

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman  
Jeff Baran  
Annie Caputo  
David A. Wright  
Christopher T. Hanson

In the Matter of

JOSEPH SHEA

(Order Prohibiting Involvement in NRC-  
Licensed Activities Immediately Effective)

Docket No. IA-20-008-EA

**CLI-21-03**

**MEMORANDUM AND ORDER**

Today we review the Atomic Safety and Licensing Board's decision to set aside the immediate effectiveness of the NRC Staff's enforcement order in this case.<sup>1</sup> For the reasons described below, we affirm the Board's decision.

**I. BACKGROUND**

On August 24, 2020, following an investigation into whether a former corporate employee of the Tennessee Valley Authority (TVA), Beth Wetzel, had been the subject of employment discrimination for engaging in protected activity, the Staff issued an

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<sup>1</sup> See LBP-20-11, 91 NRC \_\_ (Nov. 3, 2020) (slip op.).

immediately effective order banning Joseph Shea from engaging in NRC-licensed activities for a period of five years.<sup>2</sup> The order states that Mr. Shea engaged in deliberate misconduct in violation of 10 C.F.R. § 50.5, the NRC's Deliberate Misconduct Rule, when he "played a significant role in the decisionmaking process" that led to adverse employment actions against Ms. Wetzel that were motivated, at least in part, by Ms. Wetzel's protected activity.<sup>3</sup> The order states that Mr. Shea's deliberate misconduct caused TVA to be in violation of 10 C.F.R. § 50.7, the NRC's Employee Protection Rule, which prohibits discrimination by a licensee against an employee for raising nuclear safety concerns, participating in proceedings for the administration or enforcement of requirements under the Atomic Energy Act or Energy Reorganization Act, or engaging in certain other protected activities. Based on its finding that Mr. Shea violated the Deliberate Misconduct Rule and based on his broad sphere of influence within TVA as a senior executive, the Staff made the order immediately effective.<sup>4</sup>

Mr. Shea answered the Staff's order and requested a hearing.<sup>5</sup> Mr. Shea included with his answer a motion to set aside the immediate effectiveness of the order on the grounds that the Staff had not presented adequate evidence to justify its immediate effectiveness.<sup>6</sup> In particular, Mr. Shea argued that the Staff failed to show that he had violated the Deliberate

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<sup>2</sup> See Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective (Aug. 24, 2020), at 1-2 (ADAMS accession no. ML20219A676) (Enforcement Order); NRC Office of Investigations Report of Investigation 2-2019-015 (redacted) (Jan. 21, 2020) (ROI), attached to *NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing* (Sept. 28, 2020) (Staff Answer). The redacted ROI, which is attached to the Staff Answer, also includes excerpts from several ROI exhibits.

<sup>3</sup> Enforcement Order at 2, 3.

<sup>4</sup> See *id.* at 3-4; 10 C.F.R. § 2.202(a)(5).

<sup>5</sup> See *Joseph Shea's Motion to Set Aside the Immediate Effectiveness of an Order Banning Him From Engaging in NRC-Licensed Activities, Answer, and Request for Hearing* (Sept. 22, 2020) (Shea Motion).

<sup>6</sup> See *id.* at 23-25.

Misconduct Rule because it had not provided evidence that he acted with knowledge that his actions would cause TVA to violate the Employee Protection Rule.<sup>7</sup> Mr. Shea provided with his motion documentary evidence of consultations he undertook with the TVA Office of the General Counsel (OGC) and the TVA Executive Review Board (ERB) regarding his decision to terminate Ms. Wetzel.<sup>8</sup>

