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April 21, 2016

Via Electronic and First Class Mail

Chairman Stephen G. Burns
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001
Chairman@nrc.gov

Re: SECY-15-0149, ML16063A268
Role of Third Party Arbitrators in Access Authorization & Fitness-for-Duty Determination Reviews at Nuclear Power Plants

Dear Chairman Burns:

Our law firm represents Local 15, International Brotherhood of Electrical Workers, AFL-CIO. Local 15 is located in Downers Grove, Illinois and represents approximately 1,700 members employed by Exelon Generation at its five Illinois nuclear power plants: Dresden, LaSalle, Byron, Quad Cities and Braidwood. Our firm and/or Local 15 has been involved, directly or indirectly, in a number of court cases involving arbitrations and unescorted access, including the following: *Exelon Generation Company v. Local 15, International Brotherhood of Electrical Workers, AFL-CIO*, 2008 U.S. Dist. LEXIS 75099 (N.D. Ill. Sept. 29, 2008) ("Exelon I"); *Exelon Generation Co. v. Local 15, IBEW*, 676 F.3d 566 (7th Cir. 2012) ("Exelon II"); and *Exelon Generation Co. v. Local 15, IBEW*, 2015 U.S. Dist. LEXIS 136535 (N.D. Ill. October 6, 2015) ("Exelon III"). We write to you today to express our views in opposition to the Staff's recommendation that the Commission engage in expedited rule-making or any rule making to address the role of third party arbitrators in access authorization and Fitness-for-Duty (FFD) determination reviews at nuclear power plants. As such, this letter constitutes Local 15's comments in response to SECY-15-0149. Local 15 believes that rulemaking on this issue is unnecessary, unsupported by the data, and contrary to public policy encouraging collective bargaining parties to arbitrate disputes arising within the employment relationship.

I. Introduction.

The union recognizes, understands and agrees that the Licensees and the NRC have the obligation to ensure that nuclear plant employees are reliable, trustworthy and fit for duty when

they report to work so they can safely perform their duties. Local 15 believes it should be and is a partner in meeting this obligation and doing so is in the best interest of its members as a whole in addition to the public. That is not the issue here, however. The first issue is whether removing the employees' right to an impartial third party arbitrator to determine whether a denial of access and, therefore, loss of employment is actually necessary to meet these obligations. A second corollary issue is whether other, less chilling, means already exist for ensuring that an arbitrator's decision does not result in restoring unescorted access to an employee who is truly untrustworthy, unreliable and unfit to work at a nuclear power plant. The answer to the first question is "no" and the answer to the second question is "yes" as explained in detail below.

II. The Data in SECY-15-0149 does not support the conclusion that the use of a third party arbitrator has ever resulted in the reinstatement of an employee who was a security risk; and, thus, rule-making is not warranted.

SECY-15-0149 recites the background of the "Access Authorization Program for Nuclear Power Plants" (56 FR 18997) on page 2, which shows the NRC has accepted the concept of arbitral review since at least 1991. Conspicuously absent from that document, however, are any examples of third party arbitrators having issued decisions that adversely affected the safety or security of any nuclear power plant: SECY-15-0149 attempts to correct a problem that does not exist. The Staff states in the opening of its discussion in SECY-15-0149 at page 6 the premise of its recommendation:

> An arbitrator's decision requiring the reinstatement of an individual that the licensee has previously determined is not trustworthy and reliable presents a safety concern and a security vulnerability and puts the licensee in violation of NRC regulatory requirements and potentially subject to enforcement action.

That premise, however, fails to recognize that after a full and fair hearing and an arbitrator's decision, the Licensee could well decide that it had erred in its judgment that the employee was not trustworthy and reliable and, thus, decide to reinstate the employee. If the Licensee concludes that its original decision was correct, then it has the option, as discussed in Section IV of this letter, to ask a court to vacate the arbitrator's award rather than reinstate the employee. This option certainly provides the necessary safeguard for ensuring compliance with NRC regulations and the Licensees' obligations under them.

Indeed, the only[1] case which Local 15 is aware of where the Licensee actually reinstated an employee pursuant to an arbitrator's award is not cited in SECY-15-0149: that was Arbitrator

[1] The staff does mention two cases in support of its recommendation in SECY-15-0149, but it does not appear that either of them resulted in reinstatement of the employee. As to the arbitration case "within the Eighth Circuit" mentioned at SECY-15-0149, page 6, the Staff does not state that the Licensee actually reinstated the employee, but just that an arbitrator ordered reinstatement. As with the other cases in SECY-15-0149, the Staff does not specifically identify this case and so Local 15 does not know the facts and cannot address them as it was not a Local

Rabin's December 5, 2015 award discussed in Section III of this letter. As stated before, one must assume that neither the Licensee nor the staff would have allowed the employee's reinstatement, in that or other cases, if either had concluded, after the hearing and reviewing the arbitrator's award, that the employee was untrustworthy, unreliable or unfit for duty and, therefore, presented a security risk. In fact, as discussed in the next section, this case is an example of why a third party arbitrator is sometimes necessary to correct an injustice.

The old adage that 'if it isn't broke, don't fix it,' is applicable here. This is especially true when the proposed "fix" adversely affects certain employee rights established long ago by the National Labor Relations Act (NLRA)[2] to protect workers' rights under collective bargaining agreements (CBA). Unions, including Local 15, have long negotiated provisions into their CBAs that protect employees from unjust discharge and provide a mechanism for dispute resolution including arbitration before an impartial third party arbitrator to resolve disputes the parties are unable to resolve on their own.[3] The purpose of such provisions is fundamental fairness. They do not protect employees who are or who engage in activities that pose a threat to the safety of nuclear power plants. Local 15's understanding of and agreement with this is clearly demonstrated by the following statistics of Exelon Generation terminations from 2005 through March 17, 2016:

Total Terminations	38
Total Terminations Arbitrated	7 (18%)
Terminations Involving Access Denial	26
Terminations Involving Access Denial Arbitrated	4 (15%)

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15 case. If, in the case cited, the Licensee reinstated the employee as ordered, one could reasonably assume that the facts exposed during the hearing and the arbitrator's decision convinced the Licensee that it had erred in its initial determination that the employee was not trustworthy, reliable or fit for duty or it would not have done so and/or the NRC would have intervened.

