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June 5, 2013

Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Re: Docket ID NRC-2013-0024

Dear Ms. Vietti-Cook:

On behalf of the International Brotherhood of Electrical Workers ("IBEW"), I am submitting the enclosed comments on the petition for rulemaking filed by the Nuclear Energy Institute.

Sincerely,

Sherman, Dunn, Cohen, Leifer & Yellig, P.C.

Robert D Kurnick

By:
Robert D. Kurnick

UNITED STATES NUCLEAR REGULATORY COMMISSION

Docket ID NRC-2013-0024

COMMENTS OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ON THE PETITION FOR RULEMAKING FILED BY THE NUCLEAR ENERGY INSTITUTE

INTRODUCTION

The Nuclear Regulatory Commission has published for comment a petition for rulemaking filed by the Nuclear Energy Institute ("NEI"). 78 Fed. Reg. 23684 (April 22, 2013). In that petition, NEI asks the Commission to amend 10 C.F.R. § 73.56(a) and (l) by imposing a series of restrictions on the use of grievance arbitration to resolve disputes over unescorted access authorization. The amendments would severely limit the permissible scope of arbitral review and prohibit any form of make-whole relief. (NEI Petition for Rulemaking to Amend 10 C.F.R. § 73.56 [hereinafter "Petition"] at 8).

For the reasons stated herein, the International Brotherhood of Electrical Workers ("IBEW") opposes NEI's proposed amendments. NEI is in effect asking the Commission to intervene in the collective bargaining process and dictate to employers and unions the content of their agreements on arbitration. The amendments, if adopted, would make arbitration a useless exercise, one in which an employee could never obtain reinstatement of access. By precluding meaningful review of access decisions, the amendments would make the entire review process not only less fair but also less reliable. They would eliminate important employee

rights without any justification and without in any way improving public safety.

The IBEW is a labor organization whose affiliated local unions represent employees in the nuclear industry. Forty-one IBEW local unions and system councils (organizations of several local unions) represent approximately 15,000 employees who work full-time in forty-three nuclear power plants throughout the United States. IBEW local unions also represent thousands of other employees who work periodically in nuclear plants, performing construction and maintenance work in connection with outages and other projects.

Those local unions and system councils conduct collective bargaining on behalf of IBEW-represented employees. All of the collective bargaining agreements negotiated by those locals contain grievance and arbitration provisions establishing procedures for resolving disputes between the employers and local unions. The scope of the agreed-upon arbitration provisions varies. Some are broad and some are narrow, and some plainly are broad enough to include disputes over the denial or revocation of an employee's access authorization. *See e.g., Exelon Generation Co. v. IBEW Local 15,* 2008 U.S. Dist. Lexis 75099 (N.D. Ill. Sept. 29, 2008) (holding that disputes over access fall within the scope of the arbitration agreement between Exelon Generation Co. and IBEW Local Union 15). When a licensee denies or revokes the access authorization of a union-represented employee, that employee typically turns to his or her union for assistance and representation. IBEW local unions have been filing grievances and arbitrating disputes over access issues for many years. *See, e.g., Local 97 IBEW v. Niagara Mohawk Power Corp.,* 143 F.3d

704 (2nd Cir. 1998). The amendments proposed by NEI would, for the first time, impose strict limits on that process.

SUMMARY OF ARGUMENT

The problem that NEI's petition purports to resolve simply does not exist. Employers and unions have been using arbitration to resolve disputes over access for decades, without any limits on the scope of review or the availability of remedies. NEI cites no evidence, because there is none, that arbitration has ever jeopardized public safety or caused a licensee to violate obligations imposed by law or regulation.

Arbitration is an issue of contract. Parties must submit to arbitration only those disputes that they have agreed should be resolved through arbitration. A licensee is obligated to submit a dispute over access to arbitration only because it has agreed in collective bargaining to do so. If a licensee believes that certain types of disputes should be excluded from arbitration or that arbitration over some issues should be limited in scope, that licensee would be free to negotiate a contract provision so stating. NEI is in effect asking the NRC to intervene in those negotiations and determine for the parties the content of their agreement.

NEI's claim, that NRC's actual, but unstated purpose in 1991 was to limit the permissible scope of arbitration, finds no support in the administrative record. The administrative record shows that the NRC viewed arbitration as permissible in 1991, and nothing in that record, including those portions cited by NEI, suggests that the Commission intended to limit either the issues that could be resolved or the

remedies that could be awarded.

NEI's concerns about the ability of arbitrators to resolve access disputes are unfounded. The Supreme Court has frequently expressed its confidence in the ability of arbitrators to decide complex legal and factual questions. An arbitrator who hears and decides numerous cases – cases in which the arbitrator must evaluate the credibility and character of witnesses and accused employees – would be well qualified to make judgments about an individual employee's trustworthiness and reliability.

If adopted, NEI's proposal would make the arbitration process fundamentally unfair. Its proposal would prohibit an arbitrator from considering whether the licensee had adopted and applied reasonable access criteria; whether the licensee had reasonably concluded that the employee denied access was not trustworthy and reliable; or whether the licensee had acted in a manner consistent with its prior decisions. The NRC recognized in 1991 that its access program required employee cooperation, and that employees would cooperate only if they perceived the process as fair. Adopting NEI's proposal would lead employees to conclude, correctly, that the process was not fair, that it had been "fixed" in the employer's favor and that their cooperation was not warranted.

NEI's proposal would not make the access authorization process any more reliable. NEI essentially contends that licensees should have unfettered and virtually unreviewable discretion to make access decisions. Contrary to NRC regulations, the current process used by licensees to make and review access

decisions is largely opaque; employees lose their access and their jobs for reasons that are rarely explained. We submit that arbitral review makes the process more transparent and that decisions on access that must be explained and defended are necessarily more accurate and reliable and thereby enhance public safety.

BACKGROUND

NEI's petition should be viewed in its historical context. The petition is the latest chapter in the multi-year campaign of nuclear licensees to avoid review of their access decisions. NEI is asking the Commission to do what the courts and arbitrators have heretofore refused to do – prohibit meaningful review of decisions on access authorization.

In 1991, when the NRC first issued regulations requiring licensees to adopt access authorization programs, the Commission specifically stated that disputes over access could be subject to arbitral review. The 1991 regulations required licensees to adopt a procedure for reviewing access decisions. In mandating that procedure, the NRC rejected the contention of the Edison Electric Institute that review procedures were unnecessary because union-represented employees already had access to other remedies. As the NRC explained, EEI had no reason to object because "the rule would allow the use of a grievance procedure for review of denials or revocations of access authorizations." 56 Fed. Reg. 19002 (April 25. 1991). The Commission also rejected objections from unions that the mandated review procedures did not adequately protect workers' rights, explaining that the NRC "never intended that any review procedure that already exist[ed] in a [collective]

bargaining agreement [would] be abandoned." *Id.*

Despite the clarity of those statements and the absence of any evidence suggesting that the Commission intended to prohibit or limit arbitration over access, Exelon Generation Co filed a lawsuit against IBEW Local Union 15 in 2006 seeking a declaratory judgment that arbitration was prohibited. In *Exelon Generation Co. v. IBEW Local 15,* 2008 U.S. Dist. Lexis 75099 (N.D. Ill. Sept. 29, 2008), the federal district court held that nothing in the NRC's then-applicable regulations precluded the parties from agreeing to arbitrate grievances over the denial or revocation of access authorization.

In 2009, the NRC made a series of revisions to its access regulations. Section 73.56(a)(4), which addressed the relationship between a licensee and its contractors and vendors, had stated that, although a licensee could rely on parts of the access authorization programs used by those contractors and vendors, "the licensee is responsible for granting, denying, or revoking unescorted access authorization to any contractor, vendor, or other affected organization employee." 56 Fed. Reg. 19007 (April 25, 1991). In 2009, the Commission amended that section only slightly to state that, even if a licensee or applicant relied on those programs, "[o]nly a licensee or applicant shall grant or permit an individual to maintain unescorted access." 10 C.F.R. § 73.56(a)(4).

The Commission also amended section 73.56(e) – which became section 73.56(l). That section had stated that a licensee's access authorization procedure must include a procedure for reviewing the information on which the licensee's

determination had been based, and that the required review "may be an impartial and independent internal management review." 56 Fed. Reg. 19008 (April 25, 1991). As amended, that section now states that the required review procedure "must provide for an impartial and independent internal management review." 10 C.F.R. § 73.56(l). The Commission thus strengthened procedural protections for employees, especially those without union representation

Although NEI submitted comments on the proposed amendments to 10 C.F.R. § 73.56, neither NEI nor any of its members argued that the availability of arbitral review presented a problem that needed to be addressed. In fact, NEI's extensive comments said nothing whatsoever about the review of access decisions. And, nothing in the Commission's explanation of either its proposed or final regulations suggested that the amendments would or should have any effect on arbitration as a means of resolving disputes over access. What the Commission did state was that its proposed changes to section 73.56 were intended to "retain the intent" and "retain the meaning" of the 1991 regulations. 71 Fed. Reg. 62735, 62784 (2006). Thus, as the Seventh Circuit recently observed, the Commission unequivocally stated in 1991 that arbitral review was permitted, and "[n]othing in the text of the amended regulations or the rulemaking history suggest[ed] that the Commission came to a different conclusion in 2009." *Exelon Generation Co. v. Local 15, IBEW,* 676 F.3d 566, 574, 575 (7th Cir. 2012).

Despite the absence of any evidence supporting the proposition that the amended regulations were intended to prohibit arbitration over access

authorization, NEI responded to those amendments by issuing industry guidance, NEI 03-01 (Revision 3), stating that a licensee's decision on access "may not be reviewed or overturned by any third party." NEI 03-01 (Rev. 3) at 74. NEI thereby took the position that the amended regulations prohibited arbitral review.

After the issuance of NEI 03-01 (Revision 3), Exelon Generation Co. filed another lawsuit against IBEW Local Union 15 once again seeking a judgment declaring that the Commission's regulations prohibited arbitral review of decisions denying or revoking an employee's access. Although the district court accepted Exelon's contention, the Seventh Circuit, on appeal, rejected it. *Exelon Generation Co. v. IBEW Local 15,* 676 F.3d 566 (7th Cir. 2012). In its landmark decision, the court of appeals carefully reviewed the language of those sections, as first issued and as amended, the manner in which the regulations had been interpreted by the courts, statements by the NRC about their purpose, and the content of the rulemaking record.[1]

Exelon asked to Seventh Circuit to re-hear the case *en banc.* The court's denial of that request included a separate opinion by Judge Richard Posner, who

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[1] The court observed that: 1) in issuing the original version of those regulations, the Commission took the "unequivocal position" that arbitral review of access decisions was not prohibited (*id.* at 568, 574); 2) the courts have uniformly agreed that the 1991 regulations did not prohibit arbitration (*id.* at 568, 570, 574 n.4); 3) in amending those regulations, the NRC repeatedly emphasized that its purpose was to retain the intent of the original version (*id.* at 573, 574); 4) neither the NRC nor any participant in the amendment process suggested that the newly adopted language would or should prohibit arbitration (*id.* at 568, 574); 5) nothing in the text of amended section 73.56(l) suggested that arbitration was prohibited (*id.* at 570-72); and 6) the "manifest function" of amended section 73.56(a)(4), read in context, was to clarify the roles of licensees, vendors and contractors in the access authorization process, rather than to prohibit arbitration (*id.* at 572).

concluded that "the panel decision is sound," 682 F.3d at 620, but who wrote separately to state – in part because he considered arbitration unreliable – that access decisions should be subject to administrative review by the NRC. *Id.* at 620-23. Judge Posner did not suggest either that arbitration should be prohibited or limited or that licensees should have unfettered discretion to decide access issues. No other judge on the Seventh Circuit joined Judge Posner in his opinion.

Faced with the obligation of explaining its access decisions to an arbitrator, Exelon announced that it would (as required by the federal court) proceed to arbitration but that the criteria it had applied in making those decisions constituted safeguards information that could be revealed to the arbitrator and the union's attorney only if they were deemed by Exelon to be trustworthy and reliable, and that those criteria could never be revealed to the grievant, the employee who had lost his or her job as a result of their application.

Two arbitrators, in written decisions, rejected Exelon's contention that its access criteria constituted safeguards information. Rather than reveal those criteria, Exelon asked the NRC to determine whether they constituted safeguards information. In November 2012, the Commission responded that "the NRC does not believe the information should continue to be designated or controlled as SGI." (Letter from Christina Liu, Director of the Division of Security Policy to J. Bradley Fewell, Exelon VP and Deputy General Counsel, Nov. 29, 2012).

Three months after receiving that determination, NEI filed its petition for rulemaking with the Commission asking the NRC to impose limits on arbitral

review of access decisions.

