, an inspection supervisor at Stone & Webster, and that this individual admitted that a WBN inspection supervisor prevented consideration of Mr. Frady's resume by ripping up the resume (order at 47, transcript at 51-52, 196). However, though the Stone & Webster supervisor agreed that Mr. Frady was a friend of his (transcript at 480), he stated clearly and without doubt that Mr. Frady never provided him with a resume, and that he never had any conversation with Mr. Frady about anyone tearing up Mr. Frady's resume (transcript at 475-78, 482-83). Further, the WBN inspection supervisor who allegedly tore up Mr. Frady's resume unequivocally testified that he never saw Mr. Frady's resume and never had any discussions with the Stone & Webster supervisor about Mr. Frady (transcript at 466). TVA also established by documentary evidence that Mr. Frady did not submit any resume to Stone & Webster for consideration (transcript at 489-91). These points were acknowledged by the Secretary (order at 47-49) when he expressly found no discrimination with respect to this nonselection and held that Mr. Frady had not submitted his resume on this position--a conclusion that could be reached only if the Secretary found Mr. Frady's testimony not to be credible.

The Secretary's problems with respect to credibility rest largely upon his failure to consider the recorded testimony--relying instead on various inferences--and his rejection of the credibility determinations of the ALJ. It is difficult to accept the Secretary's decision when a conflict in testimony such as the one above is documented in the record and yet the Secretary finds that the substance of Frady's testimony indicates "complete candor, both at hearing and at deposition" (order at 11, note 8). Yet, in that same passage, the Secretary cites a specific example and expressly finds that "his [Mr. Frady's] testimony evinces some tendency toward hyperbole." Nevertheless, even after acknowledging this tendency, the Secretary gives credence to several instances within Frady's testimony where he describes some derogatory remarks made by the responsible SQN quality manager against him (order at 39-40, note 31). That manager denied ever making any derogatory remarks to or about Mr. Frady (transcript at 511-12) and testified clearly to the matter in which he and Mr. Frady "agreed to disagree" (transcript at 520-21, 527-28). We find it remarkable that the Secretary, who acknowledges Mr. Frady's tendency to distort the truth, gives complete credence to Mr. Frady's contradicted remarks. The ALJ found the manager involved in the SQN nuclear inspector position cancellation to be a "highly credible witness" and believed his testimony "that there was no personal animus against Complainant involved in the hiring decision" (RDO at 8). We believe that it was the responsible manager who exhibited "complete candor" in his testimony and that there is no reason to disbelieve him, while many reasons exist to disbelieve Mr. Frady.

4. **The Secretary's Decision is Contrary to the Law.** TVA will petition the United States Court of Appeals for the Sixth Circuit to review the Secretary's decision in this case. We believe that the Secretary's decision will be overturned when it is reviewed by the Court because of his failure to properly analyze the facts or follow the applicable law.

In the first instance, we believe that upon review the Sixth Circuit will find that the Secretary's decision is arbitrary and capricious because the Secretary did not follow or distinguish his own case law and regulations (*EEOC v. K-Mart Corp.*, 796 F.2d 139, 143 (6th Cir. 1986); *University of Cincinnati v. Bowen*, 875 F.2d 1207, 1209, 1212, (6th Cir. 1989); *Shaw's Supermarkets v. NLRB*, 884 F.2d 34, 36-37, 41 (1st Cir. 1989)). Under the decision in *Bartlik v. TVA*, No. 88-ERA-15 (Dec. 6, 1990, April 7, 1993), *pet. for review pending*, No. 93-3616 (6th Cir.), if the Secretary determines that the ALJ's RDO has not properly analyzed the record, the proper course of action is to remand the case to the ALJ for clarification and reconsideration of the RDO's findings. Instead, in this case where the Secretary obviously viewed the credibility of the witnesses as significant, the Secretary himself reweighed and reevaluated the evidence based solely on the bare record without the benefits of observing the demeanor of the witnesses that were available to the ALJ. In *Bartlik* the Secretary held that "[i]f credibility determinations are critical, the agency must articulate them with sufficient clarity to determine whether the ultimate finding of liability is supported by the record." The Secretary noted that "[w]here an agency's decision concerns specific persons based upon determination of particular facts and the application of general principles to those facts . . . 'courts demand that the decision-maker's opinion indicate an appropriate consideration of the evidence. . . .'" The Secretary found that the "ALJ did not cite or discuss any testimony or exhibits which support that conclusion, nor did he resolve any of the apparent conflicts in the record . . ., or state which testimony he credited and which he did not." Although there were conflicts in some of the evidence, the Secretary here credited Mr. Frady's testimony without articulating that determination with clarity and without giving explicit references to the record, or discussing testimony and exhibits which support his conclusion. Likewise, he did not state which testimony he credited and which he did not and why. If the Secretary believed the ALJ's credibility determinations were flawed, he should have remanded the case to the ALJ to revise his RDO to specifically address those evidentiary questions "and support . . . his inferences and conclusions with explicit references to the record" (slip op. at 17), as the Secretary did in *Bartlik*. The Secretary did none of these things but instead relied heavily on his own unsubstantiated conclusions about the witnesses' credibility.