The other case mentioned in the first paragraph under the "Discussion" section of SECY-15-0149 where the Staff says "The licensee did, in fact, reinstate that individual and removed all derogatory information" from PADS and then "the individual did not elect to return" is not quite accurate. As discussed in more detail in Section III of this letter, that case involved Arbitrator Armendariz's February 8, 2014 Award. The Licensee, in fact, never reinstated the employee, but instead offered him a monetary settlement and he accepted it. The Licensee did not attempt to vacate Arbitrator Armendariz's award as in violation of NRC regulations and/or public policy.

[2] The National Labor Relations Act, 29 U.S.C. §§ 151-169.

[3]Further, the NLRA requires employers to bargain concerning changes to the CBA and regarding how to comply with federal laws that affect the employees' terms and conditions of employment. 29 U.S.C. §158(a)(5) & (d).

Access Denials Overturned Through Arbitration	2
Employee Returned to Work with Restored Access	1

In summary, since 2005 and through March 17, 2016, Exelon Generation has terminated the nuclear access and employment of 26 bargaining unit employees. Local 15 arbitrated four of those 26 cases before an impartial arbitrator. The arbitrator overturned 2 of those terminations, but only 1 of those returned to work with the other one reaching a monetary settlement without reinstatement.[4]

The above is hardly a history that requires fixing by eliminating the unions' long existing bargained-for right to present cases to an impartial arbitrator when they believe the Licensees have acted unjustly or unfairly. The Licensees must have reasonable accountability: an impartial arbitrator is necessary to right the company's mistakes and errors of judgment that result in employees losing their careers and families' livelihood. As discussed further below, the company is not without recourse if it believes that the Arbitrator's award will require it to reinstate an employee that is not trustworthy, reliable or fit for duty in violation of NRC regulations. Yet, any employee who was treated unjustly will not have a meaningful remedy if the recommendation set forth in SECY-15-0149 is adopted and rule-making results in the abolition of impartial third party arbitration.

III. Removing employees' right to an impartial arbitrator to determine whether an access denial is warranted is not necessary for the Licensee and the NRC to ensure that nuclear plant employees are reliable, trustworthy and fit to safely perform their work.

Recent arbitration cases involving Local 15 members demonstrate that the status quo, allowing for arbitral review, is working well and does not present a safety concern or security vulnerability. If anything, the cases demonstrate that arbitral review is a necessary and helpful back-stop to the Licensee's decision-making process. As the statistics in Section II above show, arbitration is not overused. The Staff has not pointed to a single case where complying with an arbitrator's ruling actually endangered the safety or security of a nuclear power plant, its employees, or the public. At a minimum, such confirmed data should be required before the NRC begins the resource-intensive process of rule-making especially where, as here, the rule-making seeks to deprive the employees of their contractual due process rights guaranteed by the CBA and the NLRA.

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[4] Although Local 15 does not have the statistics for other unions, given Local 15 has been in the forefront of many of the court and arbitration cases cited in SECY-15-0149 and is one of the largest IBEW Locals representing nuclear power plant employees, it is unlikely that other unions' statistics will be dissimilar to Local 15's. In any event, before the Commission concludes that there is a problem that needs fixing, it should collect this same historical data from all licensees and unions.

One recent case arbitrated by Local 15 is referenced in SECY-15-0149 on page 6. In that case, Arbitrator Armendariz[5] found that Exelon's security department made multiple errors in handling an employee's denial of access. The Licensee failed to inform the employee of the basis for his denial of access, failed to advise the employee that he had a right to a review and respond to all the evidence in the security file on which the access determination was based, failed to advise the employee of the timeline for processing an appeal, and failed to advise the employee that he could have union representation and could meet with the program manager. In addition, the employee was not given the review criteria on which the Licensee's decision was based, complicating his ability to intelligently respond to the Licensee's decision. The Arbitrator found that the Licensee improperly denied the employee's unauthorized access[6] and ordered his reinstatement.[7] It is the Union's understanding that the NRC later reviewed the matter during a follow-up investigation and found that the Licensee had made a good faith effort to resolve the matter prior to arbitration. The NRC did not identify any performance deficiency by the Licensee, and the "staff chose to exercise its enforcement discretion in this particular instance." SECY-15-0149 at 7.

In a more recent case decided in December, 2015, Arbitrator Rabin found other problems in Exelon's unescorted access review. The Arbitrator noted that the Security Department did not interview the employee (the grievant) prior to making the decision to deny her access, but instead relied on facts gathered by plant management. The Security Department in part based its denial on the mistaken belief that the employee had made several inconsistent statements during an interview with management; but, a Human Resources representative conceded at the arbitration hearing that the employee had, in fact, given explanations for her conduct. The Security Department also made critical incorrect assumptions about the procedures that many employees, in addition to the grievant, followed in performing their work. Based on this evidence, the Arbitrator ordered the grievant's access restored. Exelon complied; and, to date, the Union is not

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[5] The Seventh Circuit case *Exelon Generation Co. v. Local 15, IBEW*, 676 F.3d 566 (7th Cir. 2012), was generated by two pending arbitrations. At the time the Seventh Circuit decided that case, neither arbitrator (Arbitrators Rabin or Armendariz) had decided the issue with respect to unescorted access. After the Seventh Circuit ruled, the parties completed the arbitrations before Arbitrators Rabin and Armendariz. Subsequently, on November 25, 2013, Arbitrator Rabin denied reinstatement of access and employment to the employee in one case; and on February 8, 2014, Arbitrator Armendariz ordered the other employee reinstated after finding that his access was improperly denied.

[6] That the employee Arbitrator Armendariz ordered reinstated was in fact trustworthy and reliable is confirmed by MidwestGen's granting him security clearance after an extensive background check. After termination and before the arbitrator ruled, the employee applied and was awarded a job at MidwestGen. MidwestGen is an operator of fossil fuel plants. That background check was at least as, if not more, stringent than that at Exelon and he passed it in spite of the fact that PADS still contained the entries regarding Exelon's termination of him.

[7] The Licensee, the Union, and the employee subsequently entered into a settlement agreement in which the employee accepted a monetary settlement in lieu of reinstatement.

aware of any issues with the employee's return to work.[8] If Exelon really thought the employee was a security risk, then it would not have allowed her to return and instead would have sought a court order vacating the award.

The cases which Local 15 has arbitrated show the benefit of arbitral review without a corresponding detriment to the safety and security of the nuclear power plants. As the statistics indicate, for the most part, the Union does not contest the Licensee's access decisions. However, in a few instances, there have been serious flaws in the Licensee's judgment, review process and decision making which unfortunately led to incorrect denial of access decisions that arbitrators have to correct. Arbitral review has shown that employees sometimes lack basic information about why their access was revoked. In addition, arbitral review gives employees an opportunity to confront decision-makers, to question them, and to fully present their defenses. This is simply fundamental fairness. It ultimately benefits the process; it respects the rights of employees; and it engenders overall support for the NRC and access decisions. Moreover, there is no evidence from these cases that arbitral review has threatened safety or security.