THERE IS NO DEMONSTRATED NEED FOR THE CHANGE THAT NEI HAS PROPOSED.

NEI states that its petition is a response to the Seventh Circuit's decision in *Exelon Generation Co v. IBEW Local 15, supra.* (Letter from Ellen Ginsberg to Annette Vietti-Cook, Jan. 25, 2013 [hereinafter "Letter"]; Petition at 2) In that case the court held that NRC regulations do not prohibit licensees and local unions from agreeing to submit disputes over employee access to arbitration. The court observed that, prior to 2009, courts had uniformly agreed that unions and licensees could lawfully agree to submit disputes over access to arbitration and that the NRC's 2009 amendments to section 73.56 did not reflect a change in NRC policy on arbitral review of access decisions. 676 F.3d at 574 16 n.4. NEI itself acknowledges that such disputes have long been deemed arbitrable (Petition at 5), and, in fact, arbitrators have been deciding cases on access for many years, without any limitation on the issues that could be decided or the remedies' that could be awarded. *See, Local 97 IBEW v. Niagara Mohawk Power Corp.*, 196 F.3d 117 (2nd Cir. 1999) (enforcing arbitration award reinstating employee whose access had been improperly revoked); *Local 97 IBEW v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2nd Cir. 1998) (enforcing arbitration award reinstating employee whose access had been improperly revoked); *Wackenhut Corp. v. Local 515 Plant Guards*, 126 F.3d 29 (2nd Cir. 1997) (enforcing arbitration award directing contractor to "renew its efforts" to have licensee restore employee's access authorization); *Burns Int'l Security Services v. Plant Guards Local 228*, 45 F.3d 205 (7th Cir. 1995) (enforcing

arbitration award directing contractor to provide comparable job to employee improperly denied access by licensee): *Iowa Electric Light and Power Co. v. IBEW Local 204*, 834 F.2d 1424 (8th Cir. 1987) (vacating on public policy grounds an arbitration award requiring reinstatement of employee whose access had been revoked); *Nextera Energy Seabrook,* 131 Lab. Arb. Rep. (BNA) 439 (Zaiger, 2012) (ordering licensee to make whole an employee whose access authorization had been improperly revoked); *South Texas Nuclear Operating Co.,* 121 Lab. Arb. Rep. (BNA) 193 (Jennings, 2005) (holding that licensee had improperly suspended an employee's access authorization) *Southern Nuclear Operating Co.,* 05-1 Lab. Arb. (CCH) P 3052 (Nolan, 2004) (ordering reinstatement of an employee whose access had been improperly revoked); *Southern Nuclear Operating Co.*, 118 Lab. Arb. Rep. (BNA) 752 (Singer, 2003) (holding that licensee had properly conditioned employee's access on abstinence from alcohol); *Kaiser Engineering*, 102 Lab. Arb. Rep. (BNA) 1189 (Minni, 1994) (directing employer to make whole employee whose access had been improperly denied); *Southern Nuclear Operating Co.*, 102 Lab. Arb. Rep. (BNA) 97 (Abrams, 1993) (directing licensee to make whole employee whose access had been improperly revoked); *Sacramento Municipal Utility District,* 91 Lab. Arb. Rep. (BNA) 1073 (Concepcion, 1988) (upholding licensee's decision to revoke grievant's access authorization); *Arkansas Power & Light Co.,* 88 Lab. Arb. Rep. (BNA) 1065 (Weisbrod, 1987) (holding that licensee had properly required employees with unescorted access authorization to undergo random drug testing).[2]

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[2] NEI states that the decision of the Seventh Circuit in *Exelon* expanded the

NEI's petition proposes a major change in NRC policy – one that would severely limit the issues that could be raised in arbitration and the remedies that could be awarded. What is missing from NEI's petition is any reasonable or convincing explanation of why those changes are needed. NEI argues that under present law, a licensee could be required to reinstate the access authorization of an employee deemed (perhaps incorrectly) not trustworthy and reliable by the licensee. (Petition at 2) And, NEI argues that a licensee could risk a regulatory enforcement action by complying with an arbitrator's award, because compliance "in extreme situations," might make the licensee unable to demonstrate adherence to NRC regulations. (Petition at 4) But, NEI does not cite even one example of an employee whose access authorization was improperly restored or a licensee whose compliance with an arbitrator's award resulted in a regulatory enforcement action. [3]

The only actual fact to which NEI refers is the fact that there are three pending arbitration cases involving access issues at Exelon Generation Co. and disputes over access at another unnamed company that might be submitted to arbitration.[4] As an example of a case in which an employee's access was properly

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scope of arbitral review (Petition at 5) but does not, because it cannot, point to the prior decision of any court limiting the scope of arbitral review.

[3] Unions have broad discretion in deciding whether to submit an issue to arbitration. The IBEW and its local unions share the Commission's concern about safety. There is no basis for assuming that any union would seek the reinstatement of an employee who posed a genuine threat and no reason to think that, even if it did, an arbitrator would require the reinstatement of that employee.

[4] One of the three cases at Exelon has been settled, without requiring the reinstatement of the grievant. The other two are have been heard by an arbitrator,

restored by an arbitrator after it had been denied by a licensee and that denial had been affirmed by the licensee's internal appeal procedure, we offer the decision in *Tennessee Valley Authority and IBEW Local 721,* (Bankston, 1993) (appended as Attachment A). In that case, TVA revoked an employee's access authorization because he failed to report as "convictions" legal proceedings resulting in small traffic fines and suspended sentences. The arbitrator noted that small fines were exempt from the obligation to report prior convictions and that a suspended sentence did not constitute a conviction, properly defined. He also noted that the licensee had deemed the employee not trustworthy and reliable primarily because he had shown no remorse for his failure to report, even though many of the employee's legal issues arose from his decision to pay for his wife's cancer treatment, rather than maintain automobile insurance.

NEI has offered a solution to a problem that does not exist. NEI's proposal, if adopted, would dramatically alter the current legal landscape for union-represented employees in the nuclear industry. It would preclude meaningful review of access decisions and deprive thousands of employees of important legal rights – all without

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but the access issue has not yet been decided. NEI's description of those two cases is less than fully accurate. In those cases, employees who were responsible for a minor glycol spill that caused no damage to the plant were induced to acknowledge their conduct by their supervisor's false assurance that no adverse action would be taken against them. When Exelon nevertheless discharged both employees, two arbitrators concluded that the supervisor's dishonesty made discharge too severe a penalty. The question whether access authorization was properly revoked was not initially decided but has now been submitted to arbitration. Among the issues that the arbitrators may consider is whether Exelon reasonably concluded that the employees' lack of forthrightness precluded continued access while its own supervisor's dishonesty has had no effect whatsoever on his continued access authorization.

any demonstrated justification.

THE DUTY TO ARBITRATE DISPUTES OVER ACCESS IS THE PRODUCT OF COLLECTIVE BARGAINING, AND A LICENSEE IS OBLIGATED TO ARBITRATE ACCESS DISPUTES ONLY BECAUSE IT HAS AGREED TO DO SO.

It is well-established that arbitration is a matter of contract. Parties are obligated to submit a dispute to arbitration only if they have agreed to do so. *AT&T Technologies, Inc. v. Communication Workers,* 475 U.S. 643, 648 (1986). It is equally well-established that arbitration is a mandatory subject of bargaining under the National Labor Relations Act. *Litton Financial Printing Div. v. NLRB,* 501 U.S. 190, 199 (1991) ("[A]rrangements for arbitration of disputes are terms and conditions of employment and a mandatory subject of bargaining."). A mandatory subject is one over which employers and unions are obligated to bargain, but not obligated to agree.

Accordingly, employers have no duty to agree to include arbitration in their collective bargaining agreements and no obligation to agree to submit disputes over access to arbitration. Unions, for their part, cannot refuse to discuss and bargain over employer proposals regarding arbitration, including proposals to limit the issues that are arbitrable or the remedies that are permissible. *See Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) ("[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.")

Licensees and the unions with which they bargain are free to design their arbitration agreements in any way they choose. They can limit the subjects that

are arbitrable. They can establish the standard to be applied by the arbitrator in reviewing the employer's decisions. And, they can limit the remedies that the arbitrator is permitted to award. At least one licensee and one local union – Entergy Operations, Inc. and IBEW Local 647 – have done exactly that. (*See* Comments submitted by IBEW Local Union 647) Any licensees genuinely concerned about the possibility of conflicting obligations imposed by the Commission's regulations and an order issued by an arbitrator – something that thus far exists only in the unrealistic hypotheticals offered in NEI's petition – are thus free to address that concern in collective bargaining. NEI has not claimed that any licensee has attempted to address that concern in negotiations and failed to reach an acceptable agreement.

Accordingly, if a licensee is obligated to submit disputes over access to arbitration, it is only because the parties have bargained over that issue and agreed to make those disputes arbitrable. A broad arbitration agreement is likely the product of the give and take of collective bargaining in which the union may very well have provided concessions to the employer to obtain that agreement. NEI is in effect asking the NRC to intervene in the collective bargaining process and dictate to the parties the scope and content of their agreement on arbitration. *See Eastern Associated Coal Corp. v. Mine Workers District 17,* 531 U.S. 57, 65 (2000) ("[I]t is 'this nation's longstanding labor policy' to give 'employers and employees the freedom through collective bargaining to establish conditions of employment.'") (quoting *California Brewers Assoc. v. Bryant*, 444 U.S. 598, 608 (1980)). NEI's

petition does not offer any convincing reason why the Commission should take that extraordinary and unprecedented step.

THE ADMINISTRATIVE RECORD DOES NOT SUPPORT NEI'S CLAIM THAT IN 1991 THE COMMISSION INTENDED TO LIMIT THE PERMISSIBLE SCOPE OF ARBITRATION OVER LICENSEE ACCESS DECISIONS

In its petition, NEI contends that its proposed amendments to section 73.56 will "align [that section] with the Commission's original intent." (Petition at 5) According to NEI, the Commission's view, as revealed by the administrative record, has always been that, in an access authorization case, an arbitrator could determine only whether a licensee had followed its own access authorization procedures and based its decision on accurate facts. Other issues – whether, for example, the criteria adopted and applied by the licensee were reasonably related to the question whether an employee is trustworthy and reliable – were always intended to be out of bounds. NEI gleans that intent, which the Commission never explicitly expressed, from the 1991 administrative record. The parts of the record cited, however, do not support that contention.

As noted, in 1991 the NRC stated that section 73.56 "would allow the use of a grievance procedure for review of denials or revocations of access authorizations." 56 Fed. Reg. 19002 (April 25, 1991). The Commission also stated that it "never intended that any review procedure that already exist[ed] in a bargaining agreement be abandoned." *Id.* The Commission could have, but did not state that arbitral review, although permissible, should be limited in scope.

NEI somehow derives that unstated intent from the Commission's statement

– made in response to concern expressed by labor unions that access criteria should be the subject of collective bargaining – that "[i]t is not the intent of the Commission to exclude from consideration . . . access issues in the collective bargaining process as long as the resolution of these issues is within the limits set by this rulemaking." *Id.* at 19006; Petition at 5. In other words, licenses and labor unions can bargain over access issues, but cannot bargain away the requirements imposed by the NRC's access regulations. This unremarkable statement – that the parties to collective bargaining cannot by agreement make applicable law inapplicable – hardly suggests that the scope of arbitration must be limited, particularly since nothing in the regulations explicitly so states. If anything, this statement that the Commission does not intend to exclude access issues from collective bargaining suggests that arbitration should be fully available, if the parties bargain and so agree.

NEI also cites the Commission's statements that the required review procedures are "necessary to assure effective access monitoring by licensees" and that "[t]he effectiveness of the program will depend on the accuracy of the information that forms the basis for access authorization and on the perception of the licensees' employees that the program is a fair one worthy of their cooperation." *Id.* at 19002; Petition at 5.[5]

First, this language refers not to arbitration, but to the internal review

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[5] We note that NEI quotes this language but in its petition omits the words "of the licensees' employees" without any indication that those words have been omitted.

procedure required by the regulations. Thus the statement that review is necessary to assure effective monitoring by licensees simply means that licensees must monitor their own procedures. That statement does not signify, as NEI claims, that an arbitrator must be confined to monitoring whether the licensee has complied with its own procedures.

Second, stating that reviewers should determine whether a licensee has complied with its own procedures does not logically mean that review must be confined to only that issue. The statement merely suggests that such compliance is one of several issues that should be considered. Surely, for example, a licensee reviewing an initial determination on access could determine that the decision had been based on information that was not credible or conclusions that were not reasonable. If the quoted language cannot be read to restrict the scope of a licensee's internal review, it cannot be read to restrict the scope of an arbitrator's review. Similarly, the statement that the effectiveness of an access program depends on the accuracy of the information used, suggests that accuracy of the information should be reviewed but does not mean that other equally important issues cannot also be considered.

