UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY	)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1	)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2	)	
Browns Ferry Nuclear Plant, Units 1,2 &3)	)	
	)	ASLBP No. 01-791-01-CivP
	)	
	)	EA 99-234

NRC STAFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING THE TENNESSEE VALLEY AUTHORITY'S VIOLATION OF 10 C.F.R. 50.7

Dennis C. Dambly
Jennifer M. Euchner
Counsel for NRC Staff

December 20, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

NUCLEAR REGULATORY COMMISSION CASES

DEPARTMENT OF LABOR CASES

MERIT SYSTEMS PROTECTION BOARD CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS SOURCES

TABLE OF ABBREVIATIONS

AEA	Atomic Energy Act
ANO	Arkansas Nuclear One
ANOVA	Analysis of Variance
ASTM	American Society for Testing Materials
BFN	Browns Ferry Nuclear Plant
BWR	Boiling Water Reactor
CUP	Chemistry Upgrade Project
DOL	Department of Labor
ERA	Energy Reorganization Act
ETP	Employee Transition Program
FY	Fiscal Year
HR	Human Resources
HRIS	Human Resources Information System
IG	Inspector General
INPO	Institute for Nuclear Power Operations
LCO	Limiting Condition for Operation
LER	Licensee Event Report
MSPB	Merit Systems Protection Board
NOV	Notice of Violation
NRC	Nuclear Regulatory Commission
NSRB	Nuclear Safety Review Board
OGC	Office of the General Counsel
OI	Office of Investigations
OIG	Office of Inspector General
OPM	Office of Personnel Management
PASS	Post Accident Sampling System
PEC	Predecisional Enforcement Conference
PG	Pay Grade
PHR	Personal History Record
PWR	Pressurized Water Reactor
RadChem	Radiological Controls and Chemistry
RadCon	Radiological Controls
RIF	Reduction in Force
SCAR	Significant Corrective Action Report
SQN	Sequoyah Nuclear Plant
SRB	Selection Review Board
TVA	Tennessee Valley Authority
VPA	Vacant Position Annoucement
WBN	Watts Bar Nuclear Plant

December 20, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY	)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1	)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2	)	
Browns Ferry Nuclear Plant, Units 1,2 &3)	)	
	)	ASLBP No. 01-791-01-CivP
	)	
	)	EA 99-234

NRC STAFF'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW CONCERNING
THE TENNESSEE VALLEY AUTHORITY'S VIOLATION OF 10 C.F.R. 50.7

I. INTRODUCTION

1.1. These findings and rulings address all outstanding issues with respect to a proposed civil penalty sought to be imposed by the Nuclear Regulatory Commission (hereinafter "NRC") Staff on the Tennessee Valley Authority (hereinafter "TVA") for an alleged violation of NRC's employee-protection requirements set forth in 10 C.F.R. § 50.7, based upon the asserted discrimination against a former employee for engaging in protected activities.

1.2. In response to an Order Imposing Civil Monetary Penalty (hereinafter "Order"), published at 66 Fed. Reg. 27166 (May 16, 2001), TVA filed a timely request for a hearing on June 1, 2001. On June 26, 2001, and Atomic Safety and Licensing Board (hereinafter "Board"), consisting of Chairman Charles Bechhoefer and Administrative Judges Dr. Richard F. Cole and Ann Marshall Young was established to preside over this proceeding. 66 Fed. Reg. 34961 (July 2, 2001).

1.3. By Memorandum and Order dated June 28, 2001, the Board granted TVA's request for a hearing and, on the same date, issued a Notice of Hearing. 66 Fed. Reg. 35467 (July 5,

2001). As set forth in the Order, the issues to be adjudicated by the Board are: (a) whether the Licensee violated the Commission's requirements in 10 C.F.R. § 50.7, as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty (hereinafter "NOV"), dated February 7, 2000; and, if so, (b) whether, on the basis of such violation, the Order Imposing Civil Monetary Penalty should be sustained. *See* Joint Exhibit 47 (hereinafter "Jt. Exh.").

1.4. On February 1, 2002, TVA filed a motion pursuant to 10 C.F.R. § 2.749 seeking summary disposition of the issues in contention in this proceeding.[1] The Board denied the TVA motion for summary disposition, finding that TVA failed to establish the lack of disputed material facts. *See Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-02-10, 55 NRC 236 (2002).

1.5. Evidentiary hearings with respect to these issues were held in Chattanooga, Tennessee, on April 23-26, 2002, April 30 - May 3, 2002, May 6-9, 2002, June 11-14, 2002, June 17-20, 2002, and in Rockville, Maryland on September 9-13, 2002. Numerous witnesses testified on behalf of the Staff and TVA at these hearings.

1.6. These proposed findings of fact and conclusions of law present the Board's findings of fact with respect to the evidence presented at the hearings concerning the NOV and Order, and the Board's conclusions of law with respect to the issues in this proceeding.

II. FINDINGS OF FACT

A. Background

2.1. The 10 C.F.R. § 50.7 violation challenged by TVA in this proceeding was set forth by the Staff in the February 7, 2000, Notice of Violation and Proposed Imposition of Civil Penalty:

> 10 CFR 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and

---

[1] *See* "Tennessee Valley Authority's Motion for Summary Decision," dated February 1, 2002.

> privileges of employment. The activities which are protected include, but are not limited to, providing a Commission licensee with information about nuclear safety at an NRC licensed facility or testifying at any Federal proceeding regarding any provision related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.
>
> Contrary to the above, the Tennessee Valley Authority (TVA) discriminated against Mr. Gary L. Fiser, a former corporate employee, for engaging in protected activities. Specifically, in July 1996, TVA eliminated Mr. Fiser's position of Chemistry and Environmental Protection Program Manager, Operations Support, as part of a reorganization, and took subsequent actions to ensure that he was not selected for one of two new positions within Operations Support. TVA took these actions, at least in part, in retaliation for Mr. Fiser's involvement in protected activities. Mr. Fiser's protected activities included the identification of chemistry related nuclear safety concerns in 1991-1993, and the subsequent filing of a Department of Labor (DOL) complaint in September 1993 based, in part, on these chemistry related nuclear safety concerns.

Jt. Exh. 47.

2.2. TVA responded to the NOV and Proposed Imposition of Civil Penalty on January 22, 2001, and March 9, 2001. After considering these responses, the Staff concluded that a violation of 10 C.F.R. § 50.7 had occurred and that TVA had failed to provide a basis for withdrawing the violation, reducing the severity level, or mitigating or rescinding the civil penalty. Therefore, on May 4, 2001, the Staff issued an Order Imposing Civil Monetary Penalty of $110,000 to TVA. Jt. Exh. 53. TVA submitted a notice of request for a hearing on June 1, 2001.

2.3. An Atomic Safety and Licensing Board Panel was established to preside over this proceeding on June 26, 2001. 66 Fed. Reg. 34961 (July 2, 2001). The Board granted TVA's request for a hearing by Memorandum and Order dated June 28, 2001. 66 Fed. Reg. 35467 (July 5, 2001). The parties conducted discovery through the end of 2001, including depositions, interrogatories, document requests, and requests for admissions.

2.4. On February 1, 2002, TVA filed a Motion for Summary Decision, requesting that the Board conclude that there were no genuine issues as to any material fact and that TVA was entitled

to judgment as a matter of law.[2] The Staff responded to TVA's motion on February 20, 2002, setting forth numerous areas of disputed material facts.[3] On March 1, 2002, both parties filed prehearing legal briefs which set forth their view of the law as relevant to the issues in this proceeding.[4] Additionally, the Nuclear Energy Institute filed an amicus brief setting forth its interpretation of the law.[5] Also on March 1, 2002, TVA filed a Reply in Support of Motion for Summary Decision.[6] The Board denied TVA's Motion for Summary Decision on March 21, 2002, finding that there were sufficient disputed material facts to preclude the grant of summary decision to TVA. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 &3), LBP-02-10, 55 NRC 236 (2002).