Some may argue that internal management review pursuant to 10 CFR § 73.56(l), provides an adequate review process, but as is apparent from the above cases, it does not.[9] Furthermore, these procedures afford none of the important due process protections, including burden of proof, available pursuant to standard CBA grievance arbitration provisions. For example, grievance arbitration would require the Licensee to deal with the employee's chosen representative (the union), would require the Licensee to provide all information relevant to the adverse action, and would require a face-to-face hearing on the matter that allows for confrontation and cross-examination of witnesses. 10 CFR § 73.56(l) provides for none of these protections which have proven essential in flushing out the facts in many cases where individual employees' access rights have been adversely affected.

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[8] As further assurances of the employee's trustworthiness and reliability, one should look at her employment prior to her employment by the Licensee: She was a military police officer, a Rockford police officer and a nuclear security officer before employed in the job from which she was terminated.

[9] 10 CFR § 73.56(l) requires licensees to maintain certain review procedures for individuals who are denied unescorted access, unescorted access authorization, or who are unfavorably terminated. Such procedures must allow for notification to the individual of the adverse decision and the grounds for the decision and must allow the individual to provide "additional relevant information." Licensee procedures must provide an opportunity for an "objective review of the information upon which the denial or unfavorable termination of unescorted access or unescorted access authorization was based" and for an "impartial and independent internal management review."

IV. As a Federal District Court recently confirmed, if, after an arbitration hearing and decision, the Licensee believes that compliance with an arbitrator's award would put it in violation of the NRC regulations, it could file an action in court to vacate the award on the basis that it was in violation of the NRC regulations and/or public policy.

Rule-making to prohibit neutral arbitrators from deciding issues with respect to access is clearly not necessary in order to protect the Licensee from being required to reinstate an employee who is untrustworthy, unreliable or unfit for duty. If an arbitrator renders such an award, the Licensee has a legal remedy without the NRC prohibiting all third party arbitrations-that is, it may file an action in the Federal District Court to vacate the award. Certainly, the NRC could not reasonably argue that the Federal Courts are unqualified to interpret NRC regulations. In fact, as the cases cited herein and in SECY-15-0149 show, the Licensees have often used the Federal Courts in an effort to enjoin arbitrations before they occur. For them instead to wait to engage the court until an arbitration hearing and all the facts are in the record under oath and the arbitrator makes a decision would not endanger the safety and security of the nuclear plants. [10] Indeed, a hearing might, as was the case of an employee a Licensee recently reinstated pursuant to Arbitrator Rabin's December 2015 Award, demonstrate to the Licensee and the NRC that the employee is actually not a risk and the Licensee's decision was in error. On the other hand, the employees will have no meaningful remedy for correcting unjustified Licensee denials of access and, therefore, loss of employment if third party arbitrations are prohibited.

In a recent case regarding a Licensee imposing a total alcohol abstinence requirement as a condition of continued access, a federal district court made the Licensee's right to seek vacation of an arbitration award very clear. Apparently, this case is the subject of the discussion in SECY-15-0149 at pages 6 and 10. With respect to that case, the Staff raised concerns about arbitration over SAE and MRO recommendations in the context of 10 CFR Part 26 FFD determinations. Local 15 believes the case to which Staff is referring is *Exelon Generation Co. v. Local 15, IBEW*, 2015 U.S. Dist. LEXIS 136535 (N.D. Ill. October 6, 2015). Apparently, someone has provided the Staff with incorrect information concerning that case, however, because the Staff's description of it is inaccurate and incomplete.[11] The Staff's expressed concerns about arbitration in the FFD context are unsupported by the actual facts of that case.

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[10] An action to vacate an arbitration award pursuant to the Federal Arbitration Act is a summary proceeding and is modeled on federal motion practice. *See In re Arbitration Between TransChemical Ltd. and China Nat. Machinery Import & Export Corp.*, 978 F.Supp. 266, 303 (S.D. Tex. 1997), aff'd, 161 F.3d 314 (5th Cir. 1998). Thus, in the unlikely event a Licensee were required to take such action, it would not be a drawn-out, lengthy process of litigation.

[11] As this example shows, it might be helpful if the NRC would proactively invite input from the unions with respect to the facts of the cases with which they are involved.

Contrary to Staff characterizations, Local 15 and Exelon never actually arbitrated the grievance Local 15 filed alleging that Exelon did not have just cause to impose total lifetime alcohol abstinence as a condition of maintaining unescorted access for an employee.[12] Rather, as the grievance approached arbitration, Exelon filed a declaratory judgment action in federal district court seeking a declaration that Exelon's imposition of this condition was not arbitrable. Exelon's action caused the arbitrator to postpone the hearing on the grievance until after the court had rendered a decision. Although Exelon argued that what Local 15 sought was a "second determination of fitness" prohibited by 10 CFR § 26.189(d), that was not correct. Local 15 argued and the court ultimately agreed that what Local 15 sought was not a remedy which was in conflict with NRC regulations and that the grievance was, in fact, arbitrable.

As to the alleged conflict which the Licensee argued existed between what the Union wanted to arbitrate and NRC regulations, the Court found as follows:

> Exelon also contends that submitting this issue to arbitration will put it in the impossible position of having to violate federal law in order to comply with an arbitration award. As Local 15 argues, however, it is premature and speculative to seek declaratory judgment to avoid that possible outcome when it is also entirely possible that an arbitral award might not force Exelon to violate NRC regulations at all. If an arbitrator determines Exelon had just cause to adopt the SAE's recommendation and impose the abstinence conditions, Exelon will not be ordered to take any action that contravenes federal law. And if an arbitrator finds Exelon's decision unsupported by just cause, the arbitrator might order Exelon to give the SAE more information and direct the SAE to reconsider her recommendation, an arbitral award that would be perfectly acceptable under the applicable NRC regulation. *See* 10 C.F.R. § 26.189(d) ("After the initial determination of fitness has been made, the professional may modify his or her evaluation and recommendations based on new or additional information from other sources including, but not limited to, the subject individual, another licensee or entity, or staff of an education or treatment program."). **More importantly, even if the result of arbitration is an award that Exelon thinks is violative of federal regulations, it will have a way out: it can revive its suit and ask the Court to vacate the arbitration award as contrary to public policy.** *See Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 716–17 (7th Cir. 2013) ("A violation of a statute or some other positive law is the clearest example of a violation of public policy.").