We believe that the Secretary's theories of credibility were conclusory and were not based on careful weighing of the record as a whole (*Cotter v. Harris*, 642 F.2d 700, 704, 706-07 (3d Cir. 1981)). Unlike the Secretary, the ALJ made specific findings as to the credibility of the witnesses. Instead of remanding for further findings as to credibility if the Secretary disagreed with those findings, the Secretary chose to disregard all of the ALJ's credibility findings. Where, as here, the

Secretary's credibility findings differ from the ALJ's, the courts give special deference to the ALJ's credibility judgments for the obvious reason that the ALJ saw the witnesses and heard them testify while the Secretary only reviews the record. *Pogue v. United States Department of Labor*, 940 F.2d 1287 (9th Cir. 1991).

Bartlik also requires evidence that the employee responsible for the alleged discriminatory decision have knowledge of the protected activity (April 7, 1993 dec. at 4, n.1). While the evidence of such knowledge may be circumstantial, the Secretary held in *Bartlik* that it is not sufficient to merely assume that the manager was told (Apr. 7, 1993, dec. at 5, 8, 9, 19). There must be substantial evidence of such knowledge. Here, there was clear, undisputed evidence in the record that the WBN and SQN managers responsible for the craft trainee selections were unaware of Mr. Frady's protected activity.

We believe that the Secretary's departures from the ALJ's factual findings were not carefully explained or reasoned (*Citizens State Bank v. FDIC*, 718 F.2d 1440, 1444-45 (8th Cir. 1983)). For instance, the Secretary also made critical mistakes with regard to the use of the settlement agreement entered into by Mr. Frady and TVA prior to Mr. Frady's filing of the three DOL complaints at issue here. First, the Secretary used the settlement agreement as a basis for inferring liability (order at 17, 38). This is contrary to Fed. R. Evid. 408 which precludes settlement agreements from being used to infer liability as a matter of law. Second, as we have stated, there was a substantial gap in time between the circumstances that gave rise to the earlier DOL complaint filed by Mr. Frady (which resulted in the settlement agreement) and the matters raised in the three DOL complaints at issue here, yet this apparently was not even considered by the Secretary. It was clearly an error under these circumstances for the Secretary to infer any hostility toward Mr. Frady. (*Brown vs. Computing 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 North Olmstead*, 795 F.2d 1265, 1272-73 (6th Cir. 1986); *Jackson v. Pepsi Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1986)). Further, as also noted previously, we believe the Secretary's willingness to second-guess management on the trainee selections and substitute his judgment for theirs was improper. *Pesterfield v. TVA*, 941 F.2d 437, 443 (6th Cir. 1991); *Garner v. Runyon*, 769 F. Supp 357 (N.D. Ala. 1991).

We believe that the Secretary's factual findings were not carefully rooted in the evidence and were rooted in speculation (*Hyatt*, 939 F.2d at 367; *Tieniber v. Heckler*, 720 F.2d 1251, 1255 (11th Cir. 1983)). The Sixth Circuit has also made it clear that it will not uphold findings of discrimination that are based on general talk of discrimination in the workplace. (*Chappell v. GTE Prods. Co.*, 803 F.2d 261, 268 n.2 (6th Cir. 1986); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 156-57 (6th Cir. 1988); *Randle v. Lasalle Telecommunications, Inc.*, 697 F. Supp. 1474, 1470-81 (N.D. Ill. 988), *aff'd* 876 F.2d 563 (7th Cir. 1989)). These are the very sorts of findings which epitomize the Secretary's decision. Mr. Frady offered stories that he and certain managers did not get along and that his reputation as a whistleblower was widespread.