And third, the statement that the effectiveness of the program will depend on the perception of employees that the program is fair and worthy of their cooperation, hardly supports limiting the scope of arbitration. Indeed adopting NEI's proposal will, if anything, convince employees that the program is fundamentally unfair, that they will never win an arbitration case and that the

licensee can never lose.

In 1991, the Commission, in response to industry objections to mandated review, also stated that "[i]f the evidence indicates a proper application of the relevant criteria in excluding an employee, the review procedure, if utilized, should result in a decision vindicating the management action." 56 Fed. Reg. 19003 (April 25, 1991). NEI cites that statement for the proposition that arbitral review should be confined to the question whether a licensee correctly applied its own criteria. (Petition at 5)

The statement, of course, does not refer to the licensee's criteria; there is no reference in the Commission's explanation to the licensee's criteria. It refers instead to the Commission's criteria, the mandatory applicability of which cannot be in dispute. Properly read, the statement is an endorsement of the arbitral process. It simply says that, if the licensee has correctly applied NRC's standards, the licensee should prevail, as indeed it should. The statement cannot be read, as NEI contends, as a veiled suggestion that the scope of review must be strictly confined to the question whether the licensee has applied its own criteria.

ARBITRATORS ARE FULLY CAPABLE OF RESOLVING DISPUTES OVER ACCESS IN A MANNER CONSISTENT WITH NRC REGULATIONS.

The fundamental argument that NEI makes in support of its petition is essentially the same as that made and rejected in 1991: that "[a] third party (i.e., an independent adjudicator) should not be deciding disputes over access authorization" because that adjudicator "could allow access to the plant to a person whom the utility management believes may present a serious threat to plant security." *Id.* at

19003 The NRC unequivocally rejected that argument in 1991, *id.*, and NEI does not point to anything that has transpired in the intervening twenty-two years suggesting that the Commission reached the wrong conclusion.

NEI's argument that resolving access disputes is too difficult a task for untrained arbitrators is impossible to reconcile with the several statements of the United States Supreme Court expressing its confidence in the ability of arbitrators to resolve thorny questions of fact and law. In *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247 (2009), for example, the Supreme Court held that a provision in a collective bargaining agreement requiring employees to arbitrate claims arising under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, was fully enforceable. In so holding, the Court concluded that arbitration tribunals were "readily capable" of resolving complex legal and factual issues and that "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims." *Id.* at 268, 269.

The Court also observed that the argument that arbitrators lacked the expertise required to resolve complex analytical questions had been based on misconceptions, but that "[t]hese misconceptions have been corrected. For example, the Court has 'recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision' and that 'there is no reason to assume at the outset that arbitrators will not follow the law.'" *Id.* at 268 (quoting

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).[6] If arbitrators are capable of resolving discrimination claims, antitrust claims, and RICO claims, *id.*, then surely they can reliably and accurately resolve disputes over access authorization.

NEI argues that arbitrators lack the expertise and training to make accurate judgments about whether employees are trustworthy and reliable. (Letter; Petition at 6, 7) That argument not only conflicts with observations of the Supreme Court, it also contravenes common sense. An arbitrator's "stock-in-trade" is her or his judgment, analytical ability and impartiality. *See* Elkouri & Elkouri, How Arbitration Works, 4-42-55 (7th ed, 2012). Labor arbitrators are individuals who, typically, have heard hundreds of cases and listened to thousands of witnesses. They make judgments about the character and credibility of employees almost daily. It would be difficult to envision better experience or more useful training. And, they are surely more impartial and objective than those employed by the licensees to review the licensees' own access decisions. Arbitrators are thus well-qualified to make objective and reliable judgments about an employee's trustworthiness and reliability.

It is important to note that, unlike judges, arbitrators are not assigned; they

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6 Similarly, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) – holding that an age discrimination claim arising outside the context of a collective bargaining relationship could be subjected to compulsory arbitration – the Court stated that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," noting that in recent years the Court had held that agreements to arbitrate several types of statutory claims were fully enforceable. *Id.* at 26.

are chosen. If an arbitrator decides a case – on access or any other issue – it is because the parties have chosen him or her to decide that case. Thus, if a licensee believes that an arbitrator is unqualified or unreliable, the logical response would be to choose someone else, rather than asking the Commission to respond to the possibility that an arbitrator might be unqualified by adopting draconian regulations limiting the issues that the arbitrator could consider and the remedies that the arbitrator could award.

In its quest to convince the Commission that arbitrators are unreliable, NEI cites the opinion of Judge Richard Posner, who concurred in the denial of Exelon's petition for rehearing *en banc*, but who wrote separately to argue that, because arbitrators may try to "split-the-difference" in crafting awards and thereby grant access to an employee who should be excluded, the NRC, rather than an arbitrator, should have the last word on access. 682 F.3d at 620-23. NEI rejects his suggestion, but enthusiastically embraces his criticism of arbitrators. (Petition at 7)

Three points are worth noting: First, Judge Posner did not endorse the proposition that licensees should have unreviewable discretion to decide issues of access. He argued that the NRC should review all access decisions, even those in which arbitral review is not available, an argument inconsistent with NEI's view that licensees are uniquely qualified to make such decisions. Second, no other judge on the Seventh Circuit joined Judge Posner in his opinion. Accordingly, it appears that no other judge on that court shares his view that arbitration is unreliable. And third, as noted, the Commission long ago expressed its own view that arbitrators

were reliable and could decide access cases. As the Commission stated, "[I]f the evidence [presented to an arbitrator] indicates a proper application of the relevant criteria in excluding an employee, the review procedure, if utilized, should result in a decision vindicating the management action." 56 Fed. Reg. 19003 (April 25, 1991).

NEI cites *Department of Navy v. Egan,* 484 U.S. 518 (1988), to support its contention that access decisions should be made and reviewed only by licensees. *Egan,* however, does not support that conclusion.

Egan was a civilian employee of the Navy. When he was denied a required security clearance and lost his job, he appealed his termination to the Merit Systems Protection Board. 484 U.S. at 520-22. The "narrow question" presented was whether the Civil Service Reform Act authorized the MSPB to review the Navy's decision denying Egan clearance. *Id.* at 520. The court of appeals had answered that question by applying the "strong presumption" that agency decisions are reviewable. *Id.* at 526. The Supreme Court, however, held that this "general proposition of administrative law," *id.*at 527, was inapplicable because "unless Congress has specifically provided otherwise, courts have traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530. The MSPB was therefore entitled to review other aspects of Egan's termination, but not the merits of the Navy's denial of clearance.[7]

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[7] *Egan* does not hold that the denial of a security clearance is, as a matter of law, unreviewable or even limited. That such denials can be reviewed is demonstrated by *Webster v. Doe,* 486 U.S. 592 (1988), decided four months after *Egan,* in which the Supreme Court held that a CIA employee deemed a security threat could challenge his termination on constitutional grounds. *Id.* at 603. "It is

The question in *Egan* was whether a federal statute authorized review, that is, whether the statute affirmatively provided for review. NEI's petition presents a very different question: whether the Commission should by regulation prohibit unions and employers from agreeing to make disputes over access fully arbitrable, that is, arbitrable without prescribed limits on permissible issues or available remedies. Nothing in *Egan* supports the proposition that the Commission should impose limits on the parties' freedom to make such agreements.

Moreover, viewing *Egan* in historical context reveals its irrelevance here. The Supreme Court decided *Egan* in 1988. In 1991, the NRC issued the initial version of its access regulations and, undeterred by *Egan*, stated that those regulations would permit arbitral review of access decisions. The administrative record contains no reference to *Egan* and, as noted, no suggestion that the scope of arbitral review should be limited in the way that NEI proposes. Thus the Commission did not read *Egan* as limiting the permissible scope of arbitration.

The essence of NEI's argument, including its reliance on *Egan*, is that, just as the military is uniquely qualified to make security decisions, licensees are somehow uniquely qualified to make decisions on access – that no one else has the necessary judgment or expertise to make those decisions. The experience of the last twenty-two years suggests otherwise. The process is not nearly as esoteric as NEI's petition suggests. The relevant criteria are set out in the Commission's regulations and, we submit, determinations about an individual's trustworthiness and

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simply not the case that all security clearance decisions are immune from judicial review." *Federal Employees v. Greenberg,* 983 F.2d 286, 289 (D.C. Cir. 1993).

reliability are largely matters of judgment and common sense.

Consider, for example, the cases cited in NEI's petition (Petition at 2-3) – an employee who attempted to take company property without authorization and employees who caused an accidental spill and then refused immediately to acknowledge their role in the accident. Whether those individuals were properly deemed untrustworthy requires consideration of the relevant facts, good judgment and common sense. Such decisions are neither highly complex nor esoteric, and there is no reason why they should be unreviewable. Moreover, experience shows that licensees do sometimes act unreasonably and do sometimes make mistakes and that those errors can and have been corrected by arbitrators. *Egan* thus has little persuasive value, and the analogy that NEI attempts to draw between licensees and the United States military should be rejected.

NEI'S PROPOSAL WOULD MAKE THE REVIEW PROCESS UNFAIR.

NEI's proposal, if adopted, would limit an arbitrator's role to determining whether the licensee had based its decision on information that was correct, whether the licensee has adhered to its own criteria, whether the licensee had complied with criteria required by law, and whether the licensee had complied with its own procedures. (Petition at 8, 11) Under that proposal, an arbitrator could not consider whether the criteria adopted and applied by the licensee were reasonable. Thus, to take an extreme example, if a licensee were to adopt a standard stating that members of a religious group or a political organization were not trustworthy, an arbitrator would be obligated to uphold the exclusion of an employee denied

access because he or she were a member of that group or organization. The reasonableness of that rule could not be challenged.

An arbitrator would also be precluded from reviewing the reasonableness of the licensee's conclusion that certain conduct warranted a denial of access authorization. An employee, for example, denied access because of a minor traffic violation would be precluded from questioning the reasonableness of the employer's conclusion that a mere traffic violation demonstrated a lack of trustworthiness or reliability. Arbitral review of the employer's credibility determinations would also be out of bounds. An employee unjustly accused, perhaps by a co-worker or supervisor bearing a recent or long-held grudge, would be precluded from disputing the veracity of her or his accuser. Consistency with prior determinations would be immaterial. That another employee or supervisor had previously engaged in the same or similar conduct without any consequence would be irrelevant.

And, even if an arbitrator concluded that an employee had been improperly denied access authorization under the narrow circumstances described in NEI's proposal, the arbitrator would be prohibited from requiring reinstatement of authorization. The only available remedy would be a remand to the licensee for reconsideration (Petition at 11) – something likely to lead to the same result with a slightly different explanation.

If the Commission adopted NEI's proposal, employees covered by collective bargaining agreements would immediately conclude that arbitration in access cases had been rendered pointless and unfair. They would understand that arbitration

was basically a "fixed" game in which the licensee could never lose and the employee could never win. In establishing the access authorization program in 1991, the Commission recognized that "[t]he effectiveness of the program will depend on . . . the perception of the licensees' employees that the program is a fair one worthy of their cooperation." 56 Fed. Reg. 19002 (1991). The lesson that employees would draw from the adoption of NEI's proposal would be that the program is not, and was not intended to be, fair. Their cooperation in that program might be difficult to secure. NEI's proposal will ultimately undermine the Commission's access authorization program, rather than strengthen it.

NEI argues that the fairness of its proposal is evidenced by the similarity between that proposal and the limited review of final agency action provided by the Administrative Procedure Act. (Petition at 9) First, the scope of review proposed by NEI is far narrower than that permitted by the APA, under which agency actions can be set aside if deemed arbitrary or capricious, unsupported by substantial evidence or rendered without due process. 5 U.S.C. § 706. Second, the APA requires agencies to accord parties several procedural rights, including the right "to present [one's] case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556((d). The APA also requires agencies to include in their decisions "a statement of findings and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c). As discussed below, the decisions rendered by licensees

in access cases bear little resemblance to final agency decisions, as described by the APA. That limited review is appropriate for the latter does not in any way support the proposition that limited review is appropriate for the former. Where, as in most cases, decisions are rendered without providing employees any due process and without any explanation, limiting the scope of review merely insures that any injustice will go uncorrected.

NEI also argues that it does not matter whether arbitration is fair or reasonable, because the internal management review required by section 73.56(l) "would continue to provide the necessary employee protections." (Petition at 8) But it wouldn't – at least not as that procedure has been implemented by licensees in recent years. Section 73.56(l) states that the review procedure "must contain a provision to ensure that the individual is informed of the grounds for the denial [of access authorization]." Section 73.56(m)(2) states that, upon request, a licensee must provide to an individual denied access "[a]ll information pertaining to a denial or unfavorable termination of the individual's unescorted access or unescorted access authorization." 10 C.F.R. § 73.56(l), (m)(2).