Specifically, Mr. Shea provided evidence that Ms. Wetzel's supervisor, Erin Henderson, filed a complaint against Ms. Wetzel and other TVA employees for engaging in a pervasive and sustained pattern of harassment by raising unfounded allegations of retaliation against Ms. Henderson.<sup>9</sup> Mr. Shea also provided emails between himself and Ms. Wetzel as evidence that Ms. Wetzel made unfounded accusations against Ms. Henderson to Mr. Shea directly.<sup>10</sup> Mr. Shea showed that he referred this email exchange with Ms. Wetzel to TVA OGC and TVA human resources for advice on how to respond and that, as a result, the emails from Ms. Wetzel were added to the ongoing TVA OGC investigation of Ms. Henderson's harassment complaint.<sup>11</sup> Mr. Shea presented evidence that the TVA OGC investigation concluded that Ms. Wetzel had raised a pattern of unfounded allegations against Ms. Henderson and thereby violated TVA standards of conduct and Federal law.<sup>12</sup> Mr. Shea also presented evidence that, after receiving the results of the TVA OGC investigation, his proposal to terminate Ms. Wetzel

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<sup>7</sup> See *id.* at 23-44; 10 C.F.R. § 2.202(c)(2)(i). Mr. Shea's hearing request on the merits of the Enforcement Order—i.e., whether the Enforcement Order should be sustained—is not before us today. The Board retains jurisdiction over that request. Today, we affirm only the Board's decision that the Staff has not, prior to the conduct of a hearing on the merits, shown adequate evidence to make its Enforcement Order immediately effective.

<sup>8</sup> See Shea Motion, Attach. 3 & 4.

<sup>9</sup> *Id.* at 6-7.

<sup>10</sup> *Id.* at Attach. 1 & 2.

<sup>11</sup> *Id.* at 9, Attach. 1.

<sup>12</sup> *Id.* at 11 (citing ROI, Ex. 14).

was reviewed by a group of TVA executives and other officials not involved in the underlying investigation or personnel action, including an outside auditor (the TVA ERB), and these officials agreed that termination of Ms. Wetzel would not violate the Employee Protection Rule.<sup>13</sup>

In response, the Staff presented documents to show that Ms. Wetzel engaged in protected activities by raising concerns of a chilled work environment to the NRC, participating in a Department of Labor proceeding, and participating in the TVA OGC investigation into Ms. Henderson's harassment complaint.<sup>14</sup> The Staff presented Ms. Henderson's harassment complaint as evidence that Mr. Shea knew Ms. Wetzel had engaged in protected activity.<sup>15</sup> The Staff also referred to a dialogue between Ms. Wetzel and Mr. Shea about approval of her travel vouchers in a series of emails, in which Ms. Wetzel alleged that Ms. Henderson had "demonstrated a longstanding pattern of using TVA processes as punitive and retaliatory tools," to show that Mr. Shea knew Ms. Wetzel had raised concerns about her supervisor.<sup>16</sup> The Staff argued that Mr. Shea took adverse action against Ms. Wetzel by first placing her on administrative leave and later terminating her employment.<sup>17</sup>

Using the evidentiary framework for proof of an Employee Protection Rule violation, the Staff next offered evidence to explain why Mr. Shea could not show by clear and convincing

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<sup>13</sup> *Id.* at 12-13, Attach. 3.

<sup>14</sup> See Staff Answer at 7-8 (citing *Affidavit of Alejandro Echavarria in Support of NRC Staff's Response to Joseph Shea's Request to Set Aside the Immediate Effectiveness of the Order Prohibiting Involvement in NRC-Licensed Activities* (Sept. 28, 2020), at ¶¶ 11, 21 (Echavarria Affidavit)). The Echavarria Affidavit, as well as the affidavit of Ian A. Gifford, Program Manager, NRC Office of Enforcement, are attached to the Staff Answer.

<sup>15</sup> *Id.* at 6, 8-9; ROI, Ex. 10 at 1-8.

<sup>16</sup> *Id.* at 9 (citing Echavarria Affidavit at ¶ 20; ROI, Ex. 11 at 13-14).