The Secretary assumed that this hostility would be transmitted to other managers in other organizations so as to taint the decisions at issue here. Yet the direct unrebutted evidence in the record shows that this just was not the case. Furthermore, the Sixth Circuit requires Mr. Frady to prove discriminatory intent by more than just inferences when, as here, an employer articulates a good faith reason for its action. (*Manzer v. Diamond Shamrock, Inc.*, 29 F.3d 1078, 1083-84 (6th Cir. 1994.)) Mr. Frady clearly did not submit such proof.

For the reasons stated, we believe that TVA management acted properly in not selecting Mr. Frady for any of the positions at issue and that upon review of the Secretary's decision, the Sixth Circuit will find no violation of law.

Absence of Any Chilling Effect

TVA has taken reasonable, prudent measures to assess whether the circumstances surrounding Mr. Frady's DOL complaints resulted in any potential chilling effect which would discourage employees from raising safety issues. As noted in Enclosure 1, Mr. Frady's complaints were filed in August and September of 1991 and January of 1992, approximately four years ago. No investigation or adjudication gave any validity to Mr. Frady's complaints until the Secretary of Labor's decision of October 23, 1995. Given the amount of time that has elapsed since the original complaints were filed, as well as the fact that no portion of his complaints were validated until the Secretary's decision just weeks ago, we determined that the most worthwhile means of detecting any adverse effect would be to examine WBN and SQN data gathered over recent years to the present regarding employee willingness to raise concerns. Upon review of the various measures TVA employs to monitor the work environment as discussed below, we have determined that there has been no chilling effect.

TVA conducts several ongoing assessments that are intended to gain insight into the effectiveness of its communication channels with employees. One effort is undertaken by TVA's Office of Inspector General (OIG) which performs annual reviews of the effectiveness of the employee concerns resolution programs at our nuclear plant sites. The review includes confidential face to face interviews with a random sample of TVA and contractor employees to determine, among other things, whether they feel free to discuss problems or concerns directly with their supervisors. We feel that this is a very important indicator of management's effectiveness in establishing and maintaining a work environment that is free of intimidation and harassment.

TVA had occasion to provide the NRC with the results of recent OIG surveys for WBN in letters to the NRC dated April 5, 1995, October 12, 1995, and October 23, 1995. In sum, the OIG found that for WBN in 1994, 98 percent of employees and contractors felt free to report nuclear safety or quality concerns to their immediate supervisor. In 1995 for WBN, the OIG determined that 100 percent of TVA employees and 99.6 percent of contractor employees would report their concerns to their supervisors.

For SQN, the OIG's 1994 survey of TVA and contractor employees reported that 99 percent of TVA employees and 100 percent of contractor employees would report their concerns to management. Just weeks ago, after the Secretary's decision in the Frady case, the OIG completed its 1995 survey of over 300 TVA and contractor employees. The 1995 report recorded the same percentages as the 1994 survey, indicating a steady and positive work environment free of intimidation and harassment. In addition, during the period from 1991 through 1995, the number of SQN employees expressing concerns has consistently dropped. In fact, for both WBN and SQN, the number of issues expressed to the site concerns programs has trended downward from 1986 through 1995.

NRC surveys of TVA and contractor employees at both WBN and SQN also provide useful data about the willingness of employees to raise concerns. An October 1995 inspection report for WBN (IR 95-63) concluded that the vast majority (99 percent) of the TVA and contractor employees interviewed responded positively to the need to report safety issues through the line organization or another independent avenue such as the Concerns Resolution Staff. The NRC found that 98 percent felt that the supervisor or foreman was the person most often identified as the person to whom a concern should be reported. Also important was the fact that the NRC found a reduction from prior years' interviews in the percentage of those who thought an independent path such as an employee concerns program was needed. The NRC attributed this reduction to the "strong support given to the resolution of safety issues over the last two years by TVA management." At SQN, the NRC's most recent survey in 1995 concluded that approximately 98 percent of TVA employees and contractors would raise safety or quality concerns to their supervision. These NRC survey results validate TVA's monitoring results and lead to the unmistakable conclusion that WBN and SQN employees are in no way discouraged from raising safety concerns.

TVA has achieved these results by maintaining a steady effort to educate and inform employees about their freedom and responsibility to raise safety concerns. Through General Employee Training, retraining, letters to employees as they process into each site, postings on bulletin boards, bulletins, and "all hands" meetings, TVA reinforces this message. We will work for continued success as TVA's nuclear program focuses on operational excellence.