Experience has shown that licensees rarely, if ever, comply with these requirements. Individuals denied access typically receive a form letter saying, without further explanation, that they have been deemed not trustworthy and reliable. A sample of such letters is appended to these comments as Attachment B. The result of the mandatory "impartial and independent internal management review" required by section 73.56(l) is rarely more informative. Employees invoking

that procedure almost always receive a letter saying simply that their appeal has been denied. A sample of such decisions is also included as Attachment C.

Although NEI claims that their internal management review procedures are fair, we note that the licensees represented by NEI have refused to supply information on the operation of those procedures. Several IBEW local unions have asked the licensees with which they bargain to state how many times since 2004 the review procedure has been used and how often those procedures have resulted in the reversal or modification of the licensee's initial decision. Not one licensee has been willing to share that information. Some have refused and others have ignored the request. An example of the request and one licensee's response is appended as Attachment D. Thus NEI claims that the review procedure is effective and fair, but no licensee is willing to provide the information needed to verify that claim or to disprove what the anecdotal evidence shows – that the review procedure is nothing more than a rubber stamp.

Many employees thus lose their access authorization and their jobs and never know why, unless they file a grievance under a collective bargaining agreement. And, because they do not know why their access authorization has been revoked, they have neither the ability nor opportunity to defend themselves – either during the initial determination or during the internal management review process. That the procedure implemented by the licensees has become so completely opaque, and frankly so thoroughly unfair, demonstrates the importance of keeping arbitration available in its present form, without unreasonable restrictions. Arbitration, as it

currently exists, without limitations on issues or remedies, provides the only meaningful way of challenging the accuracy and reasonableness of a licensee's decision on access.

NEI'S PROPOSAL WOULD MAKE LICENSEE ACCESS DECISIONS LESS ACCURATE AND LESS RELIABLE

NEI argues that access decisions should not be made by arbitrators whom NEI describes as "unaccountable third parties." (Cover Letter; Petition at 4, 6) Although NEI rails against the unaccountability of arbitrators – whose decisions can be reviewed and vacated by a court of law, *see, e.g., Iowa Electric Light and Power Co. v. IBEW Local 204*, 834 F.2d 1424 (8th Cir. 1987) (vacating an arbitration award requiring reinstatement of employee whose access had been revoked) – it is the licensees that would be rendered unaccountable by NEI's proposal. NEI is attempting to create a legal environment in which access decisions would be subject to only perfunctory review. Licensees would not have to explain or justify their access decisions, at least not in any detail, and those decisions would be immune from reversal by an arbitrator or any other "third party," including a court of law.

In 1991, the Commission noted that "mistaken access denials . . . could undermine the quality of a licensee's work force and thereby counter the interests of safety." 56 Fed. Reg. 19002 (April 25, 1991).[8] Public safety thus requires an access program that accurately and reliably distinguishes between those that should be excluded and those that should not.

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[8] NEI's assertion that the Commission was concerned only with the integrity of the process and not the merits of the decision (Petition at 5) ignores this history.

Writing in a different context, the Supreme Court of the United States "has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency." *Clemons v. Mississippi,* 494 U.S. 738, 749 (1990).[9] We submit that full arbitral review – review without limitations on issues or remedies – also promotes accuracy, consistency and reliability.

Full arbitral review has several benefits that should not be cast aside. The availability of review promotes care and thoroughness in making access decisions. It encourages licensees to be reasonable and consistent in their judgments. And, it induces licensees to make access decisions that they can explain and defend. The absence of meaningful review would make licensee decisions less accurate and reliable thereby diminishing public safety. The availability of full arbitral review, by contrast, makes the access authorization process, despite its current shortcomings, far more accurate and reliable than it would be under the regime that NEI's petition would create. Arbitration, without the limitations proposed by NEI, enhances, rather than undermines public safety.

CONCLUSION

As the IBEW has explained in these comments, NEI's proposal is unjustified, and ill-conceived. NEI's application runs directly contrary to the position on arbitration that the NRC took in promulgating its 1991 access regulations. The

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[9] That context is not as different as it might seem. The loss of access authorization usually results in termination of employment, and termination is often referred to as "industrial capital punishment." *See Griffin v. Auto Workers,* 469 F.2d 181, 183 (4th Cir. 1972) ("a discharge – the industrial equivalent of capital punishment").

NRC has never retreated from that position, and NEI has not provided any persuasive reason why the Commission should do so now. NEI's proposal, if adopted, would make the access authorization process less fair and less reliable. It would unnecessarily interfere in the collective bargaining relationships between employers and unions and it would significantly alter the legal landscape of labor-management relations in the nuclear industry without adequate justification.

Because no reason exists to initiate a rulemaking procedure to limit arbitration over access authorization disputes, the Commission should deny NEI's petition.

Respectfully submitted

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Attorneys for the International
Brotherhood of Electrical Workers

Attachment A

ARBITRATION

OPINION AND AWARD

of

Ed W. Bankston
Arbitrator

In a Matter of Dispute Between:

TENNESSEE VALLEY AUTHORITY	and	INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 721

* * * * * * * * * * * * * * * *

Held at:
Sequoyah Nuclear Plant
July 9, 1993

Termination of:
Robert L. Henderson

APPEARANCES

For TVA:

Mr. J. David Beckler, Labor Relations Officer
Mr. Robert McLeroy, GG Labor Relations
Mr. Ralph E. Thompson, Manager, Personnel Section
Mr. Michael J. Lorek, Project Engineer
Mr. William R. Lagergren, Operations Support Manager

For the Union:

Mr. James T. Springfield, Business Manager, IBEW, Local No. 721
Mr. Jerry Duncan, International Representative, IBEW
Mr. Perry C. Lawrence, Sr., Shift Operations Supervisor
Mr. Phil Mincy, Unit Operator
Mr. Robert L. Henderson, Grievant

I.

GENERAL BACKGROUND

The parties to this dispute, Tennessee Valley Authority ("TVA") and the Tennessee Valley Trades and Labor Council ("Council") are signatories to a collective bargaining agreement ("Agreement") and supplementary schedules ("Supplement") negotiated August 6, 1940, and (for these purposes) most recently revised January 7, 1991. The Council represents all temporary hourly operating, maintenance, and modification employees and was comprised of fifteen (15) local unions at the time of this grievance. The International Brotherhood of Electrical Workers, Local 721 ("Union"), is a member of the Council and represents the grievant. It has prosecuted this grievance to arbitration.

The inability of the parties to resolve the grievance throughout the various steps of the grievance procedure preliminary to arbitration has resulted in the grievance being submitted to this arbitrator for resolution. The dispute was heard by Ed W. Bankston, who was selected by the parties pursuant to Article VII of the Agreement and Paragraph B.IX.C.4 of the Supplement. The hearing was held at the Sequoyah Nuclear Plant on July 9, 1993.

TVA was represented at the hearing by Labor Relations Officer, Mr. J. David Beckler. The Union was represented by Mr. James T. Springfield, Business Manager, Local 721, I.B.E.W. Each party was properly and ably represented at the hearing and although the hearing was informal, each party was provided an opportunity to support its position with respect to the dispute by the testimony of sworn witnesses, exhibits

and oral arguments. At the close of the hearing, the Union provided the arbitrator the benefit of oral summation and waived its right to the presentation of a post-hearing brief. TVA has timely submitted its brief. The matter is now ripe for resolution.

The Union has grieved the February 8, 1991, termination of Robert L. Henderson, who at the time of his termination was classified as Assistant Unit Operator, Sequoyah Nuclear Plant. By letter dated February 8, 1991, over the signature of W.R. Lagergren, Operations Support Manager, the grievant was informed that, "...it is my decision to terminate your employment effective February 8, 1991." The grievant's employment was terminated due to loss of his security clearance.

II.

ISSUES

At the hearing of this dispute, the parties stipulated the issue to be as follows:

> Whether the grievant's termination was in accordance with the General Agreement and for cause? If not, what is the proper remedy?

A threshold issue is whether the decision of the Screening Review Board is arbitrable.

III.

RELEVANT PROVISIONS OF THE AGREEMENT

In view of the nature of this dispute as briefly described above, the issues to be resolved by your arbitrator, and the positions of the parties with respect to these issues, it appears that the following provisions of the Agreement are relevant to the resolution of this dispute:

Article VII. GRIEVANCE ADJUSTMENT PROCEDURE

> The procedure for adjusting grievances over matters explicitly covered in the General Agreement and Supplementary Schedules to this Agreement shall provide employees with full opportunity for the presentation of his/her grievance and for the participation of union representatives. Provision shall also be made for appeal from the final decision of TVA to an impartial referee.

B-VI. Work Schedules, Overtime Pay, Holidays

E. Use of Overtime

1. Every possible effort will be made to avoid overtime and to conform to bulletined hours of work. In order to avoid excessive overtime over a long period of time, additional personnel will be secured.

B-VII. Termination, Demotion, and Suspension

A. Termination or Demotion for Cause

> An annual employee is given notice of termination or demotion in writing not less than 30 calendar days before the proposed action takes place, and the notice explains in detail the reasons for the proposed action. If it is not possible to retain the employee on active duty during this period, the reasons for not doing so are stated in the notice. If the employee is on temporary status, the 30 days' notice is not required.

B-IX. Grievance Adjustment Procedure

A. What Constitutes a Grievance

1. If an employee believes he has been treated unfairly or if he disagrees with his supervisors as to the application of a policy to him as an employee, he may file a grievance. He may only do this personally or through the authorized representative of the union which is recognized as his accredited representative.

4. Appeal to impartial referee -- If the council is not satisfied with this decision, it may submit the dispute to an impartial referee who is selected from a panel of five suitable persons previously designated jointly by TVA and the council.

An appeal to an impartial referee is made as follows: When a union is not satisfied with the decision of the Manager of Labor Relations and wants to have it referred to an impartial referee, the international representative of the union notifies the Council and the Manager of Labor Relations within 45 days following the date of the Manager of Labor Relations' decision. The Manager of Labor Relations sends the Assistant Administrator of the Council two copies of the record of the appealed case. Within 45 days following the receipt of the record the Council notifies the Manager of Labor Relations in writing whether it supports the union and appeals the case to an impartial referee. If it appeals, it specifies the issue or issues appealed and requests the Manager of Labor Relations (1) to secure the services of a referee (members of the panel are requested to serve in alphabetical order of their last names); (2) to submit a full record of the case to the referee.

The Manager of Labor Relations, after being notified by the Council, secures the services of a referee, furnishes him/her with a full record of the case in dispute, and sends the Council two copies of the letter of transmittal. Within ten days after the record is sent to the referee, TVA and the Council send the referee such written comments on the factual and argumentative information considered in earlier steps of the grievance as they may

wish. Either party which submits comments to the referee provides the other party with two copies.

The referee holds a hearing if requested be either TVA or the Council within the 10 days allowed for submitting written comments. He/She may hold a hearing at his/her own initiative if one is not requested and he/she thinks one is necessary before he/she renders a decision.

The arbitrator's jurisdiction is limited to interpretation and application of the terms of the General Agreement and its Supplementary Schedules or cases involving employee discipline (termination, demotion, suspension or written letter). The arbitrator does not have the authority to add to, subtract from, or modify any term or provision of the Agreement or to render a decision contrary to Federal law or regulation applicable to TVA. Likewise, the arbitrator has no authority to rule on any matters not specifically set forth in this General Agreement and Supplementary Schedules. This paragraph does not restrict the arbitrator in determining the interest of the parties on how specific language of the General Agreement and Supplementary Schedules are to be interpreted.

On the basis of the factual record and the oral or written comments made by the parties to the dispute, but without considering the facts not presented to the Manager of Labor Relations prior to his/her decision, the referee makes his/her decision, which must not be inconsistent with the General Agreement and its Supplementary Schedules. He/She makes his/her decision within two weeks from the date he/she has received the complete record.

The decision of the referee is accepted by both parties as final. The compensation and expenses of the referee are jointly borne by TVA and the Council.

IV.

PERTINENT FACTS

The grievant, Robert L. Henderson was first employed by TVA during 1979. At the time of his termination, he was serving as an Assistant Unit Operator ("AUO") at TVA's Sequoyah Nuclear Plant having been continuously employed for over eleven (11) years. On July 3, 1990, the grievant's unescorted access nuclear plant security clearance ("security clearance") was initially withdrawn as a result of a positive drug test. The medical portion (S1) of the clearance was restored on August 1, 1990. But, by letter dated February 8, 1991, over the signature of W.R. Lagergren, the grievant received the following notice of termination:

> I have carefully reviewed this matter and have considered comments made during our January 14, 1991, meeting. I have determined that it is necessary that your position be filled by someone who is able to meet all the requirements of the position, including unescorted access security clearance, and I therefore find that your termination would promote the efficiency of the service. Accordingly, this is to notify you that it is my decision to terminate your employment effective February 8, 1991, for the reasons stated in Mr. Lorek's November 29, 1990, proposal.(JT. Ex. 2, TVA Hearing Record, Ex.6).