2.5. The Board conducted an administrative hearing on this matter from April 23, 2002 through May 9, 2002 and June 11, 2002 through June 20, 2002 in Chattanooga, Tennessee. The hearing was completed September 9, 2002 through September 13, 2002 in Rockville, Maryland. During this hearing, the Board heard the testimony of witnesses and admitted a number of exhibits to the record. The Board closed the record on October 24, 2002.[7]

---

[2] "Tennessee Valley Authority's Motion for Summary Decision," February 1, 2002.

[3] "NRC Staff Response to Tennessee Valley Authority's Motion for Summary Decision," February 20, 2002.

[4] "NRC Staff Pretrial Legal Brief," March 1, 2002; "Tennessee Valley Authority's Prehearing Brief," March 1, 2002.

[5] "Brief *Amicus Curiae* of the Nuclear Energy Institute," March 1, 2002.

[6] "Reply in Support of Tennessee Valley Authority's Motion for Summary Decision," March 1, 2002.

[7] Memorandum and Order (Rejection of Late-filed Exhibit; Closing of Evidentiary Record; Transcript Corrections; Schedules for Proposed Findings of Fact and Conclusions of Law), October 24, 2002.

B. Applicable Legal Standards

2.6. NRC regulations at 10 C.F.R. § 50.7 prohibit NRC licensees from taking an adverse action against an employee based upon his involvement in certain protected activities. Section 50.7(a) contains a broad prohibition of discrimination and sets forth a non-exhaustive list of protected activities, including:

> (i) Providing the Commission or his or her employer information about alleged violations of [the Atomic Energy Act (AEA) or the Energy Reorganization Act (ERA)] or possible violations of requirements imposed under either of those statutes;
>
> (ii) Refusing to engage in any practice made unlawful under either [the AEA or ERA] if the employee has identified the alleged illegality to the employer;
>
> (iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;
>
> (iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either [the AEA or the ERA].
>
> (v) Assisting or participating in, or is about to assist or participate in, these activities.

The protected activities identified in section 50.7(a) closely parallel the activities protected by section 211 of the Energy Reorganization Act (hereinafter "ERA").[8]

2.7. The regulation states that an employee may file a charge of discrimination through the Department of Labor (hereinafter "DOL") for a personal remedy. The regulation does not permit the Commission to provide a personal remedy to a wronged employee. Under 10 C.F.R. § 50.7(c), a violation of the regulation by a Commission licensee may be grounds for denial, revocation, or suspension of the licensee, the imposition of a civil penalty on the licensee, or other enforcement action. The regulation does not set forth a particular standard of review, nor does it provide the licensee with an opportunity to evade a violation by establishing that it would have taken the same adverse action in the absence of discrimination.

---

[8] 42 U.S.C. § 5851.

2.8. Under 10 C.F.R. § 50.9(a), all information submitted to the Commission by the licensee "shall be complete and accurate in all material respects." This regulation also requires the licensee to supplement or correct any incomplete or inaccurate information upon learning of the deficiency.

2.9. This hearing on a violation of 10 C.F.R. § 50.7 is a case of first impression. Therefore, the only law that binds the Board in determining whether such a violation occurred is the regulation itself. The Board has the discretion to look to other bodies of law to aid in interpreting section 50.7. Relevant bodies of law include DOL case law regarding violations of section 211 of the ERA and federal discrimination case law. The Board will more fully examine the relevant areas of law in Section III of this opinion.

C. Evidence Adduced at Hearing

1. Employment Background of Gary Lynn Fiser

2.10. TVA recruited and hired Gary Lynn Fiser for the position of chemistry program manager in the corporate office in 1987. Hearing Transcript p. 991, l. 22 (hereinafter "Tr.").

2.11. Prior to his employment at TVA, Fiser worked at Arkansas Nuclear One (hereinafter "ANO") in the chemistry department. Tr. p. 989, l. 21. Fiser's first position at ANO was as an entry level chemistry and health physicist. Tr. p. 989, l. 24. Fiser later became the senior chemist at ANO, with oversight over radiochemistry data, primary chemistry data, and radioactive effluents. His duties also included writing procedures to run the radiochemistry program at ANO. Tr. p. 990. l. 12. Fiser was then promoted to the radiochemistry supervisor position at ANO, with responsibility for all personnel in the radiochemistry department. Tr. p. 990, l. 25. In 1986, Fiser transferred to the quality assurance organization as a radiochemistry specialist. Tr. p. 991, l. 12. Fiser held this position until his hire by TVA. Tr. p. 991, l. 20.

2.12. Upon his hiring at TVA, Fiser worked in the corporate chemistry organization for six to eight months. In May, 1988, Fiser assumed the duties of the Chemistry Superintendent at

Sequoyah Nuclear Plant (hereinafter "SQN"). Tr. p. 992, l. 10. Fiser's original supervisor in that position was Ron Fortenberry. Tr. p. 992, l. 18. Shortly thereafter, Fortenberry was replaced as Fiser's supervisor by Steve Smith, the SQN Plant Manager. Tr. p. 993, l. 6.

2.13. On January 6, 1989, Fiser received a "Performance Planning and Evaluation for Managers, Office of Nuclear Power," in his position as SQN Chemistry Superintendent. Jt. Exh. 30. Fiser received an Overall Evaluation of "Adequate Performer" on this appraisal. Both Fiser and his current supervisor, Steve Smith, signed this evaluation. In the section of the evaluation for areas of needed improvement, Smith wrote that "Mr. Fiser must become more aggressive in the performance of his duties." Jt. Exh. 30, Section 4. Fiser disagreed with this appraisal because Smith based his evaluation upon a poor evaluation by the Institute for Nuclear Power Operations (hereinafter "INPO") that had been largely completed prior to Fiser assuming the SQN Chemistry Superintendent position. Tr. p. 2438, l. 12.

2.14. During 1989, Steve Smith ceased supervising Fiser and Bill Lagergren, the Operations Manager at SQN, became Fiser's supervisor. Tr. p. 999, l. 14. Between January, 1989 and September, 1989, Fiser's Chemistry Superintendent position changed from an M-7 position to a M-9 position. *See* Jt. Exhs. 30 and 31. Lagergren issued Fiser an "Employee Appraisal for Manager and Specialist Employees" as the Chemistry Superintendent in September, 1989. Jt. Exh. 31. During this appraisal period, Fiser's performance improved to "solid performance," although Lagergren noted some continued weaknesses in aggressiveness.

2.15. Between September, 1989 and November, 1990, Fiser's position changed from the SQN Chemistry Superintendent to the SQN Chemistry and Environmental Superintendent. Tr. p. 1005, l. 15. *See* Jt. Exh. 31, Staff Exh. 44. In November, 1990, Lagergren issued Fiser an "Employee Appraisal for Manager and Specialist Employees" as the SQN Chemistry and Environmental Superintendent. Staff Exh. 44. This appraisal noted vast improvement on Fiser's part in all areas of his performance. Fiser accomplished each of the 17 goals for accomplishment

and performance during this appraisal period. Additionally, Fiser received the highest rating available on each of the 18 behavioral standards on which he was evaluated. Staff Exh. 44.