<sup>17</sup> *Id.* at 9 (citing *Affidavit of Ian A. Gifford in Support of NRC Staff's Response to Joseph Shea's Request to Set Aside the Immediate Effectiveness of the Order Prohibiting Involvement in NRC-Licensed Activities* (Sept. 28, 2020), at ¶ 6 (Gifford Affidavit); Echavarria Affidavit at ¶ 23).

evidence that adverse action against Ms. Wetzel was taken because she had engaged in a “sustained pattern of disrespectful behavior” toward Ms. Henderson.<sup>18</sup> Specifically, the Staff provided testimony from one participant in the ERB who had concerns that terminating Ms. Wetzel without first providing her an opportunity to respond to charges of misconduct seemed unusual.<sup>19</sup> The Staff also provided documents of investigations by the TVA Employee Concerns Program into the work environment in Ms. Henderson’s work group, which did not show any evidence that employees feared retaliation for raising nuclear safety concerns but did conclude that Ms. Henderson’s behaviors could be viewed as precursors to a chilled work environment.<sup>20</sup> The Staff argued that this evidence undercut Mr. Shea’s assertion that Ms. Wetzel had made unfounded allegations against Ms. Henderson and that, therefore, Mr. Shea’s stated non-discriminatory reasons for terminating Ms. Wetzel were not sufficiently supported.<sup>21</sup>

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<sup>18</sup> *Id.* at 10-11. The evidentiary framework for proof of an Employee Protection Rule violation is set forth in the *Watts Bar* case. See *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1)*, CLI-04-24, 60 NRC 160 (2004). Under *Watts Bar*, if the Staff shows by a preponderance of evidence that an employee’s protected activity was a contributing factor—i.e., played at least some role—in an unfavorable personnel decision, a reasonable inference arises that the Employee Protection Rule was violated. See *id.* at 194, 196-97. This inference may be negated by the employer if it proves with clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity. See *id.* at 192-93. This evidentiary framework, which the Staff followed in presenting its evidence to sustain the immediate effectiveness of the Enforcement Order, is unique to the Employee Protection Rule, and imposes a high burden on employers so that nuclear whistleblowers are encouraged to come forward with safety-related information. *Id.* at 193.

<sup>19</sup> Staff Answer at 11 (citing Echavarria Affidavit at ¶¶ 15-17; ROI, Ex. 24 at 64). In his reply to the Staff Answer, Mr. Shea asserted that, prior to the Staff Answer and its attached exhibits, he was unaware of the concerns raised by an ERB participant. See *Joseph Shea’s Reply to the NRC Staff Answer* (Oct. 5, 2020), at 17.

<sup>20</sup> See Staff Answer at 10 (citing Gifford Affidavit at ¶ 6; ROI, Ex. 7 at 11, 23).

<sup>21</sup> *Id.* at 10-11.

The Staff's answer to Mr. Shea's motion also briefly addressed its assertion that Mr. Shea violated the Deliberate Misconduct Rule. The Staff asserted that because Mr. Shea knew the requirements of the Employee Protection Rule, and because "retaliation in violation of 10 C.F.R. § 50.7 is, by its nature, an intentional act," Mr. Shea had violated the Deliberate Misconduct Rule.<sup>22</sup>

The Board, with one judge dissenting, granted Mr. Shea's motion to set aside the immediate effectiveness of the Staff's order.<sup>23</sup> The Board found that Mr. Shea had met his initial burden to show the order was not based on adequate evidence of a Deliberate Misconduct Rule violation but on "mere suspicion, unfounded allegations, or error."<sup>24</sup> The Board further found that the Staff had not shown adequate evidence supporting each element of the Deliberate Misconduct Rule violation upon which the Staff's order is based.<sup>25</sup> Specifically, it found that the Staff had not presented any evidence that Mr. Shea, at the time he made decisions adverse to Ms. Wetzel's employment, knew that his decisions would cause TVA to be in violation of the Employee Protection Rule.<sup>26</sup> Judge Froehlich dissented and asserted that the majority applied an incorrect legal standard by insisting the Staff "present evidence of Mr. Shea's state of mind and his intent and that he recognized his actions were improper" when "[a]ll that is required to be shown is that Mr. Shea fully understood or should have understood

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<sup>22</sup> *Id.* at 11-12.