The grievant's security clearance had been withheld by TVA's Personnel Screening and Badging Organization pursuant to an updated background investigation. The grievant was required as part of the investigation to complete TVA Form 9871, "DATA ON CONVICTIONS." Faced with two (2) choices on Form 9871, the grievant chose to indicate that "I have never been convicted nor am I under charges for any

offense against the law." (TVA, Ex. 1). An investigation revealed "the following arrest and conviction record. . .:"

Charge	Sentence - With Date of Conviction
Passing Worthless Check	30 days; 6/25/90 (suspended cost/restitution)
Violation of Registration	$10 and costs (Not Reportable to TVA)
Driving on Revoked Lic.	60 days suspended and $50; 8/10/90
Failure to Appear (JT. Ex. 2).	60 days suspended and $50; 8/10/90

Discovery of the above facts evidencing "falsification" of Form 9871 by the grievant served as the basis for non-renewal of the grievant's security clearance. (JT. Ex. 2). Without the security clearance, TVA determined that the grievant was unable to perform his job as an AUO and terminated his employment.

On February 19, 1991, the Union grieved Henderson's termination requesting reinstatement and that he be made whole. (JT. Ex. 2, TVA Hearing Record, Ex. 1). The grievance was denied and the Union has now prosecuted the matter to arbitration.

V.

POSITIONS OF THE PARTIES

THE TENNESSEE VALLEY AUTHORITY -- The position of TVA with respect to this dispute is that the grievance should be denied. TVA insists that the grievant has been properly terminated for cause in accordance with the General Agreement and for conduct involving the intentional falsification of TVA documents. According to the TVA, the grievant deliberately and knowingly falsified TVA Form 9871 indicating no

prior conviction record when, in fact, he had experienced several recent convictions. As a result of such falsification, coupled with the conviction record, the grievant's security clearance was withdrawn. Such security clearance is a necessary condition to performance of grievant's job as an AUO. Without the clearance, he has no access to the job. On that basis, the grievant was properly terminated.

TVA further insists that the arbitrator is without jurisdiction as the propriety of the security clearance is not subject to arbitral review. "Such determinations are entrusted to TVA which has the responsibility to determine which parties should be permitted unescorted access in a nuclear power plant." (TVA Brief, p.1). Indeed, TVA asserts that the matter "is not a proper subject for challenge through the grievance procedure." (JT. Ex. 2). Thus, TVA asserts arbitrability as a threshold issue, and requests that the grievance be otherwise denied.

THE UNION -- The position of the Union with respect to this dispute is that the grievance should be sustained because TVA was without cause in terminating the grievant's employment. According to the Union, the grievant was neither properly nor timely noticed that loss of his security clearance was fatal to continued employment as an AUO. The Union insists that, as a matter of past practice, other employees (AUOs) have been allowed to continue their employment absent the security clearance. And, due to the grievant's termination, TVA is operating less efficiently and utilizing more overtime hours than necessary, all contrary to the General Agreement. Further, there are AUO jobs available which do not require the security

clearance and which the grievant should have been allowed to work as a matter of past practice.

The Union asserts that TVA FORM 9871 is ambiguous such as to invite an incorrect response as provided by the grievant and that the grievant was not furnished assistance in completion of the form, nor was he provided or allowed assistance of the Union upon review by the Screening Review Board. Moreover, the convictions of record are of no concern to the conduct of the grievant's job such as to be absolutely irrelevant and totally unrelated to any security matter involving work performance.

The Union notes that the grievant is an eleven (11) year employee of TVA with an incontrovertibly splendid work record and that the grievant is held in high esteem by all levels of management as well as his peers. The union requests that the grievant be paid back pay for the fifteen (15) months of unemployment, and that he be made whole with respect to all benefits and seniority, but that reinstatement is not requested as grievant prefers his present job at TVA's Widows Creek Plant.

VI.

ANALYSIS AND DISCUSSION

As to the Arbitrability of the Case

At the outset, TVA asserts that the arbitrator is powerless to address the merits of the grievant's discharge; that the underlying security issue lies exclusively within the domain of public policy and outside the jurisdictional purview of the arbitral process. TVA relies primarily on Department of the Navy v. Egan, 484 U.S. 538, 108

S.Ct. 818, 98 L.Ed.2d 918 (1988), a Merit Systems Protection Board ("MSPB") case wherein the United States Supreme Court stated that:

> [t]he grant or denial of security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate Executive Branch agency having the necessary expertise in protecting classified information. It is not reasonably possible for an outside, nonexpert body to review the substance of such a judgment, and such review cannot be presumed merely because the statute does not expressly preclude it. Id. at 823-825.

In effect, a divided Court held that "the Board does not have the authority to review the substance of an underlying security clearance determination in the course of reviewing an adverse (termination) action." Id. at 823-827. TVA would extend such holding to the instant case in arbitration.

In Egan, as here, Respondent was without the requisite security clearance to hold his job. Denial of Egan's security clearance was based upon California and Washington state criminal records reflecting his convictions for assault and for being a felon in possession of a gun, and further based upon his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded weapon. The Navy also referred to Egan's own statements that he had had drinking problems in the past and had served the final 28 days of a sentence in an alcohol rehabilitation program. Id. at 821. As here, Egan was removed from employment for lack of a security clearance. As stated by the Court:

> It should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The

> general standard is that clearance may be granted only when 'clearly consistent with the interests of the national security.' See, e.g., Exec. Order No. 10450, §§ 2 and 7, 3 CFR 936, 938 (1949-1953 Comp.); 10 CFR § 710.10(a) (1987) (Department of Energy); 32 CFR § 156.3(a) (1987) (Department of Defense). Id. at 824.

Under Egan, it is clear that Board review is "limited to determining whether clearance revocation occurred and whether the employee was accorded appropriate procedural due process rights." (TVA Brief, p.3). There, the Court was interpreting statutory law, Title 5 U.S.C., Ch. 75, and the rights of appeal of certain government employees to the MSPB. Here, the grievant is asserting rights to arbitral review secured through the collective bargaining agreement. Arbitral review is not to be constrained by Egan merely because it reaches the desired TVA result. It must be shown to be applicable, not merely instructive.

TVA also relies on Iowa Electric Light and Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers, where the Court vacated the arbitrator's award invoking "the public policy exception to the rule of judicial deference to arbitrator's decisions." 834 F.2d 1424, 1426 (8th.Cir. 1987). There, the arbitrator had ordered reinstatement of a machine-shop employee who had deliberately violated safety regulations at a nuclear power plant by defeating a complex door interlock system designed for radiation containment. The employee caused a fuse to be pulled thereby overriding the safety system so that he could "beat the lunch crowd." The court concluded that

> there is a well defined and dominant policy requiring strict adherence to nuclear safety rules. Moreover, we conclude that this strong public policy would be violated by judicial

> enforcement of an arbitrator's award requiring the reinstatement of an employee who acted as Schott did under the circumstances of this case. Id. at 1427.
>
> His willful actions could have caused a disaster. Id. at 1429.

Here, of course, there has been no such "willful act," no such violation of any safety rule and no one placed in danger. There has not been a violation of "dominant national policy requiring strict adherence to nuclear safety rules" as articulated by the Iowa court. Id.

TVA argues that the arbitrator is foreclosed from reaching the merits of the case by dominant public policy safety considerations. Yet, as one court has observed:

> An arbitration award is not to be based on public policy considerations, since public policy questions are for the court, not the arbitrator. An arbitrator who has based an award on public policy considerations exceeds his powers. (Citations omitted). Because collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements, the question of public policy is ultimately one for resolution by the courts. Exxon Shipping Company v. Exxon Seaman's Union, 801 F.Supp. 1379 (D.N.J. 1992)

Your arbitrator does not pretend to address considerations of public policy but does note with due regard the prescriptions of both the Egan and Iowa Courts. It is also noted that those cases involved serious matters of felony charges and grave matters of safety rule violations, both matters of utmost public policy concern relative to nuclear safety. The instant case involves neither felony nor safety related violations and as such may not rise to the level of public policy consideration.

Such appears to have been the situation in Horner v. Bonwell, Misc. Docket No. 189 (Fed. Cir., April 22, 1988), where the court asserts generally the extension of the Egan doctrine to arbitrators, but refuses review because "OPM does not meet the requirement of showing that the arbitrator's decision will have a 'substantial impact' as required by 5 U.S.C. § 7703(d)." Here, there is likewise no showing by TVA that the arbitrator's decision "will have a substantial impact on a . . . law, rule, regulation or policy doctrine."

Moreover, and insofar as it may be relevant, 5 U.S.C. § 7106(b) (Management Rights) provides as follows:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating -
>
> * * *
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials. (Added Oct. 13, 1978, P.L. 95-454, title VII, 701, 92-Stat. 1198.)

Of course, the parties have provided for such "appropriate arrangements" in the General Agreement by way of a "grievance adjustment procedure" culminating in binding arbitration. (Jt. Ex. 1, General Agreement, B-IX.4.). There, the arbitrator's jurisdiction is provided as follows:

> The arbitrator's jurisdiction is limited to interpretation and application of the terms of the General Agreement and its Supplementary Schedules or cases involving employee discipline (termination, demotion, suspension, or warning letter). The arbitrator does not have the authority to add to, subtract from, or modify any term or provision of the Agreement or to render a decision contrary to Federal law or regulation applicable to TVA. Likewise, the arbitrator

> has no authority to rule on any matters not specifically set forth in this General Agreement and Supplementary Schedules. This paragraph does not restrict the arbitrator in determining the interest of the parties on how specific language of the General Agreement and Supplementary Schedules are to be interpreted.

Thus, the parties have provided their own mechanisms for adjustment of grievances totally in conformance with federal and private sector mandates.

Given the foregoing discussion and analysis, your arbitrator has no hesitancy in reaching the merits of this grievance.

As to the Merits of the Case

Pursuant to the recertification of his security clearance, the grievant completed TVA Form 9871 on September 5, 1990, in the following manner:

DATA ON CONVICTIONS

> "Have you ever been convicted of an offense against the law or forfeited collateral, or are you now under charges for any offense against the law?" (Include convictions while in military service by summary, special or general court martial, but do not include (a) traffic violations for which you paid a fine of less than $100; (b) any offense committed before your 18th birthday which was finally adjudicated in a juvenile court or under a youth offender law, or any offense committed by a juvenile under Federal law; (c) any conviction which has been expunged under Federal or State law; and (d) any conviction set aside under the Federal Youth Corrections Act or similar State authority.) CONVICTION IS NOT A BAR TO EMPLOYMENT OR CONTINUED EMPLOYMENT: EACH CASE IS CONSIDERED ON ITS OWN MERITS.

If you have not been convicted and are not under charges, as explained by the above paragraph, all you need to do is check the answer on LINE A and sign.

If you have been convicted and/or are under charges, you must check the answer on LINE B and LIST ALL TIMES YOU WERE CONVICTED AND/OR LIST ALL OFFENSES FOR WHICH YOU ARE NOW UNDER CHARGES. Failure to give a complete list of such cases may cause YOUR DISCHARGE FOR FALSIFICATION. Persons who falsify information are subject to prosecution under Federal law. YOUR RECORD WILL BE INVESTIGATED.
PLEASE NOTE: If you check line B, it is necessary for you to obtain the signature of a Personnel or Employment Officer.

LINE A ■ I HAVE NEVER BEEN CONVICTED, NOR AM I UNDER CHARGES FOR ANY OFFENSE AGAINST THE LAW.

LINE B □ I HAVE BEEN CONVICTED AND/OR I AM UNDER CHARGES. Below is a complete list as described in the first paragraph.

This information given above is correct and complete to the best of my knowledge. I understand the penalty for falsifying any information on this form.

/s/ Robert Henderson, 9/5/90 SSN: [redacted]

I have discussed the information with the applicant/employee who has signed this form.

_____

Signature of Personnel or Employment Officer Title Date

As may be noted, the grievant checked Line A above certifying that "I HAVE NEVER BEEN CONVICTED, NOR AM I UNDER CHARGES FOR ANY OFFENSE AGAINST THE LAW." Also noted is that the last line remains unexecuted.