2.16. Fiser's performance as the SQN Chemistry and Environmental Superintendent remained strong through the first two quarters of fiscal year (hereinafter "FY") 1991. As a result of this good performance, Lagergren decided to rotate Fiser to Outage Management in order to broaden Fiser's plant experience and develop his leadership skills. Tr. p. 1007, l. 10. *See* Jt. Exh. 32, Second Quarter Evaluation. Fiser rotated to an Outage Manager position during the third quarter of FY 1991, starting in April of 1991, and continued in that position through the end of FY 1991. Tr. p. 2272, l. 8. Fiser did not retain his chemistry superintendent duties during his rotation to Outage Management. During that time, he placed two of his direct reports, Rob Richie and Scott Watson, in charge of the SQN chemistry program. Tr. p. 1008, l. 10; p. 2275, l. 5.

2.17. At the end of FY 1991, Fiser received an "Employee Appraisal for Manager and Specialist Employees" for his work as Chemistry and Environmental Superintendent and as Outage Manager. Jt. Exh. 32. This appraisal indicated that Fiser's performance within the chemistry program remained high. Fiser's performance in Outage Management was good overall, but he did experience some problems in his new position. *See* Jt. Exh. 32, Fourth Quarter Evaluation. Overall, Fiser met 16 of 17 goals for accomplishment and performance, and received the highest rating available on 15 of 18 behavioral standards. Jt. Exh. 32.

2.18. Fiser continued as Outage Manager until approximately January 1992, when he returned to his Chemistry and Environmental Superintendent position. Tr. 1015, l. 3. Shortly after his return to his permanent position, Lagergren ceased supervising Fiser and Fiser began reporting to Pat Lydon. Tr. p. 1015, l. 7.

2.19. After his return to the Chemistry and Environmental Superintendent position, Fiser remained at SQN until March 1992. At that time, Lydon informed Fiser that he would be rotating to the Corporate Chemistry Manager position in Chattanooga and that the Corporate Chemistry

Manager, Bill Jocher, would be rotating to the SQN Chemistry and Environmental Superintendent position. Tr. p. 1025, l. 1.

2.20. Fiser discussed this rotation with Rob Beecken, then the SQN Plant Manager, and Jack Wilson, then the SQN site vice president, in a stairwell at SQN. Fiser asked them if they were upset with him and if there was anything performance-related he needed to correct. At that time, both Wilson and Beecken were very positive, told Fiser he had done well at SQN and that he should use the rotation as an opportunity to broaden his horizons. Tr. p. 1026, l. 13, p. 2416, l. 6. *See also* Jt. Exh. 27, p. 5.

2.21. The original intent of Fiser's rotation as Corporate Chemistry Manager was for a one year assignment. Tr. p. 1033, l. 17. At the end of the rotation, Fiser was supposed to return to his SQN Chemistry and Environmental Superintendent position. Tr. p. 1028, l. 5. If any of the parties wanted the temporary rotation to become permanent, all parties to the rotation agreement had to agree to the permanent change. Tr. p. 1033, l. 17; Jt. Exh. 43. Wilson McArthur, then the Corporate Technical Programs Manager, was a party to this agreement, and in fact coordinated the agreement. Jt. Exh. 43.

2.22. During his rotation as Corporate Chemistry Manager, Fiser had some difficulties with employees who were loyal to Jocher. McArthur told Fiser that Sam Harvey and E.S. Chandrasekaran (hereinafter "Chandra") had expressed their allegiance to Jocher, who had recruited them for TVA employment, and that they had expressed some concerns about Fiser's management style. Tr. p. 1035, l. 5.

2.23. In September 1992, McArthur issued Fiser a performance appraisal for FY 1992, which covered Fiser's performance at SQN and in Corporate Chemistry. Jt. Exh. 33. McArthur testified that this was the worst performance appraisal he had ever written. Tr. p. 1412, l. 20. McArthur requested input from Fiser's supervisors at SQN, including Lagergren, in preparing this appraisal. Tr. p. 1412, l. 12; p. 1413, l. 16. Lagergren had a good opinion of Fiser. Tr. p. 1661,

l. 11. The bullets on the first page of the appraisal indicate things that happened during the year on which Fiser was successful. Tr. p. 1551, l. 5. McArthur identified as one of Fiser's successful contributions during that year that, "There have been no Chemistry related findings by INPO for SQN. THIS IS A RECORD FOR SQN." Jt. Exh. 33, p. CB000002 (emphasis in original). McArthur rated Fiser in the middle on all the Behavioral Standards on which he was evaluated. McArthur also noted the problems caused by the allegiance of the Corporate Chemistry staff to Jocher. Jt. Exh. 33, p. CB000006.

2.24. The September 1992 performance appraisal also stated "SQN needs a different approach to solving problems in Chemistry and the rotation was initiated to face that issues [sic]." Jt. Exh. 33, p. CB000002. Fiser stated that he was dumbfounded when he read that statement in the appraisal because it was contrary to what Beecken and Wilson had discussed with him prior to the rotation. Tr. p. 1045, l. 11. Prior to this appraisal, Fiser's management at SQN had not indicated to him that they were unhappy with his performance as SQN Chemistry Superintendent. Tr. p. 1045, l. 22.

2.25. In November 1992, McArthur and Fiser had a conversation in which McArthur told Fiser that Beecken would not accept him back at SQN at the end of the one year rotation. Tr. p. 1048, l. 22. Jt. Exh. 27, p. 7; Staff Exh. 168. McArthur did not know the reasons why Beecken was refusing to accept Fiser back at SQN at the conclusion of the rotation. Tr. p. 1425, l. 6. This conversation with McArthur was the first time that Fiser learned that Beecken did not wish him to return to Sequoyah. As a result of this conversation, Fiser arranged meetings with Beecken, Wilson, and Lagergren. Tr. p. 1091, l. 21.

2.26. Fiser met with Jack Wilson on November 21, 1992 to discuss why Beecken did not want him to return to SQN at the conclusion of his rotation in Corporate Chemistry. Wilson told him that the consensus was that he had not been effective, and that he had not been aggressive enough. Jt. Exh. 27, p. 36.

2.27. After this discussion with Wilson, Fiser then had a conversation with Lagergren on November 23, 1992 regarding his performance as the SQN Chemistry Manager. In that conversation, Lagergren stated that it would not have mattered how big an issue Fiser made of the lack of funding for the Chemistry Program, and specifically for the Chemistry Upgrade Project (hereinafter "CUP"), because upper-level management was more concerned with its "pet projects." Jt. Exh. 27, p. 41. Lagergren also told Fiser that he could use him as a reference when looking for further employment at TVA. Jt. Exh. 27, p. 46.

2.28. On December 9, 1992, Fiser met with Beecken to discuss why Beecken had told McArthur that he would not accept Fiser back at SQN at the end of his rotation as the Corporate Chemistry Manager. Tr. p. 1092, l. 21; Jt. Exh. 27, p. 50; TVA Exh. 148. Beecken told Fiser he was upset with him because he wanted a perfect INPO evaluation. Tr. p. 1092, l. 21. Jt. Exh. 27, p. 50; TVA Exh. 148. During this meeting, Fiser explained to Beecken that he had not been in charge of the SQN Chemistry program for a year and a half and that when he was at SQN, they had no INPO findings. Tr. p. 2533, l. 19. Beecken told Fiser that he was upset with him and that he did not think that Fiser had been effective as SQN Chemistry Manager. Jt. Exh. 27, p. 54; TVA Exh. 148. Beecken also stated that the Chemistry program at SQN was broken and that he wanted it fixed. Tr. p. 2531, l. 7. Jt. Exh. 27, p. 56; TVA Exh. 148. This conversation was diametrically opposed to what Beecken had told him in March 1992 when Fiser was leaving for his rotation as Corporate Chemistry Manager. Tr. p. 1094, l. 12.