<sup>23</sup> See LBP-20-11, 91 NRC at \_\_ (slip op. at 15-16, 17-25).

<sup>24</sup> 10 C.F.R. § 2.202(c)(2)(vi); see LBP-20-11, 91 NRC at \_\_ (slip op. at 12).

<sup>25</sup> LBP-20-11, 91 NRC at \_\_ (slip op. at 12-15).

<sup>26</sup> *Id.*

his responsibility to comply with the [whistleblower protection statute] and Commission regulations.”<sup>27</sup>

## II. DISCUSSION

Our decision today on whether to sustain the immediate effectiveness of the Staff’s enforcement order against Mr. Shea is not a decision on the merits of the order. The charge that Mr. Shea violated the Deliberate Misconduct Rule by causing TVA to violate the Employee Protection Rule is serious and will be separately evaluated by the Board based on evidence presented during the pending adjudicatory hearing on this matter.<sup>28</sup> The question before us today is limited to whether the Board’s decision to set aside the immediate effectiveness of the Staff’s order was based on the correct legal framework and whether the Board’s factual finding based on the evidence presented at this stage of the proceeding involved clear error or an abuse of discretion.

### A. Legal Standards

The Board’s decision to stay the immediate effectiveness of the Staff’s enforcement order is automatically referred to us for review and has no effect pending further order of the Commission.<sup>29</sup> Accordingly, we review the Board’s decision to determine whether it applied the correct legal standards. We defer to the Board’s factual findings absent clear error or an abuse of discretion. We review the Board’s application of legal standards *de novo*.

The pertinent legal standards in this case are set forth in 10 C.F.R. § 2.202, which governs the issuance and dispute of immediately effective enforcement orders, and the Deliberate Misconduct Rule, which forms the basis for the Staff’s decision to pursue

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<sup>27</sup> *Id.* at \_\_\_ (slip op. at 17-19) (Froehlich, J., Dissenting).

<sup>28</sup> See Licensing Board Order (Dec. 2, 2020) (unpublished) (Notice of Hearing).

<sup>29</sup> 10 C.F.R. § 2.202(c)(2)(viii).

enforcement action against Mr. Shea.<sup>30</sup> Under 10 C.F.R. § 2.202(c)(2)(vi), Mr. Shea may challenge the immediate effectiveness of the order by producing evidence that the order is based on “mere suspicion, unfounded allegations, or error.” The Staff then bears the burden of persuading the Board that “adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted.”<sup>31</sup> When an immediate effectiveness determination is challenged,

the Staff must satisfy a two-part test: it must demonstrate that adequate evidence—i.e., reliable, probative, and substantial (but not preponderant) evidence—supports a conclusion that (1) the [asserted wrongdoer] violated a Commission requirement, *and* (2) the violation was “willful,” *or* the violation poses a risk to “the public health, safety, or interest” that requires immediate action.<sup>32</sup>

The Staff’s burden to show adequate evidence justifying an immediately effective order is not heavy. At this stage, the Staff does not need to prove that a violation of the Deliberate Misconduct Rule more likely than not occurred to sustain the order’s immediate effectiveness. Rather, the Staff’s burden is akin to probable cause, i.e., the Staff must show that a reasonable person would have cause to think, based on something more than uncorroborated suspicion or accusation, that a violation of the Deliberate Misconduct Rule occurred.<sup>33</sup>

The Staff must show adequate evidence of each element of its proposed Deliberate Misconduct Rule violation to sustain the immediate effectiveness of its order. Providing adequate evidence that a violation of the Employee Protection Rule occurred is only one

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<sup>30</sup> See Enforcement Order at 2-3; 10 C.F.R. § 50.5.

<sup>31</sup> 10 C.F.R. § 2.202(c)(2)(vi).