By memorandum dated September 26, 1990 to K. J. Wallace over the signature of R.E. Thompson, the grievant's "criminal history" is reported as follows:

> On September 3, Mr. Henderson reported to the Nuclear Security office and completed his security paperwork. Mr. Henderson reported on TVA 9871 that he had never been convicted. When a criminal history was conducted in Hamilton County the following arrest and conviction record was located.
>
> | Charge | Sentence - With Date of Conviction |
> |---|---|
> | Passing Worthless Check | 30 days; 6/25/90 (suspended cost/restitution) |
> | Violation of Registration | $10 and costs (Not Reportable to TVA) |
> | Driving on Revoked Lic. | 60 days suspended and $50; 8/10/90 |
> | Failure to Appear | 60 days suspended and $50; 8/10/90 |
>
> This last charge arose from Mr. Henderson's failing to appear for his first trial on the above charges. In addition, Mr. Henderson's driver's license was revoked in November 1984 for failure to file an accident report and proof of insurance with the State of Tennessee. Apparently, Mr. Henderson has continued to operate a motor vehicle without a license and failed to maintain insurance. He was convicted of speeding in February 1985 and no driver's license in May 89, at which time he failed to provide proof of insurance, again. I am sending N. A. Zigrossi a copy of documentation of the above-listed convictions.
>
> Based upon these facts, it has been determined that Mr. Henderson falsified Form 9871 by failing to report the convictions for passing worthless check, driving on revoked license, and failure to adhere to 10 CFR 26 requirements concerning fitness for duty. Mr. Henderson's unescorted access clearance cannot be restored based on the minimum requirements for nuclear plant access based upon the

criteria delineated in TVA's Physical Security/Contingency Plan. (JT. Ex. 2, No. 7).

The above report proved problematic and was corrected by Memorandum dated October 5, 1990, again over the signature of R. E. Thompson, as follows:

> Robert Lee Henderson contacted our office concerning the failure to appear conviction that was listed in the memorandum, dated September 26, 1990. In this memorandum, our office stated that Mr. Henderson was convicted of failure to appear, fined $50, sentenced to 60 days in the county jail. After researching the court house records, it was discovered that Mr. Henderson was not convicted for failure to appear, as reported. The General Session's records shows that forfeiture and alias warrants (failure to appear) were issued on docket numbers 499907 and 500860. After Mr. Henderson appeared before the court and offered a satisfactory explanation for his failure to appear, these warrants were recalled. We apologize for any inconvenience this error may have caused.
>
> In the process of researching the failure to appear question, it was discovered that an additional conviction had been overlooked. The court's records shows that Mr. Henderson was charged and convicted with driving on revoked license (499907, 500860) and violation of registration law on two occasions, June 8, and June 19, On August 10, Mr. Henderson was found guilty on all charges and fined $50.00 and sentenced to 60 days in jail, suspended upon payment of fine and costs, on each count of driving on revoked and $10 and cost on each count of violation of registration law. Mr. Henderson did not report either of the driving on revoked license convictions on his security paperwork, dated September 3, as required.
>
> After reviewing Mr. Henderson's security file with this additional information, it has been determined that Mr. Henderson's unescorted access clearance was not denied based on the failure to appear conviction, but on his falsification of form TVA 9871. Mr. Henderson still does not meet the minimum requirements for nuclear plant access based on the criteria delineated in TVA's Physical Security/Contingency Plan. (JT. Ex. 2, No. 8).

According to protocol, the Office of Personnel Security is charged with the task of "determining whether and when a clearance can be reinstated. . ." (TVA Ex. 3, Fitness for Duty Program Administration, p. 31). It was this Office which determined that the grievant's security clearance would not be reissued. That decision was appealed to the Screening Review Board which "serve(s) as an appellate body to make final determinations on appeals from denials of unescorted access to nuclear facilities . . ." (TVA Ex. 4, Screening Review Board, p.2). According to Thompson, his Office of Personnel Security processed, in 1992, over 9,900 security clearances. Only ten or fifteen clearance denials have been appealed in the past eighteen months and only two of those were reversed. Either Thompson is doing a remarkably good job or the SRB is rubber stamping his decisions. Whatever the case, the grievant's appeal to the SRB was not successful.

According to TVA, the grievant has falsified Form 9871 and has thereby "demonstrated (a) lack of trustworthiness" which "cannot be tolerated when the safety of fellow employees and the public is at stake." (TVA Brief, p. 1). The grievant very candidly acknowledges the events reported above, but denies having willfully and intentionally falsified TVA Form 9871. He states that he completed the form without assistance in the comfort of his home and then hand carried the document to R. E. Thompson. As explained by the grievant, he followed explicitly the directions contained in the first paragraph which prescribes that the applicant/employee "not include (a) traffic violations for which you paid a fine of less than $100.00." As may be noted above, each of the grievant's fines were indeed for less than $100.00. It

appears that the grievant reported precisely as required by the form with respect to the traffic violations. As he had no traffic violations, the fines of which were more than $100.00, he correctly reported none. Not so, cries TVA. Those traffic violations are "convictions" which prescribe sentences for each of 30-60 days, although suspended, and should have been reported on that basis. The grievant responds that his understanding of the meaning of the term "conviction" is that it applies to one who has, in fact, been jailed. Having never been imprisoned pursuant to conviction, the grievant reasoned that the form did not require such reporting of the subject offenses. According to TVA, the offenses are properly characterized as "convictions" and are reportable. But, the grievant did not think the offenses to be in the nature of "convictions" and, thus, did not report them as such. TVA cites a "similar (TVA) case" wherein Arbitrator James P. Whyte states that:

> Although grievant may have preferred to believe that he had not been convicted because he was not jailed or imprisoned for either offense . . ., it is well known that suspended sentences and probation commonly follow convictions, even on occasion, for very serious crimes. Grievant is charged with having this knowledge. To reason otherwise would render meaningless one aspect of the maxim that all persons are presumed to know the law - - that ignorance of the law is no excuse. (TVA Brief, p. 4).

Perceiving some ambiguity in the situation and not being ever so certain as Arbitrator Whyte as to the meaning of the term "conviction," I proceeded to brief the issue.

According to Ballantine's Law Dictionary, 3rd. ed., Lawyers Cooperative Publishing Company, 1969, p. 270, the term "conviction" is defined in pertinent part as:

> An adjudication that a person is guilty of a crime based upon a verdict or, in a proper case, the ascertainment of guilt by a plea of guilty or nolo contendere. 21 Am J2d Crim L § 617. Such is the primary and usual meaning of the term "conviction," but "it is possible that it may be used in such a connection and under such circumstances as to have a secondary or unusual meaning, **which would include the final judgment of the court."** United States v. Watkinds, (CC Or) 6 F 152, 158, 159; 39 Am J1st Pard § 38. **There is no conviction, within the meaning of the constitutional or statutory provisions disfranchising one convicted of crime, unless there is something in the nature of a final judgment upon the verdict of guilt declared by the jury, suspension of sentence or granting of probation is insufficient.** Truchon v. Toomey, 116 Cal App 2d 736, 254 P.2d 638, 36 A.L.R.2d 1230; Anno: 36 A.L.R.2d 1238.

It appears that, "there is no conviction" without "a final judgment. . .; suspension of sentence . . . is insufficient." Ballantine's defines the term "suspension of sentence" as the postponement of the judgment of the court temporarily or indefinitely, the conviction and the disabilities arising therefrom remaining and become operative when judgment is rendered. Ballantine's, Id. at 1247. Read in conjunction, it appears that there is no conviction where the sentence is suspended because there has been no final judgment. The term "final judgment" is defined to be any judicial decision upon a question of law or fact which is not provisional and subject to change in the future by the same tribunal. Ballantine's, Id. at 473. Here, it appears that the grievant's sentence(s) remain suspended, thereby provisional, and thus precluding their characterization as "convictions." Consider the following summary annotation on the subject by the American Law Reports, 2d:

> [a] Probation or suspended sentence.

> There seems to be little authority on the question herein annotated, but the little there is seems to hold uniformly that disfranchisement does not follow unless there is something in the nature of a final judgment upon the verdict of guilt declared by the jury; there is therefore no "conviction" or one has not been "convicted," within the meaning of the statutory provisions where sentence was suspended or probation granted. (36 A.L.R.2d 1238).

But, there is more.

According to a leading legal encyclopedia, the word "conviction" has two meanings: its ordinary or popular meaning, which refers to a finding of guilt by plea or verdict, and its legal or technical meaning, which refers to the final judgment entered on plea or verdict of guilty. In some legal contexts, the word may appear in its popular sense, though in others the strict sense is used and a verdict or plea of guilty is not a conviction until a judgment has been entered. . . . It has been suggested that the popular meaning is adopted only where the rights of persons other than the convict are involved, but where legal disabilities, disqualifications, and forfeitures are to follow, the strict legal meaning is to be applied, absent some indication of a contrary intent. (21A Am Jur2d, Crim Law, § 1024, pp. 568-9). Application of a strict constructionist view appears to be appropriate as the consequences of these circumstances concern grave "disabilities, disqualifications, and forfeitures" attending the grievant's act in completion of TVA Form 9871. Given these definitive considerations, the grievant's position appears all the more tenable and his actions all the more reasonable. Consider that "the suspension of civil rights does not begin when the defendant is convicted and sentenced, but only when he is actually imprisoned under the sentence imposed." Id. at 567. Here, the grievant's

job was at stake, the loss of which was a severe "disability," the ultimate "disqualification," a fatal economic "forfeiture," probably as important as any loss of his "civil rights." Yet, TVA felt comfortable in its loose application of the term "conviction."

R. E. Thompson, Manager of Personnel Security, made the determination not to reinstate the grievant's security clearance. Upon cross-examination, Thompson responds as follows:

Mr. Springfield: Where is the term "conviction" defined?

Mr. Thompson: We do not provide any additional definition beyond a common-sense definition of having been convicted in court.

Mr. Springfield: Did any of Mr. Henderson's tickets exceed $100.00?

Mr. Thompson: They did not, but that isn't really the issue. Specifically, in less than 1 year, he was sentenced to 150 days in the work house. That's the penalty of particular interest he failed to admit.

Mr. Springfield: Did anyone review this document (TVA Form 9871) with Mr. Henderson?

Mr. Thompson: I do not know.

Mr. Springfield: So, no one explained to Mr. Henderson what the term "convicted" meant?

Mr. Thompson: No, sir.

Mr. Springfield: Did you have any conversation with Mr. Henderson as to what the term "conviction" meant?

Mr. Thompson: Yes. He took the position that since he had not been incarcerated, he did not consider it to be a conviction. He never acknowledged that he had

gotten a conviction. He took the principle that unless he was locked-up, it wasn't a conviction.

Mr. Springfield: Did he acknowledge the tickets and the bad check?

Mr. Thompson: Yes.

Mr. Springfield: Did he serve any time in jail?

Mr. Thompson: Not to my knowledge.

Mr. Springfield: Do you know if the judge told Mr. Henderson that he had a suspension?

Mr. Thompson: No, I have no knowledge of that.

Mr. Thompson further stated upon cross-examination that if the grievant would have been truthful with him, that he could have worked with him, intimating thereby, that if the grievant had merely acknowledged his "convictions" as convictions, then his security clearance could have been reinstated. But, the grievant held to his position that he had not falsified TVA Form 9871 because all traffic tickets were less than $100.00 and he had not been jailed, thus, never convicted.

Thompson faulted Henderson for having shown "no remorse," for not "admitting the convictions," for offering an "unacceptable explanation," for "repeatedly violating state law," with "no sign of rehabilitation," and by demonstrating that "his heart was not in the right place." All of this was gleaned by Thompson of Henderson in one conversation, all the while the grievant being truthful and forthcoming, just not acquiescent. Based upon the preceding information, Thompson applied the following "safeguards" criteria:

1.2.1.9. Evaluation Criteria for Unescorted Access Authorization

> Clearance for unescorted nuclear plant access and access to Safeguards Information may be denied or rescinded if any one of the following conditions are indicated by relevant evidence.
>
> A. Willful omission or falsification of material information submitted in support of employment or request for unescorted access authorization to protected or vital areas.
>
> C. A criminal history without adequate evidence of rehabilitation which establishes untrustworthiness or unreliability.
>
> H. Any other information that would adversely reflect upon the reliability and trustworthiness of the individual as relates to the individual being permitted unescorted access. (TVA Ex. 2, Safeguards Information).

Thompson faulted the grievant under Paragraph A, above, for the "willful . . . falsification" of TVA Form 9871. According to Ballantine's Law Dictionary, supra, p. 1369, the term "willful" is defined as follows:

> A word of several meanings, the meaning in the particular case often being influenced by the context. Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418. Voluntary, as distinguished from accidental. 21 Am J2d Crim L § 87. Intentional or deliberate, yet not necessarily with an evil purpose in mind. Fulton v. Wilmington Star Mining Co., (CA7 Ill) 133 F. 193; Kite v. Hamblen, 192 Tenn 643, 241 SW 2d 601. Stubborn, obstinate, perverse. United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381. Inflexible. Refractory. Wick v. Gunn, 66 Okla 316, 169 P 1087, 4 A.L.R. 107. Intentional and with a bad purpose. State v. Clifton, 152 NC 800, 67 SE 751. Having a bad purpose, evil intent, or legal malice. Caldwell v. State, 55 Tex Crim 164, 115 SW 597.