2.29. In November of 1992, McArthur removed Fiser from the Corporate Chemistry Manager position and demoted him to a Chemistry Program Manager position. Tr. p. 1420, l. 16. McArthur stated that it was his idea to demote Fiser, although in the November 16, 1992 conversation with Fiser, McArthur intimated that it was Bynum and Keuter who were suggesting to him that Fiser be removed from the position. Tr. p. 1420, l. 16. Jt. Exh. 27, p. 15; Staff Exh. 168.

2.30. After demoting Fiser, McArthur designated Sam Harvey as the Acting Corporate Chemistry Manager. McArthur felt that Harvey was the most qualified to handle the position because TVA had two Pressurized Water Reactor (hereinafter "PWR") plants, and Harvey spent most of his time working with PWR's. Tr. p. 1424, l. 12. McArthur issued a memorandum announcing the reassignment on November 18, 1992, two days after his conversation with Fiser. Staff Exh. 90.

2.31. At the conclusion of his one year rotation in Corporate Chemistry, Fiser did not return to his position as SQN Chemistry and Environmental Superintendent, although Jocher did return to his position in Corporate Chemistry, where he remained until he was terminated by Bynum for engaging in protected activities. Tr. p. 1096, l. 21. *See Jocher v. Tennessee Valley Authority*, 94-ERA-24 (ALJ July 31, 1996) (ARB June 24, 1996). Fiser remained in the Corporate Chemistry organization as a Chemistry Program Manager. At that time, McArthur had enough vacancies in his organization to retain Fiser in Corporate Chemistry. Tr. p. 1427, l. 11. However, after being informed that McArthur had a position available for Fiser, Bynum cut the head count of McArthur's organization and eliminated the position which Fiser could have filled. Tr. p. 1430, l. 11. Jt. Exh. 24, p. 3. Instead of returning to SQN or remaining in Corporate Chemistry, Fiser was given a Notice of Transfer to Employee Transition Program (hereinafter "ETP") on April 2, 1993. Jt. Exh. 59. This letter claimed that Fiser's "position of Manager, Chemistry, PG-9, Sequoyah Nuclear Plant, has been determined to be surplus." Jt. Exh. 59, p.1.

2.32. By the terms of the rotation agreement, Fiser was entitled to return to SQN at the end of his one year rotation in Corporate Chemistry. Jt. Exh. 43. TVA did not honor that agreement because Beecken refused to accept Fiser back at SQN. The terms of the rotation agreement did not give Beecken the authority to refuse Fiser's return to SQN at the end of the rotation. Jt. Exh. 43. McArthur acknowledged that nothing in the rotation agreement gave SQN management the right to refuse to take Fiser back at the end of the rotation. Tr. p. 1411, l. 14.

2.33. At the time Fiser received the notice sending him to the ETP, he was not currently occupying the SQN Chemistry Manager position, he was in a Program Manager position in Corporate Chemistry. The Corporate office handled the surplus notice, and at the time of the notice, SQN still had a Chemistry Manager position in its organization. Tr. p. 1097, l. 24. McArthur stated that it was not normal TVA practice for the Corporate office to reduce an individual from a plant position. Tr. p. 1433, l. 11. At the time Fiser received this notice, the SQN Radiological Controls and Chemistry (hereinafter "RadChem") organization was in the process of reorganizing and it was not yet known whether the Chemistry Manager position would be cut. Joe Bynum approved the final organization on April 27, 1993, which included a SQN Chemistry Manager position. Staff Exh. 12.

2.34. Fiser pursued jobs within TVA while he was in the ETP, including his former SQN Chemistry Manager position. Charles Kent, the new RadChem Manager for SQN was the hiring supervisor for that position. Tr. p. 1101, l. 1. Kent had previously considered Fiser for the Technical Support Supervisor position, and then considered Fiser for the SQN Chemistry Manager position. Tr. p. 3027, l. 14. Fiser was not interested in the Technical Support Supervisor position because it was a lower level position than his prior position as SQN Chemistry Superintendent. Tr. p. 3030, l. 9.

2.35. Management had approved the final SQN RadChem organization, which included a Chemistry Manager, and Kent was being pressured to fill the position. Tr. p. 3031, l. 10. Kent contacted Fiser about the SQN Chemistry Manager position in early July, 1993 to set up an interview. Kent interviewed Fiser on July 6, 1993, and introduced Fiser to Ken Powers, the new SQN Plant Manager. Tr. p. 1102, l. 14. Jt. Exh. 27, p. 74. At this interview, Kent offered Fiser the position, and quoted him the pay grade (hereinafter "PG") of the position and a salary of $81,000. Kent also told Fiser to come to SQN the following Thursday ready to work, and that in the interim, he would talk to McArthur and others to make the offer happen. Tr. p. 1104, l. 1, p. 2343, l. 15.

Jt. Exh. 27, p. 74. Additionally, Kent provided the information about the position, salary, and grade level of the position he offered to Fiser to Ronald Brock in the ETP. Staff Exh. 177, Exhibit 7, p. 1of 2.

2.36. After offering the position to Fiser, Kent spoke to McArthur about hiring Fiser as the SQN Chemistry Manager. Tr. p. 1105, l. 9. In response to a request from Kent, McArthur spoke to Dan Keuter and Joe Bynum, and then relayed to Kent that TVA management did not support the hiring of Fiser as the SQN Chemistry Manager. Tr. p. 1437, l. 9; p. 1438, l. 1; p. 1441, l. 17; p. 1574, l. 6. McArthur told Kent that he should consider the fact that Fiser had not been effective as the SQN Chemistry Manager before and that he did not think it was a good idea to bring Fiser back as the SQN Chemistry Manager. Tr. p. 1573, l. 7; p. 3203, l. 6. McArthur also told Kent that he would support him in whatever decision he made regarding Fiser. Tr. p. 3039, l. 2.

2.37. Although Kent had told Fiser to come to SQN to begin working, Kent called Fiser on July 9, 1993 and informed him that he was rescinding the job offer and asked Fiser to come to SQN to discuss why the job offer did not work out. Tr. p. 1110, l. 1. Jt. Exh. 27, p. 75. At this meeting, Kent told Fiser that once McArthur started making inquiries about the job offer, "Comments came out of the woodwork." Jt. Exh. 27, p. 76; Staff Exh. 179. Kent told Fiser that he did not think he could survive in the position because of the skepticism raised by others. Jt. Exh. 27, p. 77; Staff Exh. 179. Kent later posted a Vacant Position Announcement (hereinafter "VPA") for the SQN Chemistry Manager position, and Fiser did not apply on the VPA. Tr. p. 3203, l. 13. TVA Exh. 12, p. EE000082.

2.38. After the job offer at SQN fell through, Fiser requested that the ETP Coordinator, Ronald Brock, contact SQN to determine why the offer was revoked. Brock called Al Black at SQN Human Resources (hereinafter "HR"), with Fiser listening on the speaker phone. Black told Brock that the offer to Fiser was blocked at a level higher than Kent. Tr. p. 1111, l. 18. Staff Exh. 177, Exhibit 7, page 2 of 2.

2.39. On July 14, 1993, Fiser approached McArthur to inquire as to what input he provided to Kent with regard to the job offer. McArthur told Fiser that he discussed the offer with Joe Bynum and Dan Keuter and that he relayed to Kent that Fiser was not supported by management. Jt. Exh. 27, p. 78-79. Staff Exh. 169. During that same conversation, McArthur warned Fiser that he should be careful about going to court against TVA because no one wants to hire a troublemaker. Jt. Exh. 27, p. 80; Staff Exh. 169.