Exelon Generation Co. v. Local 15, IBEW, 2015 U.S. Dist. LEXIS 136535 at *25-27 (N.D. Ill. October 6, 2015) (copy attached). Emphasis added. *See also, Int'l Ass'n of Machinists & Aerospace Workers, Lodge No. 1777 v. Fansteel, Inc.*, 900 F.2d 1005, 1009 (7th Cir. 1990).

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[12] That employee had held unescorted access for 34 years, had never tested positive for alcohol at work and had no performance or attendance problems relating to alcohol.

After the Court's decision was issued and on the eve of arbitration, the parties reached a settlement of that grievance (and several others concerning similar unjust impositions of total abstinence conditions) which included (among other things) an agreement by the Company to provide corrected[13] and additional accurate information and instructions to the counselors who had recommended total abstinence such that they could re-evaluate their recommendations in light of this new information and with instructions consistent with NRC regulations. This is yet another example of the manner in which irregularities in the Licensee's handling of access and FFD matters were uncovered through the grievance arbitration process and remedied in a manner that does not conflict with NRC regulations and did not place Exelon's license in jeopardy. Had Exelon not interposed its declaratory judgment action, the parties' contractually agreed-upon arbitral process would have been an expedient and effective vehicle for achieving resolution of the dispute.

Without the option of arbitration, the Licensee would have had no impetus to settle as it did not for over two years and until the Court ordered arbitration. It was only then, on the eve of arbitration, that the parties reached a fair settlement similar to what the union had offered over a year before. The settlement agreement is compliant with NRC Regulations and gives the employees a chance to be fairly evaluated.

V. Conclusion.

In summary, Licensees' agents sometimes make mistakes as demonstrated by the cases discussed above. These errors in judgment, facts, procedure and/or investigation sometimes result in the Licensees' employees being unjustly denied access which results in the termination of their employment. The Commission should consider this obvious fact and the devastating consequences of such mistakes on the employee and the employee's family when deciding whether the actual facts and data justify the Commission entering into rule-making to prohibit such cases from being heard by a third party impartial arbitrator.

Given the lack of any data showing that having the option of an impartial third party arbitrator has ever resulted in the Licensee being required to reinstate an employee who is truly untrustworthy, unreliable and/or unfit safely to perform his duties and given the fact that if an arbitrator ordered a Licensee to reinstate such an employee, the Licensee would have a speedy remedy in court, rule-making is not justified in this case. To do so, would eliminate the wronged employees' only meaningful avenue of redress and would interfere with the employees' rights under the CBA and the NLRA without justification by a compelling governmental interest.

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[13] For example, the CAC's evaluation of one of the grievants showed that he believed the employee had a positive alcohol test at work when he did not.

Some Licensees and Unions have agreed to broad arbitration clauses allowing for arbitral review of access decisions and conditions placed on access. This is consistent with existing NRC regulations and federal labor law policy. By agreeing to such broad arbitration clauses the Licensees have, long ago, acknowledged that arbitral review suits their need to comply with NRC requirements and to ensure that employees are trustworthy, reliable and fit for duty and history has proven them correct. The NRC should not deny Licensees and unions the ability to bargain and mutually agree to such an important term of employment based on concerns about safety and security that are to date unsupported and contradicted by actual practice.

Local 15 has the facts and data on which this comment is based which it would be happy to share with the Commission.

Local 15 respectfully requests an in person meeting with you to discuss the issues involved in SECY-15-0149 before you make a decision adverse to Local 15's and its members interest. Thank you for your consideration of this serious matter.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EXELON GENERATION COMPANY, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 15 C 309**
	)	
LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Local 15, International Brotherhood of Electrical Workers, AFL-CIO, filed grievances against Exelon Generation Company, LLC on behalf of six employees for imposing upon them a requirement of complete abstinence from alcohol. Exelon imposed this requirement upon each of the employees pursuant to the recommendations of its Substance Abuse Expert in her role within its Fitness For Duty program, which is mandated by Nuclear Regulatory Commision (NRC) regulations.

Exelon has filed suit against Local 15 seeking a declaratory judgment that the union cannot challenge fitness-for-duty determinations by filing grievances or seeking arbitration under the dispute resolution procedure established by the parties' collective bargaining agreement (CBA). Local 15 responds that the CBA requires arbitration of the dispute and that any disagreement about the dispute's arbitrability must itself be arbitrated. Both parties have moved for summary judgment. For the reasons stated

below, the Court grants Local 15's motion and denies Exelon's motion.[1]

Background

Exelon is in the business of power generation and supply. It owns and operates nuclear power plants in Illinois, Pennsylvania, and New Jersey. It is licensed to conduct nuclear power generation by the NRC and is subject to the agency's regulations. One such set of regulations requires all commercial nuclear power plant licensees to maintain an approved Fitness For Duty (FFD) program. This program must "provide reasonable assurance that individuals are trustworthy and reliable as demonstrated by the avoidance of substance abuse." 10 C.F.R. § 26.23(a). It must also "provide reasonable assurance that individuals are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties." *Id.* § 26.23(b).

Like other nuclear power plant operators, Exelon requires employees working in its nuclear power generating facilities to acquire unescorted access authorization as a condition of their employment. NRC regulations require that when there are indications that an individual with unescorted access "may be in violation of the licensee's or other entity's FFD policy or is otherwise unable to safely and competently perform his or her duties," that individual must undergo an evaluation called a "determination of fitness." *Id.* § 26.189(a). This determination of fitness must be carried out by a qualified Substance Abuse Expert (SAE) when an employee's violation of the FFD program

[1] Local 15 also moved, pursuant to Federal Rule of Civil Procedure 56(d), for discovery to respond to Exelon's motion for summary judgment. Because the Court grants Local 15's motion for summary judgment, it need not decide Local 15's discovery motion.

involves substance abuse. *Id.* §§ 26.187, 26.189(a)(1). NRC regulations provide that a qualified SAE "shall evaluate individuals who have violated the substance abuse provisions of an FFD policy and make recommendations concerning education, treatment, return to duty, followup drug and alcohol testing, and aftercare." *Id.* § 26.187(g). An SAE has the obligation "to protect public health and safety and the common defense and security by professionally evaluating the individual and recommending appropriate education/treatment, follow-up tests, and aftercare." *Id.* In order to "ensure consistency and continuity in the treatment of an individual who may be undergoing treatment, aftercare, and followup testing," 70 Fed. Reg. No. 165, 50442, 50575 (Aug. 25, 2005), NRC regulations strictly limit who may review or revise an SAE's evaluation:

> Neither the individual nor licensees and other entities may seek a second determination of fitness if a determination of fitness under this part has already been performed by a qualified professional employed by or under contract to the licensee or other entity. After the initial determination of fitness has been made, the professional may modify his or her evaluation and recommendations based on new or additional information from other sources including, but not limited to, the subject individual, another licensee or entity, or staff of an education or treatment program. Unless the professional who made the initial determination of fitness is no longer employed by or under contract to the licensee or other entity, only that professional is authorized to modify the evaluation and recommendations.