On page 1370, Ballantine's defines "willfully" with similar import, thusly:

> With a purpose or willingness to commit an act or to omit the performance of an act, irrespective of intent to violate the law or to injure another. Howe v. Martin, 23 Okla 561, 102 P 128. Deliberately and with a specific purpose. Hartzel v. United States, 322 U.S. 680, 64 S. Ct. 1233, 88 L Ed. 1534. Knowingly, obstinately, and persistently, but not necessarily maliciously. 34 Am J1st Mal § 2. A technical word in an indictment or information. 27 Am J1st Indict 67. Implying a certain state of mind for the performance of an act proscribed by statute. Screws v. United States,325 U.S. 91, 65 S Ct. 1031, 89 L Ed. 1495, 162 A.L.R. 1330. Intentionally, deliberately, with a bad or evil purpose, contrary to known duty. State ex rel. Fletcher v. Naumann, 2134 Iowa 418, 239 NW 93, 81 ALR 483.
>
> This word when used in a criminal statute generally means an act done with a bad purpose, or without justifiable excuse, or stubbornly, obstinately, perversely, and is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act. United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381.

To vindicate TVA's position, one must conclude that the grievant's act in completion of TVA Form 9871 was "done with a bad purpose, without justifiable excuse . . . without ground for believing it is lawful," that the act was done "intentionally, deliberately, with . . . evil purpose, contrary to known duty." Such is the position of R. E. Thompson, that the grievant deliberately and knowingly committed a bad act purposely to deceive TVA and without justification. Thompson refused to acknowledge the possibility that the grievant's "common-sense" definition of the term conviction may have legitimately differed from his own "common-sense" definition of the term. Yet, W. R. Lagergren, Operations Support Manager, responded hypothetically that, "I probably would not consider it (traffic violations) to be a

conviction," and "I probably would have completed the form (TVA Form 9871) just as the grievant did."

Thompson also faulted the grievant under Paragraph C of the "Safeguards" criteria which states:

> 1.2.1.9 Evaluation Criteria for Unescorted Access Authorization
>
> Clearance for unescorted nuclear plant access and access to Safeguards Information may be denied or rescinded if any one of the following conditions are indicated by relevant evidence.
>
> C. A criminal history without adequate evidence of rehabilitation which establishes untrustworthiness or unreliability. (TVA Ex. 2, Safeguards Information)

Given the previous discussion and conclusion as to the meaning and application of the term "conviction," the grievant is without a "criminal history" requiring rehabilitation the lack thereof precluding TVA's proper characterization of the grievant as "untrustworthy." (TVA Brief, p.1). According to Ballantine's, p. 1081, the term "rehabilitation" is defined as "the restoration of one convicted of a crime to a respected and useful position in society, often by putting him on probation." Logan v. People, 138 Colo. 304, 332 P.2d 897; State v. Summers, 60 Wash.2d 702, 375 P.2d 143. As noted earlier, "suspension of sentence or granting of probation is insufficient" basis upon which to establish a conviction, hence, not a sufficient basis to establish a "criminal history," thus foreclosing Thompson's consideration of the concept of "rehabilitation." But, according to Thompson, "he (the grievant) was not rehabilitated and he showed no remorse." Upon cross-examination, Thompson was

asked: "How did you determine that he (Henderson) had intentionally falsified (the form) instead of having made a legitimate mistake?" He replied: "I, by no stretch of my imagination, could arrive at the number of convictions that Mr. Henderson had had, and his use of the rationale 'if I haven't been locked-up. I haven't been convicted' as being a rational explanation and he could offer nothing beyond that as an explanation." It appears that Thompson simply could not reconcile the grievant's number of "convictions" and Henderson's stance of not having been "convicted." In explanation, Thompson pronounced that: "Part of what you do is when you're interviewing the individual, you are assessing (the questions): 'Have they rehabilitated? Do they see the error of their ways? Is there any remorse being shown? All I received from Mr. Henderson was this explanation: 'I didn't think it was a conviction,' no remorse, and he was willing to repeatedly violate the state law. As to whether he was rehabilitated, the answer to that is no." Thus, Thompson faulted Henderson for having not seen the "error of his ways." It's almost as though Thompson confusedly required of Henderson, not rehabilitation, but sorrowful repentance of his sins! On such a basis, the grievant's security clearance was denied. Yet, there was nothing upon this record requiring grievant's rehabilitation, remorse, nor repentance, as demanded by Thompson. One, such as grievant, who has not been convicted does not need rehabilitation, may not feel remorse, and thus, may not show remorse. However, it must be noted that grievant's suspended sentences were in fact probations each "for a period of eleven months and 29 days." (TVA Brief,

Exhibits of Judgments). Apparently, the grievant has successfully completed these probationary periods.

Thompson also faulted the grievant under Paragraph H of the "Safeguards" criteria which states:

> 1.2.1.9 Evaluation Criteria for Unescorted Access Authorization
>
> Clearance for unescorted nuclear plant access and access to Safeguards Information may be denied or rescinded if any one of the following conditions are indicated by relevant evidence.
>
> H. Any other information that would adversely reflect upon the reliability and trustworthiness of the individual as relates to the individual being permitted unescorted access. (TVA Ex. 2, Safeguards Information).

Thompson faulted the grievant additionally for "continu(ing) to operate a motor vehicle without a license and failure to maintain insurance." (JT. Ex. 2, No. 7). Apparently, this "other information" is used to impugn the grievant's "reliability and trustworthiness." But, just how such information translates negatively "to the individual [grievant] being permitted unescorted access" is not readily comprehended by this arbitrator. Nevertheless, it is of record and was part of Thompson's decision-making calculus.

Thompson also expressed concern "with the number of violations within such a short period of time," and was especially concerned with the fact that the suspended sentences totalled 150 days -- "that's the penalty of particular interest." The short period of time appears to have been 5-6 years, from 1984 through 1990. (TVA Brief, Exhibits). And, the 150 days (30 + 60 + 60) are not particularly shocking

as they are all suspended. Apparently, it has not shocked the sensibilities of the Court. And, those concerns are all subsumed by the allegation of falsification which forms the basis for denial of the security clearance. (JT. Ex. 2, No. 8).

The union inquired of Thompson as to notice with the following dialogue:

Mr. Springfield: Can you tell me what procedure identifies 3 misdemeanors warrant denial of a person's clearance?

Mr. Thompson: It's an internal procedure within my office to help us adjudicate cases in a standard fashion.

Mr. Springfield: Is this information available to supervisors and employees? Do they know this?

Mr. Thompson: Uh, yes, I think so . . . the information is out there. We don't publish it, but it's available.

Mr. Springfield: Where is it available?

Mr. Thompson: We issued it to all our contractors and they have released it to union representatives.

Mr. Springfield: But, how do TVA annual employees get the information?

Mr. Thompson: This is an internal procedure, decision-making within my organization, and it is not made available as a matter of procedure.

Mr. Springfield: Where is it identified that once having lost his clearance, then there is a 5 year limit (interval) for review?

Mr. Thompson: That's an internal policy within my department. This is a serious case of falsification -- we use a 5 year standard.

Thus, TVA was unable to show (as they must) that employees such as the grievant were properly put on notice that under these circumstances, they could lose their jobs. TVA was unable to show that employees were properly on notice that a series

of traffic tickets could cost them their security clearances, thus their jobs. Yet, Thompson candidly admits that "all contractors receive this information," upon request. It may be as asserts TVA, that employees are aware, or should be aware that their jobs are conditional upon maintaining their security clearances. But, apparently the information has not been provided to them that their clearances are put at risk by the gathering of traffic tickets coupled with the personal impression that such violations do not constitute "convictions." TVA has had prior difficulty with its Form 9871 leading to charges of falsification. (TVA Brief, p.4). TVA ought to have addressed the problem with Form 9871 at the first opportunity. Instead, the form continues to produce problems such as this. Perhaps, a definition of the term "conviction" on the face of the form would eliminate the confusion.

Most certainly, proper administration and execution of the form as required of a TVA "Personnel or Employment Officer" would have substantially reduced the confusion. The bottom line of Form 9871 states: "I have discussed the information with the applicant/employee who has signed this form." (TVA Ex. 1, Form 9871). Admittedly, no one discussed with the grievant the information supplied, and no TVA official has signed the form. Discussion as required by the form of whatever information is supplied would probably have eliminated the confusion experienced here. Obviously, that is the main objective of requiring a TVA representative to discuss the information with the "applicant/employee." Had Thompson or someone on his staff been available to assist the grievant in completion of the form, to answer his questions, to alert him as to the nature of the information required, this mess

could probably have been avoided. Instead, a good and valuable long-term TVA employee has been subjected to unnecessary and unreasonable hardship.

As an arbitrator, I have not heard testimony from a more truthful and sincere grievant. Henderson readily acknowledged his personal and financial problems and candidly detailed his wife's battle with colon cancer which strained his pocketbook. For a reasonable person, there is no choice between paying for automobile insurance and your spouse's medical expenses; the medical treatment becomes imperative and the insurance optional. Personal priorities are rearranged to fit the circumstances. Henderson's priorities ill-suited Thompson and the SRB was "not interested -- did not want to hear" the details of his situation. As stated in dissent to Egan, *supra,* at 829, "[t]oday's result is not necessary to protect the Nation's secrets." Here, it was not necessary to deny the grievant his clearance to protect the Nation's secrets. TVA was unable to show any rational nexus to national security concerns of the grievant's excusable failure to report his traffic violations. Nor was TVA able to demonstrate any rational nexus to national security concerns of the objective reality of those traffic violations. Nor was TVA able to demonstrate any rational nexus to national security concerns of the matter of the bad check, restitution having been made. There is nothing on this record which impinges on the area of national security. Dealing with a non-safety related violation, gambling at work, the court in Otis stated that, "the worker's conduct may have threatened morality, but not safety." Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25 (2d.Cir.), *cert. denied*, 373 U.S. 949, 83 S.Ct. 1680, 10 L.Ed.2d 705 (1963). Here, it appears likewise that

Henderson's actions of driving without a valid driver's license and without state mandated insurance threatened Thompson's morality more so than any perceived threat to the Nation's safety. In a sense, Henderson was gambling that he would not be caught without his license and insurance. But, as explained by the Iowa court, ". . . it is hardly analogous to gambling with the public well-being by flouting a safety rule in a nuclear power plant." Iowa, *supra* at 1429.

According to the Egan Court, *supra* at 824, "a clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct . . . ." There is absolutely nothing in this record suggestive that the grievant "might compromise sensitive information." Indeed, nothing of Thompson's testimony was directed to prediction of the grievant's "possible future behavior" gauged by his "past conduct." Thompson's assessment of the grievant's situation went directly to grievant's character -- indeed, his moral integrity as evidenced by his illicit acts. What resulted of Thompson's assessment had nothing to do with national nuclear security. What resulted was character assassination, a brutal, demeaning and damaging attack upon the character of the grievant. What Thompson did here was to pass judgment upon the grievant's character; vis-a-vis, "he showed no remorse; he refused to see the error of his ways; he has not rehabilitated; he obstinantly refused to admit he was wrong (about the meaning of the word "conviction"); he drove his vehicle without a license,

without insurance." Therefore, he is a person of undesirable character, not trustworthy and unsuited for grant of a security clearance.

The grievant's future behavior is better predicted by his eleven (11) years of good and valuable service to TVA down in the trenches, all without a blemish on his record. Attesting to this observation is the testimony of Shift Operations Supervisor, Perry Lawrence, who states that the grievant worked for him and was an asset to the Sequoyah Nuclear Plant, that he is a good man with a good work record, and that he is very conscientious. Michael Lorek states that the grievant worked under him and was a good AUO. Bill Lagergren, Operations Support Manager, ran the operation and made the decision to terminate the grievant. He states that with a security clearance, the grievant would still be at Sequoyah, and that he assisted the grievant in becoming reemployed fifteen months later at TVA's (non-nuclear) Widow's Creek Plant. Even Thompson admits that Henderson's "3031s are ok."

In fact, for the period 10/27/88 to 10/26/89, Henderson's "total service" performance was rated at "better than fully adequate," as reported on 2/15/90. (JT. Ex. 2, No. 22). On his 3031 appears this statement: "Robert's knowledge and experience has been an asset to the continued safe and reliable operation and performance of the units at SQN." Moreover, by letter dated September 16, 1988, the grievant is commended by Operations Superintendant, J.D. Patrick "for being selected as a nominee for Operator of the Quarter . . . . You have been recognized by your peers and supervisors for the professional work accomplished the past quarter." (JT. Ex. 2, No. 11). And, upon hearing of these difficulties, several of

Henderson's peers submitted glowing testimonials to Henderson's work performance, esteem, competence and abilities, each in tribute and recognition thereof. (JT. Ex. 2, No. 21, Statements of Johnson, Reeves, Welch, and Siler). As an arbitrator, I have not heard from a grievant more universally respected by his peers and supervisors. The Egan Court states that "the grant of a clearance requires an affirmative act of discretion on the part of the granting official." Id. at 824. Here, the denial of grievant's clearance appears to be more an act of indiscretion.