2.40. After Kent revoked the offer of the SQN Chemistry Manager position, Fiser then received a termination letter on August 13, 1993. Tr. p. 1120, l. 5; Jt. Exh. 60. According to this letter, Fiser was terminated because his position of Manager, Chemistry, PG-9, Sequoyah Nuclear Plant was eliminated in a Reduction in Force (hereinafter "RIF"). Jt. Exh. 60, p.1. At the time this termination letter was issued, there was a Chemistry Manager position at SQN, which was filled one week later by Gordon Rich. *See* TVA Exh. 12, p. EE000082.

2.41. On August 16, 1993, Fiser, Jocher, and D.R. Matthews sent a letter to then-Senator James Sasser regarding the repressive management structure at TVA Nuclear. Staff Exh. 29. In this letter, Fiser identified a number of safety and management concerns at TVA, including problems with the Post Accident Sampling System (hereinafter "PASS"), problems with the emergency diesel generator storage tanks, and problems with the availability of chemistry equipment. Staff Exh. 29, p. CB000133. Fiser specifically stated in this letter that he and Jocher had a disagreement with SQN Site Vice President Jack Wilson regarding the three hour time limit to take a reactor coolant sample from PASS and that they conducted a test and remedial training to correct this issue. *Id.*

2.42. In the letter to Senator Sasser, Fiser also identified a preexisting problem with the radiation monitor setpoint, which resulted in the filing of a Licensee Event Report (hereinafter "LER"). Fiser stated that Beecken, the SQN Plant Manager, retaliated against him because he and

the employees under his supervision found, documented, reported, and fixed the preexisting problem with the radiation monitor. Staff Exh. 29, p. CB000134.

2.43. Fiser, Jocher, and Matthews sent copies of this letter to Dr. Ivan Selin, then the Chairman of the NRC, and Oscar DeMiranda, then the Allegations Coordinator in Region II of the NRC. Staff Exh. 29, p. CB000136. On August 24, 1993, Senator Sasser mailed a copy of this letter, with a request for further information, to William Hinshaw, II, then the TVA Inspector General (hereinafter "IG"). Staff Exh. 30, p. AJ667. In response to this request, the TVA IG sent a number of letters to Senator Sasser. First, on September 9, 1993, the IG sent a letter in which it noted that it had not yet received a complaint from Fiser, but that Fiser had refused to meet with an IG agent for an interview regarding a complaint filed by Jocher. Staff Exh. 30, p. AJ665. In this letter, TVA threatened a charge of insubordination if Fiser continued to refuse the interview with the IG. *Id.* The letter also stated that it would recontact Fiser in an attempt to obtain relevant information. *Id.* at p. AJ666. The letter made no other mention of the issues raised by Fiser in the letter to Senator Sasser.

2.44. On October 22, 1993, the IG sent a follow-up letter to Senator Sasser in which it updated the Senator on the complaints filed by Jocher and Matthews. Staff Exh. 32. G. Donald Hickman, then the Department Manager responsible for supervising nuclear investigations within the TVA Office of the Inspector General (hereinafter "OIG"), testified that in preparing the September 9, 1993 and October 22, 1993 letters he reviewed the investigative files. Tr. p. 4209, l. 4. By the time the October letter was sent, Fiser had filed a complaint with the DOL based upon his termination. *See* Staff Exh. 34. However, the October letter made no mention of that complaint and did not provide any information regarding an investigation by the TVA IG into the issues raised in either that complaint or in the Sasser letter.

2.45. Finally, on April 22, 1994, after TVA had settled with Fiser over his 1993 DOL complaint, the TVA IG sent another update letter to Senator Sasser. *See* Staff Exh. 33; Jt. Exh. 34.

In this letter, the IG merely provided information regarding its investigation into the Jocher complaint. Staff Exh. 33. Despite the recent settlement with Fiser, the IG still provided no information regarding the information contained in either the Sasser letter or Fiser's DOL complaint. Hickman testified that a review of the TVA OIG file did not reveal any other written responses to Sasser's inquiry. Tr. p. 4212, l. 20.

2.46. On September 23, 1993, Fiser filed a complaint with the DOL regarding his transfer into the ETP despite the continued existence of the SQN Chemistry Manager position. Staff Exh. 34. In this complaint, Fiser identified three technical issues for which TVA had retaliated against him for his involvement. First, Fiser stated that Beecken was angry with him because a problem with the radiation monitor setpoints had been reported through a Significant Corrective Action Report (hereinafter "SCAR"). Staff Exh. 34, p. AJ000135. Second, Fiser stated that Beecken was upset because a problem with the filter change-out procedure had occurred and been documented. *Id.* at AJ000135-136. Finally, Fiser stated that he and Jocher determined that SQN personnel could not meet the three hour PASS requirement, while the SQN Site Vice President, disagreed with their interpretation of the NRC requirement. After NRC confirmed that Fiser and Jocher were correct, they conducted exercises to determine the training level of the technicians. *Id.* at 136.

2.47. Fiser also noted in his 1993 complaint that the Chemistry Manager position from which he had been surplused had not actually been eliminated, but had simply been recreated with a different title. Staff Exh. 34, p. AJ000135. Fiser stated that the SQN RadChem Manager, Charles Kent, offered him the Chemistry Manager position in July, 1993, but that this offer was later withdrawn because he had a "target" on his back. *Id.* at p. AJ000138.

2.48. In spring of 1994, TVA settled Fiser's 1993 DOL complaint. Jt. Exh. 34. As part of the settlement agreement, Fiser was given a PG-8 Chemistry Program Manager position in the Corporate Chemistry Organization. Tr. p. 2280, l. 2. Additionally, the settlement agreement

provided Fiser with a lump sum payment, restored annual leave, and attorneys' fees incurred in pursuing his complaint. Jt. Exh. 34.

2.49. Upon his return to the Corporate Chemistry organization, Ronald Grover, the Corporate Chemistry Manager, became Fiser's immediate supervisor. Grover was new to TVA and Fiser had never worked for him before. Tr. p. 2290, l. 15.

2.50. In 1994, the Corporate Radiological Controls and Chemistry Organization underwent a reorganization. In that reorganization, Fiser was given a surplus notice and had to compete for one of several PG-8 Chemistry and Environmental Protection Program Manager positions. Tr. p. 2290, l. 20. In that reorganization, Grover was selected as the Corporate Chemistry and Environmental Protection Manager and became the selecting official for the Chemistry and Environmental Protection Program Manager positions. Tr. p. 2301, l. 24; p. 3588, l. 10. Fiser did not file a DOL complaint as a result of this reorganization because the posting of the Chemistry and Environmental Protection Program Manager positions appeared to be legitimate and no one involved with his 1993 DOL complaint was involved in the selection process. Tr. p. 2304, l. 4.

2.51. Grover established a selection review board (hereinafter "SRB") for the selection of the positions. Tr. p. 1828, l. 25. The SRB interviewed the candidates for the PG-8 Chemistry and Environmental Protection Program Manager positions on September 22, 1994. TVA Exh. 24, p. HH000004. The SRB interviewed six candidates for these positions: Harvey, Chandra, David Sorrelle, Al Dyson, Fiser, and Joseph Pleva. TVA Exh. 24. Gordon Rich, John Sabados, Pat Hughes, McArthur, and Grover sat on the SRB, although Hughes and McArthur shared review duties. Hughes interviewed and evaluated Harvey, Chandra, Sorrelle, and Fiser, while McArthur interviewed and evaluated Dyson and Pleva. Tr. p. 1459, l. 5. TVA Exh. 24.