<sup>32</sup> *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 NRC 53, 61 (2005) (quoting 10 C.F.R. § 2.202(a)(1), (a)(5)); see Hearings on Challenges to the Immediate Effectiveness of Orders; Final Rule, 80 Fed. Reg. 63,409, 63,411 (Oct. 20, 2015) (quoting *Safety Light* as the two-part test that the Staff must meet when an immediate effectiveness determination is challenged).

<sup>33</sup> See Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,196 (May 12, 1992).



element of the violation. The Staff must also present adequate evidence that Mr. Shea, at the time he allegedly retaliated against Ms. Wetzel, had actual knowledge that his conduct would cause TVA to be in violation of the Employee Protection Rule.<sup>34</sup> In order to address the actual knowledge element of a Deliberate Misconduct Rule violation, the Staff must provide evidence, either circumstantial or direct, that speaks to Mr. Shea's state of mind at the time he took adverse action against Ms. Wetzel.<sup>35</sup>

## **B. Analysis**

The Board found that Mr. Shea met his initial burden to challenge the immediate effectiveness of the Staff's order under 10 C.F.R. § 2.202(c)(2)(i).<sup>36</sup> In particular, the Board found that Mr. Shea produced evidence that internal TVA reviews determined that Ms. Wetzel had engaged in a pattern of harassment against her supervisor in violation of TVA policy and Federal law and that Mr. Shea's decision to terminate Ms. Wetzel would not violate the Employee Protection Rule.<sup>37</sup> In the Board's view, Mr. Shea supported his assertion that his decision to place Ms. Wetzel on administrative leave and later terminate her employment was not deliberate misconduct designed to violate the Employee Protection Rule. Therefore, the Board concluded that Mr. Shea made an adequate showing that the Staff's order was not based on adequate evidence but on mere suspicion and unfounded allegations.<sup>38</sup> Based on this

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<sup>34</sup> See 10 C.F.R. § 50.5(c); LBP-20-11, 91 NRC at \_\_ (slip op. at 7-9, 12 n.70).

<sup>35</sup> See, e.g., *David Geisen*, CLI-10-23, 72 NRC 210, 220-22, 226 (2010) (holding that enforcement action against an individual under the Deliberate Misconduct Rule turns on the individual's state of mind, which may be inferred through circumstantial evidence).

<sup>36</sup> LBP-20-11, 91 NRC at \_\_ (slip op. at 12).

<sup>37</sup> See *id.* at \_\_ (slip op. at 2-3, 12 n.72).

<sup>38</sup> *Id.* at \_\_ (slip op. at 12-13).

record, we see no error in the Board's conclusion that Mr. Shea met his initial burden to challenge the immediate effectiveness of the Staff's order.

The Board next reviewed whether the Staff provided adequate evidence that Mr. Shea violated each element of the Deliberate Misconduct Rule.<sup>39</sup> At oral argument, the Board questioned the Staff regarding its theory of the case and its basis for asserting that Mr. Shea knew—even though internal TVA documentation suggested otherwise—that his decisions regarding Ms. Wetzel's employment would cause TVA to violate the Employee Protection Rule. Specifically, Judge Gibson asked the Staff if the TVA OGC investigation and ERB were not legitimate processes but mere "window dressing" designed to obscure Mr. Shea's true intention to retaliate against Ms. Wetzel.<sup>40</sup> The Staff responded that it did consider the TVA OGC investigation to be "window dressing."<sup>41</sup> Counsel for Mr. Shea in turn responded that the Staff's assertion of "window dressing" was unsupported by any evidence and therefore argued that the Staff's immediate effectiveness determination was based on mere suspicion.<sup>42</sup>

In its decision, the Board agreed that the Staff had based its immediate effectiveness determination on mere suspicion and not on adequate evidence that a Deliberate Misconduct Rule violation occurred.<sup>43</sup> The Board correctly noted that the adequate evidence standard does not impose a high burden of persuasion but that Mr. Shea's knowledge of the requirements of the Employee Protection Rule was, by itself, insufficient to prove that he intended his conduct to

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<sup>39</sup> See *id.* at \_\_\_ (slip op. at 12-15).