10 C.F.R. § 26.189(d).

Exelon is required to submit to NRC audit at least once every twenty-four months. The NRC last audited Exelon's FFD program in October 2014 and approved it as compliant with the agency's regulations. Among other things, NRC inspectors verified that Exelon's SAE was qualified and that the company's FFD program met the requirements of 10 C.F.R. § 26.

Pursuant to its approved program, Exelon contracts with Triangle Occupational Medicine and its president, Dr. Barbara Pohlman, to provide medical review officer services. Dr. Pohlman is a licensed physician with knowledge of substance abuse disorders and training in substance abuse treatment. Although she serves as Exelon's Medical Review Officer and SAE, Dr. Pohlman and her staff often receive treatment recommendations from staff members of Optum Health, which administers Exelon's employee assistance program. Exelon's written FFD policy provides that Optum staff may be called upon to collect specimens for drug and alcohol testing, perform behavioral observation, and provide input for determinations of fitness. Optum staff is responsible for providing confidential assessment, short-term counseling, referral services, and treatment monitoring for FFD related issues.

After conducting an assessment, Optum submits a report to Dr. Pohlman. Optum's reports are modeled on sample reports that Optum provides to its staff, which instruct evaluators to communicate the issue or problem the employee presents and the employee's history of substance use. Optum representatives are instructed to provide a treatment recommendation, a diagnosis and prognosis, and a return-to-work recommendation. The sample reports also ask the Optum representative to provide a "professional determination that the employee is/is not 'trustworthy and reliable' to perform duties and be considered to maintain nuclear access to protected areas" and to make a "clinical recommendation regarding whether or not the employee should maintain a lifetime of abstinence from alcohol and/or addictive substances." The sample form further instructs the Optum representative: "Please use the following wording: 'Due to the client's history and clinical presentation, complete abstinence from

the use of alcohol and/or any other intoxicating substances at all times and under all circumstances, including during working hours and non-working hours, weekends, and holidays, is recommended.'" Dr. Pohlman makes fitness determinations in light of the recommendations she receives from Optum staff.

In 2012 and 2013, numerous Exelon employees were evaluated by Optum staff, who submitted their findings and recommendations to Dr. Pohlman. Dr. Pohlman reviewed and adopted those findings and recommendations in the course of making determinations of fitness for those employees. The employees then received letters from Susan Techau, Exelon's Access Authorization Fitness for Duty Program Manager. The letters informed the employees that they were each required to totally abstain from alcohol as a condition of continued unescorted access to Exelon's nuclear power plants.

Local 15 is a labor union that represents approximately 1,600 hourly employees at Exelon's nuclear generating facilities in Illinois. Exelon and Local 15 are parties to a collective bargaining agreement, and they have engaged in collective bargaining for more than fifty years. The CBA contains an arbitration clause. Article VIII, paragraph 5, of the CBA provides:

> Should any dispute or difference arise between the Company and the Union or its members as to the interpretation or application of any of the provisions of this Agreement or with respect to job working conditions, the term working conditions being limited to those elements concerned with the hours when an employee is at work and the acts required of the employee during such hours, the dispute or difference shall be settled through the grievance procedure.
>
> It is the intent of the Company, Local Union 15, and the employees that timely filed grievances shall be settled promptly. A grievance is timely filed when submitted at Step 1 of this grievance process by the appropriate Local Union 15 representative in writing on the form adopted for such purpose to an appropriate management representative of the Company no later than thirty (30) calendar days after the date of the

> action complained of, or the date the employee became aware or reasonably should have become aware of the incident which is the basis for the grievance, whichever is later.
>
> A dispute as to whether a particular disagreement is a proper subject for the grievance procedure shall itself be treated as a grievance.

Exelon Ex. E, Dkt. No. 25-1, at 104–05.

Between May 2012 and August 2013, Local 15 filed grievances against Exelon on behalf of six separate employees who received complete abstinence letters. The grievances stated:[2]

May 1, 2012 Grievance: "The Company has placed a permanent abstinence alcohol requirement/expectation on [the grieving employee] in order to maintain his Nuclear access. 'This requirement/expectation is not required by any standard and affects his ability to participate in legal off site activities.'" *Id.*, Ex. D at 95.

July 3, 2012 Grievance: "The Company has placed a permanent alcohol requirement on [the grieving employee] in order to obtain and maintain his access to Exelon nuclear facilities. This requirement is not required by any standard and affects [the grieving employee's] ability to participate in legal off-site activities." *Id.* at 96.

September 25, 2012 Grievance: "[The grieving employee] received an unjust 'Complete Abstinence Letter' from Access Authorization Fitness for Duty Program Manager-Susan Techau and Exelon's MRO in order to maintain unescorted access to Exelon Nuclear Generating Stations." *Id.* at 97.

April 30, 2013 Grievance: "[The grieving employee] has received an abstinence letter concerning alcohol consumption that restricts his ability to conduct legal activities

[2] Information identifying the employees has been redacted from the records presented to the Court.

while off of Company time." *Id.* at 98.

May 28, 2013 Grievance: "On April 30, 2013, [the grieving employee] was informed through certified mail that he has to abstain from alcohol consumption and intoxicating substances during non work hours, work hours, holidays and weekends. This condition must be maintained to be employed with Exelon. Local 15 feels this is excessive and needs to be removed from his file." *Id.* at 99.

August 6, 2013 Grievance: "[The grieving employee] has received an unjust 'Complete Abstinence Letter' from Access Authorization fitness for duty Manager Susan Techau and Exelon MRO in order to maintain unescorted access to Exelon Nuclear Generating Station's [sic]. The Union Demands [sic] this requirement/letter be removed from [the grieving employee's] record." *Id.* at 100.

One of the grievances proceeded through to arbitration, which was set for early February 2015. Exelon objected to the filing of the grievances and refused to participate in the arbitration. It filed suit in this Court seeking a declaratory judgment, and the arbitrator stayed arbitration proceedings pending resolution of this lawsuit.