2.52. Grover selected Fiser, Harvey, Chandra, and Sorrelle for the PG-8 Chemistry and Environmental Protection Program Manager positions. Tr. p. 1830, l. 6. Fiser, Harvey and Chandra were all chemists who primarily performed chemistry functions, while Sorrelle was an

environmental specialist who performed the environmental functions. Tr. p. 2311, l. 13. At the time of this reorganization, the intent was that the chemists and environmental specialists would cross train and learn the functions of the other specialization so that they could be proficient in both fields. Tr. p. 1826, l. 25. This intention was never realized and the three chemists continued to perform 95 percent chemistry related duties. Tr. p. 1885, l. 22; p. 2311, l. 13; p. 5036, l. 19.

2.53. Grover evaluated Fiser in performance appraisals for FY 1994 and FY 1995. Staff Exhs. 46 and 47. In FY 1994, Fiser's overall evaluation from Grover was "Meets" expectations. Fiser received an evaluation of "Exceeds" expectations in eight of the eleven behavioral areas in which he was rated. Staff Exh. 46. Neither McArthur nor Thomas McGrath, then the Chairman of the Nuclear Safety Review Board (hereinafter "NSRB"), had any input into this evaluation. Tr. p. 2311, l. 9. In FY 1995, Fiser's overall evaluation from Grover was again "Meets" expectations. Fiser received an evaluation of "Exceeds" expectations in six of the fourteen behavioral areas in which he was rated. Staff Exh. 47. Again, neither McArthur nor McGrath had any input into this evaluation. Tr. p. 2311, l. 9.

2.54. In October 1995, McGrath became the Acting General Manager of Operations Support, Fiser's second level supervisor. Tr. p. 429, l. 19. This was the first time McGrath was within Fiser's supervisory chain of command. In early 1996, McGrath notified his direct reports, including both Grover and McArthur, that the Operations Support group would be undergoing a reorganization. McGrath provided guidance as to how to make the necessary reductions and told them to get back to him with their proposals. Tr. p. 436, l. 3.

2.55. Grover initially proposed that the first year of the reorganization plan involve no incumbents losing their positions, but that the organization rely upon the elimination of an unfilled vacancy to meet its first-year goal. Tr. p. 1862, l. 10; p. 2199, l. 16. McGrath rejected that proposal and required Grover to develop a plan that eliminated all but two Chemistry Program Manager positions. Tr. p. 1860, l. 15. McGrath decided that these positions should be a PWR Chemistry

Program Manager and a Boiling Water Reactor (hereinafter "BWR") Chemistry Program Manager. Tr. p. 453, l. 17; p. 1699, l. 15; p. 1863, l. 10. McGrath announced these two positions and that they would be advertised for competition at an all-hands meeting on June 17, 1996. Tr. p. 2339, l. 1.

2.56. As part of the reorganization, the Chemistry and Environmental Protection Manager position held by Grover and the Radiological Controls (hereinafter "RadCon") Manager position held by McArthur were eliminated and combined into a single RadChem Manager position. This position would include responsibility for the two new Chemistry Program Manager positions. Tr. p. 479, l. 25. At the June 17, 1996 all-hands meeting, McGrath announced that McArthur had been selected as the RadChem Manager and therefore would be serving as the selecting official for the two chemistry positions. Tr. p. 2339, l. 17.

2.57. After McGrath announced that the Chemistry positions in the new organization would be posted for competition, Fiser went to speak with Ben Easley in HR. Because Fiser had taped conversations with Easley in the past, Easley did not feel comfortable discussing this matter with Fiser alone. Easley took Fiser to speak with his supervisor, James Boyles. Tr. p. 1238, l. 17. Fiser explained to Boyles that he objected to the posting of the PWR Chemistry Program Manager position because this was the position he had been given in settlement of his 1993 DOL complaint. Fiser believed that posting the Chemistry position would violate his settlement agreement. Tr. p. 2359, l. 17. During this meeting, Fiser explained to Boyles that although environmental functions had been added to the position in 1994, those functions had never been performed. Fiser told Boyles that if the position was posted for competition, that he would file a DOL complaint. Tr. p. 2360, l. 7.

2.58. Boyles told Fiser that he would discuss Fiser's concerns with his supervisor, Phil Reynolds, then the General Manager of HR. Boyles also was adamant about Fiser applying for the PWR Chemistry Program Manager position vacancy. Tr. p. 2360, l. 19. Shortly thereafter,

Boyles told Fiser that he had discussed this issue and the settlement agreement with Reynolds, McGrath, and TVA Office of the General Counsel (hereinafter "OGC"). Tr. p. 2361, l. 18. Additionally, Boyles said that the position had changed and the settlement agreement was no longer applicable because the PWR Chemistry position was a different job than the Chemistry Program Manager position Fiser had been given in the settlement agreement. Tr. p. 2362, l. 5.

2.59. On July 18, 1996, an SRB was conducted to interview candidates for the positions to be supervised by McArthur, including the two Chemistry Program Manager positions. The SRB consisted of Charles Kent, the RadChem Manager for SQN, John Corey, the RadChem Manager for Browns Ferry Nuclear Plant (hereinafter "BFN"), and Heyward "Rick" Rogers, the Corporate Maintenance Support Manager. *See* Jt. Exh. 20, p. GG000032. Additionally, McArthur and an HR representative, Milissa Westbrook, were present during the interviews. Tr. p. 1521, l. 6. The SRB members scored each individual candidate based on a number of questions, then provided their scores to the HR representative, who tallied them. Taking the results of the SRB scores, McArthur then selected Sam Harvey for the PWR Chemistry Manager position. *See* Jt. Exh. 20, p. GG000022.

2.60. After Fiser's nonselection for the PWR Chemistry Program Manager position, he received a notice of assignment to the TVA Services organization. Jt. Exh. 28. This notice provided Fiser with two options: resign his TVA employment and receive severance pay, if eligible, and one year's salary as a lump sum payment; or be assigned to TVA Services until finding another position or until the end of FY 1997. Tr. p. 2367, l. 22. However, if Fiser selected the latter option, he could have been required to accept a position away from his home at a lesser salary and without severance pay, or be terminated immediately from his TVA employment if he refused an offered position. Jt. Exh. 28, Option 2. Fiser decided to select option one and resign his TVA employment and accept the severance package because he did not want to risk losing the severance pay if he

chose not to accept a lower paying position within TVA. Tr. p. 2370, l. 24, p. 2373, l. 24. Fiser submitted his resignation to McGrath, effective September 5, 1996. Jt. Exh. 29.

2.61. After Fiser resigned, Phil Reynolds, then the General Manager of HR, offered Fiser a position as PWR Chemistry Program Manager in the Corporate RadChem organization. TVA Exh. 4. Fiser declined this offer for a number of reasons. First, in this position, Fiser would have been reporting to McArthur and McGrath as his first and second line supervisors, respectively, and he did not trust those individuals. Tr. p. 4298, l. 20. Additionally, Fiser's earlier experience at SQN where he had been lied to regarding his return to SQN at the end of his rotation in Corporate Chemistry made him doubt that TVA would uphold this offer. Tr. p. 2382, l. 25. Finally, Fiser had no guarantee that within a short time after accepting the position, McGrath would not reorganize the position out of existence, since the position Reynolds was offering was not on the organization chart, and, as he had learned from Boyles, positions offered in a settlement would not be guaranteed for any length of time. Tr. p. 4299, l. 5.