<sup>40</sup> Tr. at 109.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 110-11.

<sup>43</sup> LBP-20-11, 91 NRC at \_\_\_ (slip op. at 12-13).

violate the rule.<sup>44</sup> The Board found that the Staff presented no evidence that either the TVA OGC or ERB reviews were conducted in bad faith or to cover Mr. Shea's alleged intention to cause a violation of the Employee Protection Rule (although it acknowledged this could be a valid line of inquiry at hearing).<sup>45</sup> Accordingly, the Board concluded that the immediate effectiveness of the Staff's order could not be sustained because the Staff had not established with adequate evidence a violation of the Deliberate Misconduct Rule.<sup>46</sup>

We agree with the Board's conclusion. The Board appropriately differentiated the legal framework for demonstrating a violation of the Employee Protection Rule from the framework for demonstrating a violation of the Deliberate Misconduct Rule and applied these frameworks in the context of Mr. Shea's challenge to the immediate effectiveness of the Staff's order.<sup>47</sup> Adequate evidence of a Deliberate Misconduct Rule violation requires some showing, with either direct or circumstantial evidence, that an individual knew that his or her conduct would constitute a violation or cause a licensee to be in violation of some other NRC requirement.<sup>48</sup> By contrast, a violation of the Employee Protection Rule can be shown with sufficient evidence that a protected activity was a contributing factor to an adverse personnel action, absent clear and convincing evidence that the employer would have taken the same unfavorable personnel action notwithstanding the protected activity.<sup>49</sup> As the Board discerned, the legal elements of

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<sup>44</sup> *Id.* at \_\_\_ (slip op. at 7, 9).

<sup>45</sup> *Id.* at \_\_\_ (slip op. at 13-14).

<sup>46</sup> *Id.* at \_\_\_ (slip op. at 15-16).

<sup>47</sup> *See id.* at \_\_\_ (slip op. at 11 n.67).

<sup>48</sup> *See id.* at \_\_\_ (slip op. at 8, 11 n.67); 10 C.F.R. § 50.5(a)(1), (c); *see also David Geisen*, CLI-10-23, 72 NRC at 242-43 (recognizing staff is permitted to show its case through circumstantial evidence).

<sup>49</sup> *See Watts Bar*, CLI-04-24, 60 NRC at 187.

these two violations differ, and evidence sufficient to show that Mr. Shea's conduct caused TVA to be in violation of the Employee Protection Rule is not *per se* sufficient to also show a violation of the Deliberate Misconduct Rule.<sup>50</sup>

In his dissenting opinion, Judge Froehlich explained that he would have sustained the immediate effectiveness of the order because the Staff showed adequate evidence that Mr. Shea's conduct violated the Employee Protection Rule and "adequate evidence has been submitted to show (for purposes of an immediately effective order) that the termination of Ms. Wetzel was a deliberate violation."<sup>51</sup> Judge Froehlich noted that the Staff's order was based on a Deliberate Misconduct Rule violation, however, he states that the majority applied an incorrect legal standard by insisting the Staff "present evidence of Mr. Shea's state of mind and his intent and that he recognized his actions were improper" when "[a]ll that is required to be shown is that Mr. Shea fully understood or should have understood his responsibility to comply with the [whistleblower protection statute] and Commission regulations."<sup>52</sup>

We disagree with the dissent's analysis. As explained above, the Staff's order to Mr. Shea—an unlicensed individual—is based on a violation of the Deliberate Misconduct Rule,