As noted earlier, the Egan Court characterized "the grant or denial of security clearance" as a "judgment call," not susceptible to review by "an outside, nonexpert body." Egan, *supra*, at 819. But here, the judgment call bears no relation to matters of national security. The judgment call made by Thompson merely reflects his belief that the grievant willfully and intentionally falsified TVA Form 9871. On that basis, the grievant's clearance was denied. (JT. Ex. 2, No. 8). A finding on this record that the grievant did not so willfully and intentionally falsify the document does not require of your arbitrator, admittedly an "outside, nonexpert," an exercise into matters of national security. Such a finding need not approach matters of national security, but need merely approach, simply and directly, grievant's truthfulness and earnestness in answering the form as he did.

Thus, there is nothing on this record requiring your arbitrator to defer to national security interests as requested by TVA. The proscriptions articulated by the Egan and Iowa Courts are not found to apply herein. And, as recognized by the Court in Iowa, "labor awards directing the reinstatement of employees whose acts posed

no danger to public health or safety are usually upheld." Iowa, *supra*, at 1429. The act complained of herein posed no danger to public health or safety and bore no rational nexus to national security concerns.

SUMMARY OF MAJOR FINDINGS OF FACT

Based upon the foregoing analysis and discussion, your arbitrator finds that:

1. Matters of national security are not implicated by the facts concerning the grievant's termination.
2. The grievant's response to TVA Form 9871 does not constitute willful and intentional falsification of the document.
3. Denial of the grievant's security clearance was erroneously predicated upon allegations of falsification of TVA Form 9871.
4. Wrongful denial of the grievant's security clearance resulted in the grievant's improper termination, all without just and proper cause.

The following award issues forthwith.

AWARD

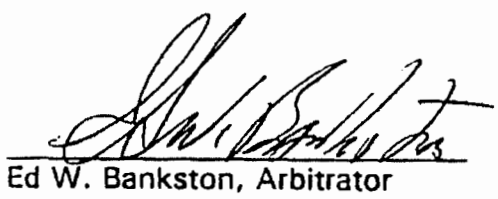
FOR THE REASONS SET FORTH AND DISCUSSED ABOVE, it is the AWARD of the undersigned arbitrator that the Grievance be sustained and that TVA remedy the Grievance in the following manner:

1. Robert L. Henderson is to be offered the option of reinstatement to his former employment at the Sequoyah Nuclear Plant.

2. He is to be made whole and otherwise returned to status quo with respect to any and all wages, benefits, seniority and other contractual entitlements as may have been lost or expended due to his wrongful termination on February 8, 1991. Such "make-whole" remedy includes complete restoration of any and all annual leave, sick leave and pension benefits existing at the time of the termination which may have been expended due to the grievant's wrongful termination.

3. TVA is allowed to offset the back pay award by any and all amounts earned by the grievant during his period of termination and by the amount of all unemployment payments received by the grievant during such period.

4. The arbitrator retains jurisdiction over this matter for purposes of interpretation and implementation of this Award.



Ed W. Bankston, Arbitrator

Dated this 23rd day
of September, 1993, at
New Orleans, Louisiana

Attachment B

Exelon Generation
4300 Winfield Road
Warrenville, IL 60555

www.exeloncorp.com

Exelon
Nuclear

COPY

[redacted]
CERTIFIED MAIL

[redacted]

Dear [redacted]

In accordance with Exelon's Access Authorization Program, your unescorted access to our nuclear stations has been denied because we have determined that you are not trustworthy and reliable.

You have a right to appeal this program violation. Appeals must be made in writing within ten (10) business days of receipt of this letter. Your written appeal must include specific details to provide a basis for your appeal and/or provide mitigating circumstances explaining the violation.

If you have any questions or need additional information, please contact Mary Fran Yerkes of my staff at 630-657-2912.

Sincerely,

Susan C. Techau
Access Authorization/Fitness For Duty
Program Manager

SCT/MFY/law

cc: File

Exelon Generation
4300 Winfield Road
Warrenville, IL 60555

www.exeloncorp.com

Exelon.
Nuclear

[redacted]
CERTIFIED MAIL

[redacted]

Dear [redacted]

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If you have any questions or need additional information, please contact Mary Fran Yerkes of my staff at 630-657-2912.

Sincerely,

Susan C. Techau
Access Authorization/Fitness For Duty
Program Manager

SCT/MF/law

cc: File

UNESCORTED ACCESS DENIAL NOTIFICATION

Name: [redacted] SSN: [redacted]

Company: FENOC-DAVIS BESSE Date: [redacted]

This letter is to inform you that you do not meet the minimum requirements for unescorted or escorted access at any First Energy Nuclear Operating Company (FENOC) facility due to the reason(s) identified below. Your name has been added to the FENOC Ineligible Access List and the Personnel Access Data System (PADS). As such, you are not permitted on FENOC property without authorization from FENOC Access Authorization.

You may appeal this decision within three (3) business days of receipt of this notification. Your written request for appeal and any additional/relevant documentation you feel will have an impact on your current status should be faxed or mailed to:

Davis-Besse Nuclear Power Station
Supervisor, Nuclear Access
Mail Stop 5125
5501 North State Route 2
Oak Harbor, Ohio 43449
Fax Number 419-249-2448

The above named individual is denied unescorted and escorted access for the following reason(s):

- [X] 10CFR73.56 Personnel Access Authorization
  - [ ] Background Information
  - [ ] Psychological Assessment
  - [X] Willful Omission/Falsification
- [ ] 10CFR73.57 Requirements for Criminal History
- [ ] 10CFR26 Fitness For Duty Program

Additional Information _____

_____

_____

_____

_____

Individual Acknowledgement _____ Date _____

Company/Contractor Representative _____ Date _____

FENOC Access Mark Nelson Date [redacted]

[X] MAILED (Individual Not Available) Brenda Swoboda Date [redacted]

NEXTera ENERGY POINT BEACH

[redacted]

"Personal and Confidential"

[redacted]

Dear [redacted]

FPL/NextEra has reviewed information generated from the access authorization process. As of March 22, 2010, your access to FPL/NextEra nuclear facilities has been denied.

Information received from the investigation indicates that you do not meet the criteria necessary for FPL/NextEra nuclear access authorization. This denial is based upon the results of the recent Point Beach investigation and the determination that you do not meet trustworthiness and reliability requirements.

Please be advised that you are required by federal regulations to report this denial of access to all nuclear facilities in which you apply for unescorted access. Failure to do so may result in further actions being taken as defined in 10 CFR 50.5.

Enclosed is the notification form and instructions on how to appeal if you so choose. The 10-day time limit for any appeal begins upon your receipt of this letter. Please read the enclosed materials, sign and date the notification form at the bottom and return the form to:

David J. Bonthron - JNS/JB
FPL - Nuclear Division
P.O. Box 14000
Juno Beach, FL. 33408-0420

If you have any questions regarding this please call me at the below listed number.

Sincerely,

Donald C. Popp

Donald C. Popp
Access/FFD Supervisor
(920) 755-7756

Attachment C

EXELON SECURITY
APPEAL PROCESS

Case: [redacted]

Appeal Reviewer: Keith Jury

Appeal Reviewer: Keith L. Jury
Signature

Date Review: [redacted]

Following is the decision made based on the information that was presented.

X Affirm the Denial

_____ Eligible to reapply for Unescorted Access
(Evidence of rehabilitation and enough time has passed to indicate this type of behavior will not reoccur.)

_____ Additional Information Requested

_____ Reverse the Denial of Unescorted Access

Comments:_____

Please return this packet of information to Mary Fran Yerkes, Exelon Nuclear Security, First Fluor at Cantera.

LUT0142

[redacted]

[redacted]

[redacted]

On [redacted], the FirstEnergy Nuclear Operating Company (FENOC) Review Board (FRB) met to discuss your appeal request.

The FRB concurred with the decision to deny you unescorted access to FENOC plants.

As a result, the decision to deny you unescorted access is final and will not be changed.

The decision to deny you site and unescorted access does not preclude you from pursuing unescorted access to FENOC plants, if the opportunity presents itself in the future.

Sincerely,

Michael Fisher
Davis-Besse Access Authorization

Tennessee Valley Authority, Nuclear Access Services, 1101 Market Street, Chattanooga, Tennessee 37402-2801

[redacted]

[redacted]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Dear [redacted]

This letter constitutes Tennessee Valley Authority's (TVA) final decision on your unescorted access authorization (UAA) clearance. The Independent Denial Review (IDR) decision is to uphold the denial of your clearance. This is the final decision of the IDR and there is no further appeal within TVA. You will be eligible for unescorted access reconsideration after [redacted].

Sincerely,

Mark P. Findlay, PhD
Director, Nuclear Security

Attachment D

AFL-CIO

SYSTEM COUNCIL U-4 IBEW

REPRESENTING LOCAL UNIONS: 359, 622, 627, 641, 759, 820, 1042, 1066, 1191, 1263, 1908

Phone: (561) 624-2700 Fax: (561) 624-5072 • 3944 Florida Blvd., Palm Beach Gardens, FL 33410

April 12, 2013

B. Callaghan, Director
Labor Relations Department
Florida Power and Light Company
P. O. Box 14000
Juno Beach, Florida 33408-0420

Dear Brendan:

I am writing on behalf of System Council U-4, to request certain information that the System Council needs to fulfill its duties as a collective bargaining representative. This information concerns the denial or revocation of unescorted access to your Florida Power and Light nuclear facilities and appeals from those denials or revocations.

The System Council requests the following information:

1. The number of employees in the bargaining unit represented by Local Union 359, 627 and the System Council whose access authorization has been revoked or denied, either permanently or temporarily, from January 1, 2004 to the present;

2. The number of those employees who have used the "impartial and independent internal management review," mandated by 10 C.F.R. § 73.56(l), to appeal the denial or revocation of their access authorization;

3. The number of those appeals that resulted in a reversal of the original decision to revoke or deny unescorted access;

4. The names of the bargaining unit employees whose appeals resulted in those reversals;

5. The number of those appeals that resulted in an affirmance of the original decision to deny or revoke unescorted access;

6. If any appeals resulted in a modification, rather than a reversal or affirmance, of the original decision, the number of those appeals, the names of the employees who filed those appeals and a description of the manner in which the original decisions were modified; and

7. Copies of all written decisions resulting from the appeals described in our requests 2 through 6.

The System Council needs this information for a number of reasons. I will describe one, but there are others. When a bargaining unit employee's access is revoked or denied, the Local Unions must decide whether to file a grievance over that revocation or denial and, if the grievance is not resolved, the System Council votes whether to seek arbitration. That decision may turn on the effectiveness, reliability and fairness of the "impartial and independent management review" available to the employee. The information and documents requested in this letter will assist the Local Unions and the System Council in making that determination.

I would appreciate receiving the requested information and documents within two weeks from the receipt of this letter. If you would like to discuss any issues relating to this request, please contact me so that we can arrange to meet and discuss them.

Sincerely,

Gary J. Aleknavich

Gary J. Aleknavich
Business Manager

GJA/ct
File:

Florida Power & Light Company, P.O. Box 14000, 700 Universe Blvd., Juno Beach, FL 33408-0420

FPL

May 8, 2013

Gary Aleknavich
Business Manager
System Council U-4, IBEW
3944 Florida Blvd.
Suite 202
Palm Beach Gardens, FL 33410

Dear Mr. Aleknavich,

In your request for information dated April 12, 2013 on the matter of the "...denial or revocation of unescorted access....", you state that the Union needs this information in order to decide whether to file a grievance, and if that grievance goes unresolved, whether or not to pursue arbitration. As the Union has filed suit to compel arbitration over the denial of access to Mr. Kohl, you are well aware of the Company's position that decisions regarding the granting or denial of unescorted access to our nuclear facilities are not subject to the grievance/arbitration provisions of our collective bargaining agreement. Consistent with that position, the Company does not consider the requested information to be relevant or necessary.

However, in your letter you state you need this information for a "....number of reasons". While we are not aware of any reason that would make this information relevant or necessary, without knowing what those other reasons are, we are unable to evaluate their impact on our obligation to provide the information you requested.

If you wish to provide those reasons, we will evaluate them against the legal standards that guide us in determining when and what information we are obligated to provide you.

Very truly yours,

Richard D. Curtis
for Brendan Callaghan, Director
Corporate Safety and Labor Relations