2. Employment Background of Wilson McArthur

2.62. Wilson McArthur was hired into TVA as the Technical Programs Manager in 1990. Prior to his employment with TVA, McArthur had worked with O.J. Zeringue at the Shearon Harris facility, Carolina Power and Light Company. Tr. p. 1386, l. 17. When the Technical Programs Manager position became available, McArthur spoke to Zeringue and interviewed with several people at TVA. Tr. p. 1386, l. 21.

2.63. In the years leading up to his TVA employment, McArthur held a variety of positions in the nuclear industry. McArthur installed accelerators and conducted research on radiation monitor instrumentation at Nuclear Chicago. He then worked for Carolina Power and Light as a project engineer for the Shearon Harris Nuclear Plant. Tr. p. 1383, l. 5. After leaving Shearon Harris, McArthur was the Vice President and General Manager of Hittman Nuclear, working in the areas of radiological waste processing. Tr. p. 1384, l. 3. McArthur then became the Vice President

of Engineering at Tera and EDS Nuclear, and then worked for his own company, KLM Engineering. McArthur sold this company to Quadrex and continued working for Quadrex to assist them in decontamination and decommissioning work. He then moved to TVA in 1990. Tr. p. 1384, l. 24.

2.64. As the Technical Programs Manager, McArthur supervised the RadCon, Chemistry, Environmental, Emergency Preparedness, Industrial Safety, Security, and Fire Protection organizations, as well as the laboratory at Mussel Shoals. *See* Jt. Exh. 21, p. GG000210. During his tenure as Technical Programs Manager, he recommended to Oliver Kingsley that the security function be moved to the sites, and the fire protection organization was transferred to the fossil fuel organization. Both of these suggestions were implemented between 1990 and 1994. Tr. p. 1387, l. 24.

2.65. As the Corporate Technical Programs Manager, McArthur supervised Fiser during his rotation as the Corporate Chemistry Manager and then the Corporate Chemistry Program Manager from March 1992 until his surplus notice in April 1993. Tr. p. 1415, l. 5. Upon Fiser's return to the Corporate Chemistry organization after the settlement of his 1993 DOL complaint, McArthur was Fiser's second line supervisor for a few months. *See* Tr. p. 1820, l. 5; p. 1821, l. 9.

2.66. In 1994, the Corporate Technical Support organization underwent a reorganization in which the Technical Programs Manager position, which was a PG-SR position, was eliminated. John Maciecjewski, then the General Manager of Operations Support, decided to have a RadCon Manager position and a Chemistry and Environmental Protection Manager position. Tr. p. 1450, l. 23. At that time, McArthur became the RadCon Manager, which was a PG-11 position. Tr. p. 3794, l. 2. As the RadCon Manager, McArthur did not have supervisory authority over Fiser.

2.67. In 1995, the Corporate RadChem Manager position was created and Allen Sorrelle was placed in that position on an acting basis. Sorrelle held that position for a brief period prior to his retirement from TVA. Upon his retirement, the RadChem Manager position remained vacant until the spring of 1996. Tr. p. 907, l. 20; p. 1874, l. 25. TVA Exh. 62, p. BI000159 - BI000160.

2.68. In the spring of 1996, as part of the reorganization of Operations Support, McGrath eliminated the RadCon Manager position and the Chemistry and Environmental Protection Manager position and decided to fill the then-vacant RadChem Manager position. Tr. p. 479, l. 25. He initially told McArthur that the position would be posted for competition. McArthur questioned whether the position should be posted because he had previously been the Technical Programs Manager. Tr. p. 1481, l. 8. Shortly after McArthur raised this concern to McGrath, McGrath informed McArthur that he would be the RadChem Manager and that he would not have to compete for the position. According to McGrath, HR had conducted some type of evaluation and determined that McArthur had rights to the RadChem Manager position. Tr. p. 483, l. 10. At that time, no one told either McGrath or McArthur that McArthur was transferred into the RadChem Manager position because he lacked a position description for the RadCon Manager position, or that McArthur had only been the acting RadCon Manager from 1994 through 1996. Tr. p. 477, l. 9; p. 1481, l. 8.

2.69. McGrath announced that McArthur would be the RadChem Manager at a June 17, 1996 all-hands meeting to discuss the reorganization of Operations Support. At that same meeting, McGrath announced that there would be two Chemistry Program Manager positions, one for PWR and one for BWR. Tr, p. 2339, l. 5. As the new RadChem Manager, McArthur would be the selecting official for the Chemistry positions. Tr. p. 1493, l. 13.

3. Employment Background of Thomas McGrath

2.70. Tom McGrath began his employment with TVA in May 1987. Prior to that time, McGrath spent over 16 years as an officer and a civilian working for the United States Navy on naval reactors. Tr. p. 366, l. 22, p. 367, l. 12. After leaving the Navy, McGrath worked for Lockheed Shipbuilding in the Quality Assurance and program management divisions. Tr. p. 368, l. 8.

2.71. In May of 1987, McGrath started working for TVA. After an orientation period, McGrath was assigned to Watts Bar Nuclear Plant (hereinafter "WBN") as the Manager of Projects

for approximately six months. Tr. p. 369, l. 6. He was then assigned to the Acting Maintenance Superintendent position at WBN. Tr. p. 370, l. 15. In late 1988 and early 1989, McGrath was given a series of assignments on operational readiness review teams, first for the SQN restart, then for BFN and WBN. He then briefly transferred to the Corporate office as the Corporate Outage Manager in the Corporate Maintenance organization. Tr. p. 373, l. 4. In mid-1989, McGrath became the Manager of the Staff for Oliver Kingsley, the Chief Nuclear Officer for TVA. Tr. p. 375, l. 16. In 1990, a reorganization resulted in McGrath becoming the General Manager of Materials, Contracts, and Administrative Support, a position he held until 1995. Tr. p. 378, l. 19; p. 381, l. 1.

2.72. In late 1989, McGrath took over as the Chairman of TVA's NSRB. Tr. p. 376, l. 7. McGrath remained the Chairman of the NSRB until 1997, when he became the Vice Chairman of the NSRB. Tr. p. 380, l. 12. The NSRB Chairman position was a collateral duty for McGrath, who held other positions throughout the course of his tenure as Chairman of the NSRB.

2.73. McGrath first interacted with Fiser at SQN during his tenure as the Chairman of the NSRB. In 1991, McGrath attended a meeting of the NSRB Chemistry subcommittee in Fiser's office. Tr. p. 1018, l. 1. At this meeting, Fiser, members of his staff, and members of the NSRB discussed a number of issues at SQN, including problems with PASS, unmonitored releases, and chemistry trending. Tr. p. 1400, l. 6.

2.74. In October 1995, McGrath was assigned as the Acting General Manager of Operations Support, which he held until 1997. Tr. p. 382, l. 2. McGrath replaced Don Moody, who was ill with cancer and permanently took over for Moody in January 1996. Tr. p. 430, l. 23. In this position, McGrath became the immediate supervisor of Grover and McArthur, and the second line supervisor of Fiser. *See* Staff Exh. 130.

2.75. In March 1996, a budget planning guidelines memorandum was issued setting forth goals for all the corporate organizations. The goal for FY 1997 was to reduce the budget by a minimum of 17 percent. Tr. p. 433, l. 17. The organizations were required to set budget targets

through 2001. McGrath's assignment from Kingsley was for the organization to be set up efficiently as soon as the desired results could be achieved. Tr. p. 434, l. 2. The overall goal for reduction by FY 2001 was a 40 percent reduction. Tr. p. 434, l. 19.