In its complaint, Exelon asserts that NRC regulations forbid anyone other than the SAE from rescinding the recommendations made in a determination of fitness and that Local 15's grievances necessarily would require an arbitrator to do just that. Exelon seeks a declaration that (1) only a court may determine whether NRC regulations preclude arbitration of FFD disputes like the ones presented in the grievances; (2) only the SAE may make determinations of fitness pursuant to NRC regulations; and (3) determinations of fitness made by the SAE are not subject to the CBA's grievance procedure.

Local 15 responds by claiming that pursuant to the parties' CBA, the issue of whether Exelon had just cause to impose a total abstinence requirement is a question for an arbitrator to resolve, and in any event, the CBA provides that arbitrability of such a dispute is itself a question for arbitral resolution. Local 15 also argues that Exelon's suit is not ripe for judicial determination because it is not clear that an arbitrator's decision would conflict with federal regulations. Local 15 has also counterclaimed, seeking an order compelling arbitration pursuant to the CBA. Both parties have now moved for summary judgment.

Discussion

A party is entitled to summary judgment if it shows that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). On a motion for summary judgment, the Court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. On cross-motions for summary judgment, the Court assesses whether each movant has satisfied the requirements of Rule 56. *See Cont'l Cas. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005). "As with any summary judgment motion, [the Court] review[s] cross-motions for summary judgment construing all facts, and drawing all reasonable inferences from those facts, in favor of the nonmoving party." *Laskin v. Siegel*, 728 F.3d 731, 734 (7th Cir. 2013) (internal quotation marks omitted).

A. Who determines arbitrability

As a general rule, determination of whether parties to a CBA have agreed to submit a dispute to arbitration is a task reserved to the courts. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208 (1991). This default rule can be avoided, however, if the parties contract to assign determination of the arbitrability of a dispute to an arbitrator. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Air Line Pilots Ass'n, Int'l v. Midwest Express Airlines, Inc.*, 279 F.3d 553, 555 (7th Cir. 2002). To assign questions of arbitrability to an arbitrator, "parties must evidence in their agreement a clear and unmistakable intent to cede the arbitrability question to the arbitrator." *Air Line Pilots Ass'n*, 279 F.3d at 559 (Ripple, J., concurring in part and dissenting in part) (citing *Kaplan*, 514 U.S. at 944). Even then, it is a court's duty to determine whether the question of arbitrability has been assigned to an arbitrator. *Kaplan*, 514 U.S. at 944.

Local 15 contends that the parties contracted to submit all arbitrability questions to arbitration. It cites language in the CBA stating that "[a] dispute as to whether a particular disagreement is a proper subject for the grievance procedure shall itself be treated as a grievance" as clear and unmistakable evidence that the parties intended for an arbitrator to determine all disputes as to whether a disagreement is arbitrable.

Exelon advances three arguments against submitting arbitrability to an arbitrator for resolution. First, it attempts to reframe the issue as a dispute not about work conditions, but rather about whether federal law preempts the parties' CBA. Exelon's argument is essentially that a "dispute" in the arbitrability clause refers to a disagreement over whether a challenge to work conditions has been properly brought or

involves the kind of work conditions the CBA has in mind, not a disagreement over whether federal law permits arbitration. Second (and relatedly), Exelon argues that the CBA by its terms forbids an arbitrator from settling disputes about arbitrability arising out of conflicts with federal law. Exelon bases this contention on a portion of the CBA stating that "[a]ll decisions rendered by the impartial arbitrator shall be final and binding upon both parties. The impartial arbitrator shall be governed wholly by the terms of this agreement and shall have no power to add to or change its terms." Exelon Ex. E, dkt. no. 25-1, at 108. Exelon says that under this provision, an arbitrator has no ability to examine or consider external law and thus cannot make an arbitrability determination that requires consideration of NRC regulations. Third, Exelon argues that even if the CBA submits the question of arbitrability to the grievance process, past dealings between Local 15 and Exelon make it apparent that a court, not an arbitrator, is to decide issues of arbitrability. Specifically, Exelon says that in three earlier cases, Local 15 either did not argue that an arbitrator must decide arbitrability or stipulated that the question was one for the courts to decide.

This last point is problematic, for two reasons. Exelon contends that through three earlier cases in this district, the parties have established a practice of submitting the question of arbitrability to the court. Not so. It is true that in one of the cases, the district judge noted that "the parties have stipulated that these two issues require judicial resolution by declaratory judgment." *Exelon Gen. Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL–CIO*, No. 10 C 4846, 2011 WL 2149624, at *2 (N.D. Ill. May 25, 2011) ("*Exelon 2*"), *rev'd on other grounds*, 676 F.3d 566 (7th Cir. 2012) ("*Exelon 3*"). In another, however, Local 15 argued that under the CBA, the issue of arbitrability should

be determined by an arbitrator. *See Exelon Gen. Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL–CIO*, No. 06 C 6961, 2008 WL 4442608, at *8 n.3 (N.D. Ill. Sept. 29, 2008) ("*Exelon 1*"). And in the third case, the issue does not appear to have been raised. *Exelon Gen. Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL–CIO*, No. 07 C 968, 2007 WL 4526595 (N.D. Ill. Dec. 3, 2007) ("*Exelon 4*"). In short, there is no pattern of the sort that Exelon suggests. And in any event, even if there were the kind of pattern Exelon alleges, it would not matter. Exelon cites no authority, and the Court is aware of none, indicating that failure to make an argument in a past suit amounts to forfeiture of the same argument in a later suit or a tacit agreement that the other side's position in the earlier suit will govern later suits.

Standing alone, the arbitrability provision in the CBA seems to evince "clear and unmistakable" intent to submit all disputes about arbitrability to an arbitrator, even where external law motivates Exelon's actions. Local 15 correctly argues that Exelon's reliance on *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), is misguided. *Wright* stands merely for the proposition that without a clear and unequivocal waiver, a union-negotiated CBA may not waive employees' statutory right to a judicial forum for discrimination claims. Local 15 is also right that courts have held determination of arbitrability to be sufficiently conferred upon the arbitrator in CBAs containing provisions similar to the one in the Exelon-Local 15 CBA. *See, e.g.*, *Air Line Pilots Ass'n*, 279 F.3d at 559 (Ripple, J., concurring).