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<sup>50</sup> In a footnote differentiating the legal elements of a Deliberate Misconduct Rule violation from the legal elements of an Employee Protection Rule violation, the Board stated that "[t]he standards for 10 C.F.R. § 50.5 do not permit 'reasonable' inferences, but require actual knowledge," and that 10 C.F.R. § 50.7 imposes a "lower evidentiary burden" on the Staff than does 10 C.F.R. § 50.5. LBP-20-11, 91 NRC at \_\_ (slip op. at 11 n.67). We understand these statements to mean that the elements of an Employee Protection Rule violation, which may be proven using the burden-shifting evidentiary framework established by *Watts Bar*, are different from those for a Deliberate Misconduct Rule violation, to which the evidentiary framework set forth in *Watts Bar* does not apply. See CLI-04-24, 60 NRC at 192-94, 196-97. We do not interpret the Board's footnote as attempting to establish a new standard regarding the Staff's burden of proof for a Deliberate Misconduct Rule or Employee Protection Rule violation or concluding that only direct evidence can be used to prove Mr. Shea's state of mind. Under both the Employee Protection Rule and the Deliberate Misconduct Rule either direct or circumstantial evidence may be used to show a violation.

<sup>51</sup> LBP-20-11, 91 NRC at \_\_ (slip op. at 18-20) (Froehlich, J., Dissenting).

<sup>52</sup> *Id.* at \_\_ (slip op. at 17-19) (Froehlich, J., Dissenting).

not the Employee Protection Rule.<sup>53</sup> Mr. Shea's state of mind is therefore an element of the violation charged and must be shown with adequate evidence to sustain the immediate effectiveness of the Staff's order.<sup>54</sup> The majority opinion correctly applied this legal standard.

In summary, the Board appropriately applied the correct legal standards in this case, and its review of the evidence was reasonably rooted in the record available to it at this stage of the proceeding. Mr. Shea provided evidence that he based his decisions with respect to Ms. Wetzel's employment on legal advice from TVA OGC and an independent review from the TVA ERB. The Staff provided evidence to dispute whether Mr. Shea's stated reasons could ultimately be proven by clear and convincing evidence; however, such evidence goes primarily to whether a violation of the Employee Protection Rule occurred and is not *per se* evidence of a Deliberate Misconduct Rule violation. The Board found that the Staff had presented no direct or circumstantial evidence at this stage in the proceeding that Mr. Shea intended to misuse TVA's decisionmaking processes to retaliate against Ms. Wetzel. Therefore, the Board correctly concluded that the immediate effectiveness of the order could not be sustained because the Deliberate Misconduct Rule violation upon which the order was based had not been adequately established at this stage of the proceeding.

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<sup>53</sup> The Staff's decision to base its order on an alleged violation of the Deliberate Misconduct Rule squares with our regulatory and enforcement framework because the Deliberate Misconduct Rule applies directly to individuals, including unlicensed individuals, whereas the Employee Protection Rule prohibits discrimination by a licensee, an applicant for a license, or a contractor or subcontractor thereof. *Compare* 10 C.F.R. §§ 50.5(a), (b), *with* 10 C.F.R. § 50.7(a). The Deliberate Misconduct Rule, not the Employee Protection Rule, puts unlicensed individuals on notice that intentionally causing a licensee to violate NRC requirements may subject them to direct NRC enforcement action. See Revision to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,665 (Aug. 15, 1991).

<sup>54</sup> See Section II.A, *supra*. To be clear, Mr. Shea's state of mind is relevant to the first prong of the *Safety Light* test, which requires the staff to demonstrate adequate evidence of a violation of a Commission requirement – in this case, the Deliberate Misconduct Rule.

### III. CONCLUSION

For the reasons described above we *affirm* the Board's decision to set aside the immediate effectiveness of the Staff's enforcement order.

IT IS SO ORDERED.

For the Commission



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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 15<sup>th</sup> day of January 2021.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
Mr. Joseph Shea ) IA-20-008-EA  
(Order Prohibiting Involvement in )  
NRC-Licensed Activities) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-21-03)** have been served upon the following persons by Electronic Information Exchange.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
This 15<sup>th</sup> day of January 20201