In view of the overwhelmingly positive indications to date, we do not perceive any chilling effect as a result of the Frady case and do not believe that additional corrective action is warranted in this regard.

Enforcement Considerations

For the reasons expressed in Enclosure 1, we believe that TVA acted without any discriminatory intent in connection with the three selection processes singled out as discriminatory by the Secretary of Labor. We believe that the Secretary's findings were wrong, and that the evidence as found by the ALJ, the DOL investigators and TVA's OIG investigators supports the fact that TVA acted in accordance with sound business practices and without discriminatory intent. TVA also believes that the United States Court of Appeals for the Sixth Circuit will rule that no violation of the ERA occurred. For these reasons, we do not believe that there was any violation of 10 CFR Section 50.7 and we urge the NRC to find the same. At a minimum, the NRC should postpone consideration of possible enforcement action pending a decision by the Sixth Circuit. The circumstances that gave rise to these matters took place nearly four and one-half years ago, and there is no need to institute additional enforcement action at this point, prior to a final disposition of the matter.*

Even if a violation of NRC requirements is deemed to have occurred, the circumstances of this case provide a strong basis for the NRC to reduce or refrain from issuing a civil penalty. As noted above, the events took place four and one-half years ago and TVA took prompt action at the time to thoroughly investigate Mr. Frady's allegations. After investigations conducted by DOL and TVA's OIG in 1991 and 1992 which found no evidence of problems, and extensive fact-finding by an ALJ in 1992 and the RDO in TVA's favor in 1993, the Secretary decided just weeks ago that three of 14 nonselections were improper. The purposes of NRC's enforcement program are set forth in NUREG-1600--to serve as a deterrent to emphasize compliance with regulatory requirements, and as an encouragement to promptly identify and take corrective action. Both purposes are ill-served given the circumstances of this case and warrant against the full application of the enforcement program here.

In addition, while we fully recognize the potential significance of any claim of discrimination under the ERA, the events associated with Mr. Frady's claim have been carefully examined and do not have any impact beyond the complainant himself. TVA has examined the various measures used to monitor the work environment, and that analysis shows no effect on employee willingness to express any safety or quality concerns.

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* TVA understands, however, its obligations insofar as Mr. Frady is concerned. As you know, the Secretary remanded the case to the ALJ for further proceedings to establish Mr. Frady's remedy consistent with the decision. We are presently working with Mr. Frady and his counsel to arrange for a mutually agreeable job assignment within TVA and to arrive at a mutually agreeable amount of backpay and compensation for legal expenses with the aim of avoiding any further proceedings before the ALJ.

Mr. Frady's complaints alleged that his nonselection for jobs within TVA was the result of his previous litigation with the agency. While the allegation is serious, it is important for the sake of enforcement considerations that no safety issue was involved. We are aware that there would be a potential for safety significance if a chilling effect could be shown among employees who became aware of a finding of adverse action taken against an individual for raising safety concerns. As noted above, however, no such effect was identified.

The circumstances surrounding Mr. Frady's allegations cannot be considered as suggesting a programmatic discrimination problem nor can they be considered particularly blatant or egregious. Mr. Frady's complaints covered 14 job selection processes, and all withstood the scrutiny of various DOL and TVA OIG investigators, along with the ALJ who considered each job selection at trial. Moreover, the findings of the Secretary were based on inferences which were drawn from his perspective on the case. Criticism of those perspectives aside, building a case based on inferences is not indicative of a fact pattern which suggests a programmatic, blatant, or egregious discrimination problem.

TVA has taken effective action to positively reemphasize its policy against discrimination and to appropriately address the overall work environment. Our efforts in this regard and the results we have achieved are outlined in Enclosure 2. These efforts include establishing an effective Concerns Resolution program, conducting information and education initiatives to improve and reinforce employee communications, and instituting various monitoring mechanisms to gauge the effectiveness of our efforts. Through our commitment of considerable time and resources, TVA has made significant progress in improving employee communication and enhancing the safety of our nuclear program.

For the reasons stated above, TVA believes that no discrimination occurred in connection with the selection processes cited by Mr. Frady. TVA will ask the Sixth Circuit to review the Secretary's decision and believes that there is no compelling reason for the NRC to consider enforcement prior to the Court's ruling on the matter. Should the NRC elect to consider enforcement action, and should it decide that a violation of Section 50.7 has taken place, there are ample reasons why the NRC should reduce or refrain from issuing a civil penalty due to the special circumstances surrounding this case.