But the arbitrability provision does not stand alone. Instead, it must be read together with the CBA's limitation on an arbitrator's adjudicative capacity, which states that the arbitrator is entirely governed by the terms of the CBA. And although arbitrating

the dispute between Local 15 and Exelon may not require an arbitrator to consider federal law, determining whether arbitration is proper will. This case presents the question whether attempting to arbitrate the propriety of Exelon's implementation of its SAE's recommendation is tantamount to seeking a second determination of fitness in violation of federal law. There does not appear to be any way for an arbitrator to determine whether a grievance is a "second determination of fitness" without examining federal regulations for a definition of that term.

The standard for demonstrating that determination of arbitrability has been assigned to an arbitrator is strict. *See Miller v. Flume*, 139 F.3d 1130, 1133–34 (7th Cir. 1998). In light of the limitations the CBA places on arbitrators, the Court is not prepared to say that the CBA clearly and unmistakably grants an arbitrator the authority to determine whether this particular dispute is arbitrable. Because the presumption in favor of judicial determination of arbitrability has not been rebutted, the Court will determine arbitrability.

B. Whether the grievances are arbitrable

As an initial matter, if pursuing a grievance challenging SAE-mandated abstinence requirements is tantamount to "seek[ing] a second determination of fitness," NRC regulations forbid arbitration. 10 C.F.R. § 26.189. Local 15's position on this has drifted somewhat over the course of briefing. At times, Local 15 has appeared to suggest that it seeks to have an arbitrator review the evidence submitted to the SAE to determine whether her recommendation was a good one, or to determine whether her process was compliant with NRC regulations. This would be impermissible, because pursuing a grievance to mount such challenges amounts to seeking a second

determination of fitness from someone other than the authorized SAE, which 10 C.F.R. § 26.189 does not permit. Despite this occasional drift, however, Local 15 has consistently repeated (in every filing) that it seeks through its grievances to arbitrate whether Exelon had just cause to impose new conditions on an employee's unescorted access to its nuclear power plants. And Local 15 has consistently argued that this does not amount to a request for redetermination of the employee's fitness. Exelon urges that this is a mere semantics game, but it is not: asking an arbitrator to determine whether Exelon had just cause to place conditions on continued unescorted access simply is not the same thing as asking an arbitrator to determine whether the employee is fit for duty or should have received a different treatment recommendation from the SAE.

The grieved dispute therefore concerns whether, when it adopts and implements the recommendation an SAE gives in its determination of fitness, Exelon has just cause to impose new conditions on unescorted access. To determine whether Exelon and Local 15 have committed this dispute to arbitration, the Court must look to whether the dispute is, "on its face," governed by the CBA's arbitration provision. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. TriMas Corp.*, 531 F.3d 531, 535 (7th Cir. 2008). The Supreme Court has made clear that law and public policy strongly favor arbitration and that the party seeking it is entitled to the benefit of the doubt. *Int'l Bhd. of Elec. Workers Local 2150 v. NextEra Energy Point Beach, LLC*, 762 F.3d 592, 594 (7th Cir. 2014) (citing *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 378–79 (1974)). Where an arbitration clause is broad, disputes are presumed arbitrable. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475

U.S. 643, 649 (1986). The Court will compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steel*, 531 F.3d at 535 (quoting *United Steelworkers of Am. v. Warrior & Gulf*, 363 U.S. 574, 582–83 (1960)).

As other courts have previously pointed out, the arbitration clause contained in the CBA between Local 15 and Exelon is considerably broad. In *Exelon 1*, an employee's unescorted access was revoked pursuant to the company's NRC-mandated access authorization program. The employee filed a grievance seeking review of whether revocation of his unauthorized access was supported by just cause. Exelon sought a declaratory judgment from a federal court stating that the issue was not arbitrable because Exelon's revocation decision was made as a result of mandatory requirements imposed under NRC regulation. The court observed that within 10 C.F.R. § 73 (the NRC regulations that require employees to satisfy certain access authorization standards in order to retain their unescorted access) there exists a provision which indicates that companies should provide a review process by which employees who lose their unescorted access may challenge revocation. The court held that the regulatory history and text did not indicate any intention to abdicate—and, indeed, suggested that the NRC in fact supported—the longstanding industry practice of arbitrating challenges to unescorted access revocations, even where such revocations were mandated under federal regulation. *See Exelon 1*, 2008 WL 4442608, at *3–5.

In *Exelon 3*, the Seventh Circuit examined whether the 2009 amendments to the NRC regulations implicitly terminated this longstanding tradition. The case arose under similar circumstances as those present in *Exelon 1*: Exelon revoked an employee's

unescorted access pursuant to mandatory NRC rules under 10 C.F.R. § 73 when the employee failed to satisfy requirements under the company's access authorization program, and the employee filed a grievance claiming the revocation was not supported by just cause. The Seventh Circuit held that if the NRC had intended to do away with the longstanding and notorious practice of committing to arbitration disputes about unauthorized access revocation, it would have done so expressly. Because it did not, arbitration was still an acceptable method for an employee to challenge the revocation of his unescorted access. *See Exelon 3*, 676 F.3d at 573–75 .

To be sure, the circumstances in these cases were different from those in the present case. Exelon first attempts to distinguish them by pointing out that in both of these prior cases, Local 15 brought grievances on behalf of employees challenging actual revocations of their unrestricted access, long understood to be the type of employment action that employees challenge through arbitration. Exelon argues that although challenging a revocation is commonplace, challenging the adoption of an SAE's recommendations is not and was never contemplated as a proper subject of arbitration. But this argument presents a distinction without a difference. As noted above, the arbitration clause in this CBA is quite broad. As such, the Court applies a presumption of arbitrability, which may be rebutted only by forceful evidence that the parties intended to exclude the particular type of dispute from arbitration. *See, e.g.*, *Exelon Gen. Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 540 F.3d 640, 646 (7th Cir. 2008) (quoting *AT&T Techs.*, 475 U.S. at 650) ("Where the arbitration provision is broad, as it is here, only an 'express provision excluding a particular grievance from arbitration . . . [or] the most forceful evidence of a purpose to exclude the claim from

arbitration' can keep the claim from arbitration."). The CBA does not limit arbitration to disputes about revocation of unescorted access. Instead, it provides that the parties shall arbitrate all disputes about working conditions, and it broadly defines working conditions as "those elements concerned with the hours when an employee is at work and the acts required of the employee during such hours." Maintenance of unescorted access, and new conditions on keeping it, are working conditions. This is true regardless whether the company has already revoked it or threatens to do so if an employee fails to meet certain requirements.

Exelon argues that this construction is problematic because it asks an arbitrator to consider external law (which an arbitrator is not empowered to do) when determining whether Exelon had just cause to implement SAE recommendations pursuant to mandatory federal regulation. In response, Local 15 cites *International Brotherhood of Electrical Workers Local 2150 v. NextEra Energy Point Beach, LLC*, 762 F.3d 592 (7th Cir. 2014), in which an employee lost his unescorted access when he was deemed to have violated a company's FFD policy. The employee in *NextEra* was subsequently discharged, whereupon he filed a grievance claiming that he was "discharged from employment without just cause due to an inappropriate site access denial determination." *Id.* at 593. The company claimed it should not be required to arbitrate because the parties' CBA did not expressly designate disputes about unescorted access decisions as arbitrable. *Id.* at 596. The Seventh Circuit held that on its face, the CBA committed disputes over discharge to arbitration, so the dispute giving rise to the suit belonged in arbitration. *Id.* The court stated:

> We note, however, that we do *not* hold that the arbitrator may, in fact, review and overturn NextEra's revocation of [the employee's] unescorted

> access privileges. We express no opinion on the subject. NextEra is entitled to present its arguments on that issue to the arbitrator, and the arbitrator may well find the decision unreviewable. If so, the entire matter of the propriety of the discharge might be very quickly resolved. But the potential weakness of the Union's claim on the merits is no defense to the arbitrability of this dispute, as a threshold question.

Id. (emphasis in original).

Exelon is right to point out that *NextEra* did not concern whether NRC regulations rendered unreviewable decisions to revoke (or impose conditions on) unescorted access, but rather whether the arbitration provision that committed discharge disputes to arbitration committed disputes about revocation of unescorted access to arbitration as well. *But see Int'l Bhd. of Elec. Workers Sys. Council U-4 v. Florida Power & Light*, 580 F. App'x 868, 869 (11th Cir. 2014) (citing *NextEra* for the contention that the district court should "consider only whether the collective bargaining agreement provides the arbitrator with authority to adjudicate this dispute, not issues that go to the merits, *such as whether the NRC regulations render [the employer's] actions unreviewable*" (emphasis added)). But *NextEra* does reiterate the well known rule that where a dispute is committed to arbitration, a court should not resolve the question of arbitrability by making judgments as to whether the party seeking arbitration will or should win the arbitration. Local 15's grievances do not require an arbitrator to consider whether Exelon's FFD program complies with federal regulations, nor do they require an arbitrator to make an unqualified fitness-for-duty determination regarding the grieving employees. The grievances instead ask whether the company had just cause to act as it did in restricting the employees' access to the company's plants, which is what the Seventh Circuit has held is arbitrable under a sufficiently broad arbitration agreement like this one. *See Exelon 3*, 676 F.3d at 575; *NextEra*, 762 F.3d at 598. No

consideration of external law is necessary to make this determination.

Exelon also contends that submitting this issue to arbitration will put it in the impossible position of having to violate federal law in order to comply with an arbitration award. As Local 15 argues, however, it is premature and speculative to seek declaratory judgment to avoid that possible outcome when it is also entirely possible that an arbitral award might not force Exelon to violate NRC regulations at all. If an arbitrator determines Exelon had just cause to adopt the SAE's recommendation and impose the abstinence conditions, Exelon will not be ordered to take any action that contravenes federal law. And if an arbitrator finds Exelon's decision unsupported by just cause, the arbitrator might order Exelon to give the SAE more information and direct the SAE to reconsider her recommendation, an arbitral award that would be perfectly acceptable under the applicable NRC regulation. *See* 10 C.F.R. § 26.189(d) ("After the initial determination of fitness has been made, the professional may modify his or her evaluation and recommendations based on new or additional information from other sources including, but not limited to, the subject individual, another licensee or entity, or staff of an education or treatment program."). More importantly, even if the result of arbitration is an award that Exelon thinks is violative of federal regulations, it will have a way out: it can revive its suit and ask the Court to vacate the arbitration award as contrary to public policy. *See Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 716–17 (7th Cir. 2013) ("A violation of a statute or some other positive law is the clearest example of a violation of public policy.").

Finally, Exelon points out that both *Exelon 1* and *Exelon 3* dealt with company

action taken in compliance with 10 C.F.R. § 73, which provides that all regulated entities must provide a means of independent review when employees are found to have violated the access authorization program. *See* 10 C.F.R. § 73.56(l). In contrast, this case concerns FFD determinations under 10 C.F.R. § 26. Section 26 has a similar provision for independent review when employees are found to have violated an FFD policy, *see* 10 C.F.R. § 26.39, but it also contains the limiting provision that forbids a party from seeking a second determination of fitness or seeking a determination from anyone other than the SAE herself, *see* 10 C.F.R. § 26.189. Exelon seems to argue that because section 26.189 contains a limitation on review that is unique to section 26, disputes over adverse employment action taken pursuant to regulations in section 26 are generally less amenable to arbitration than are disputes over adverse action taken pursuant to section 73. But it is a stretch to construe a regulation forbidding a second determination of fitness as forbidding or even limiting review of any company action arising out of an SAE's recommendation. Section 26.189 says that a party may not seek a determination of fitness from someone other than the authorized SAE or a second determination of fitness after one has already been completed. It says nothing about removing from arbitration disputes about working conditions that arise out of an SAE's recommendation.

Conclusion

For the foregoing reasons, the Court grants Local 15's motion for summary judgment and to compel arbitration [dkt. no. 40] and denies Exelon's motion for summary judgment [dkt. no. 22]. In light of the Court's ruling on cross-motion for summary judgment, the Court denies as moot Local 15's motion for discovery. The

Clerk is instructed to enter judgment in favor of defendant and directing that the grievances that are the subject of the lawsuit are to be submitted to arbitration pursuant to the parties' collective bargaining agreement.

MATTHEW F. KENNELLY
United States District Judge

Date: October 6, 2015

CHAIRMAN Resource

From: Sandra Perry <sp@schuchatcw.com>
Sent: Thursday, April 21, 2016 4:29 PM
To: CHAIRMAN Resource
Cc: Marilyn S. Teitelbaum; Sandra Perry; Dean Apple; Billy Phillips; Dave Sergenti
Subject: [External_Sender] SECY-15-0149, ML16063A268 | Role of Third Party Arbitrators in Access Authorization & Fitness-for-Duty Determination Reviews at Nuclear Power Plants | Comments of Local 15, IBEW
Attachments: 4-21-16 Letter to Chairman Stephen Burns (649091).PDF

Dear Chairman Burns:

Please see the attached comment submitted on behalf of Local 15, International Brotherhood of Electrical Workers, AFL-CIO regarding the above-referenced matter. A hard copy of the same has been mailed to you this date as well.

Thank you.

Sandra

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