2.76. McGrath met with his direct reports, including Grover and McArthur, and provided them with criteria and guidelines regarding the reorganization. McGrath wanted them to determine what their organization should look like without initially worrying about what year they would reach that goal. Tr. p. 436, l. 3. McGrath wanted to take the logical first step to reach the long-term steady state organization. This first step had to be a minimum of 17 percent, with a target of a 40 percent reduction over a period of time. Tr. p. 1857, l. 21. One criteria McGrath provided his direct reports was to eliminate the use of generic position descriptions and begin using specific position descriptions that provide accountability and make expectations clear. Tr. p. 438, l. 18.

2.77. McGrath requested that his direct reports bring information back to him with their recommendations based on the guidelines he had provided them. Tr. p. 437, l. 20. Each organization had to explain how they would meet the objective, but they were not required to meet the reduction goals in the same way. The reductions could be made at any time over the course of the reduction plan, but the end point of reductions had to be 40 percent. Tr. p. 2185, l. 25; p. 2186, l. 25. After the first round of recommendations from his direct reports, McGrath decided that certain groups would be required to cut more than 40 percent, while other groups would remain intact. Tr. p. 2187, l. 20.

2.78. For the Chemistry organization, McGrath rejected Grover's first recommendation, which would not have resulted in any of the incumbents losing a position. Tr. p. 1862, l. 10; p. 2199, l. 16. McGrath insisted that Grover cut at least one of the Chemistry and Environmental Protection Program Manager positions, and decided that the existing positions should be replaced with one PWR Chemistry Program Manager and one BWR Chemistry Program Manager. Tr. p. 453, l. 17; p. 1699, l. 15; p. 1860, l. 15; p. 1863, l. 10. This would result in one of the three

incumbent Chemistry and Environmental Protection Program Managers losing his position in the reorganization.

2.79. A review of the final Operations Support organization as approved by McGrath reveals that only Chemistry and Operations Outage and Fire Protection were required to meet the entire 40 percent reduction in the first year of the reduction plan. The other five organizations under McGrath were reduced zero to 20 percent during that time. *See* Staff Exh. 128. The Operations Support group overall reduced by 18 percent, which was above the stated goal of 15 to 17 percent. *Id.* The organization would also have met its numerical goals if McGrath had not insisted that the Chemistry organization be cut to only two Chemistry Program Manager positions.

4. Employment Background of Ronald Grover

2.80. Ronald Grover attended the United States Naval Academy and was selected for the Navy's Nuclear Power program. Grover attended the Navy's nuclear propulsion schools and qualified as a propulsion plant watch officer, which is the Navy equivalent of a civilian senior reactor operator. Grover's first shipboard assignment in the Navy was the USS Enterprise. Grover also had collateral duty as the division officer supervising the radiological and chemistry technicians. Tr. p. 1806, l. 16. Once Grover completed his qualification for watch officer aboard the Enterprise, he was assigned to manage operation of the plant for a four to six hour shift. After a year to a year and a half, Grover was selected as the head of chemistry and radiological controls. Tr. p. 1807, l. 13. As the division officer in RadCon and Chemistry, Grover supervised the radiology laboratory assistants in performing the RadCon and Chemistry functions aboard the ship. Tr. p. 1811, l. 14. Grover then became the head of the Chemistry and RadCon Department, again with responsibility over both RadCon and Chemistry technicians. Tr. p. 1814, l. 4.

2.81. Grover left the Navy in June of 1980 and worked at DuPont managing the process engineering group for two to two and a half years. Tr. p. 1816, l. 5. After leaving DuPont, Grover accepted the Corporate Chemistry Manager position at the New York Power Authority, providing

support to Fitzpatrick Nuclear Plant, a BWR plant, and Indian Point Nuclear Plant, Unit 3, a PWR plant. Grover served in that position for eleven years. Tr. p. 1816, l. 19.

2.82. After leaving the New York Power Authority, Grover accepted the Corporate Chemistry Manager position at TVA in 1994. Grover was interviewed by McArthur and John Maciecjewski and hired by McArthur. Tr. p. 1817, l. 16. As the Corporate Chemistry Manager, his duties included providing technical support to the sites, addressing long-term chemistry issues at the plants, and assisting the plants with day-to-day issues. Tr. p. 1819, l. 1. McArthur, then the Technical Programs Manager, was his initial supervisor at TVA. Tr. p. 1820, l. 5.

2.83. Upon assuming the Corporate Chemistry Manager position at TVA, Grover had a vacant Chemistry Program Manager position to fill. Grover began the recruitment process for that position, but then was informed by McArthur that Fiser, who had filed a DOL complaint that TVA had settled, would be returning to Corporate Chemistry and would fill that position. Tr. p. 1821, l. 2.

2.84. In 1994, the Corporate Operations Services and Technical Programs organization underwent a reorganization. Grover received the direction to combine the Chemistry and Environmental organizations into one organization, and RadCon would be a separate organization. The Chemistry Manager position and the Environmental Manager position were combined into a single PG-11 Chemistry and Environmental Manager position. Tr. p. 1823, l. 17. Grover interviewed with Maciecjewski for the new position and was selected for that position. Tr. p. 1824, l. 24.

2.85. Grover then became the selecting manager for four Chemistry and Environmental Protection Program Manager positions. Tr. p. 1830, l. 6. The biggest responsibilities of those positions were the chemistry functions because there were more chemistry issues to address at that time. Grover testified that the functions were not split evenly between chemistry and environmental. Tr. p. 1901, l. 13.

2.86. Grover formed an SRB to interview the candidates for the Chemistry and Environmental Protection Program Manager positions. TVA Exh. 24. After these interviews, Grover selected Fiser, Harvey, Chandra, and David Sorrell as the four Program Managers. *See* Tr. p. 2105, l. 10.

2.87. In 1995, Maciecjewski ceased being Grover's supervisor and Don Moody became the Manager of Operations Support. In October 1995, with Moody suffering from a severe illness, McGrath became the Acting General Manager of Operations Support. Tr. p. 1845, l. 12.

2.88. In the spring of 1996, McGrath announced that the Operations Support organization needed to undergo reductions over a five year period. In the RadChem organization, McGrath decided to combine the PG-11 Chemistry and Environmental Manager position held by Grover and the PG-11 RadCon Manager position held by McArthur into a single PG-SR RadChem Manager position that had previously been vacated by Allan Sorrelle. Tr. p. 479, l. 25. This position would have been a promotion for either Grover or McArthur. Grover informed McGrath that he was interested in applying for the RadChem Manager position. Tr. p. 1875, l. 23; p. 1876, l. 13; p. 3594, l. 2.

2.89. Knowing that his Chemistry and Environmental Manager position would be eliminated and that he would have to compete for a position in the new organization, Grover decided to simultaneously pursue the option of a rotation to INPO in Atlanta. Grover first made an oral inquiry regarding the potential of an INPO rotation to McGrath. Tr. p. 764, l. 16. After McGrath found out from nuclear assurance and licensing that there was an opening at INPO, Grover submitted a written request submitting his name for the loan program to McGrath on April 22, 1996. Tr. p. 764, l. 16. TVA Exh. 31. Grover felt that INPO was an opportunity to expand his experience base and become more well rounded. He was not promised or guaranteed a slot at INPO, but had to apply for the program via a request, just as he would have to apply for any new position within TVA. Tr. p. 3593, l. 6. Although Grover submitted this request, he also anticipated having the

opportunity to compete for the RadChem Manager position when it was posted for competition. Tr. p. 3594, l. 2.

2.90. On June 17, 1996, McGrath had scheduled an all hands meeting to discuss the pending reorganization. Just prior to this meeting, McGrath informed Grover that he had selected McArthur as the RadChem Manager. At that time, McGrath did not explain to Grover why McArthur had been selected for the position. Tr. p. 2020, l. 12; p. 3595, l. 23. As a result of his inability to compete for the RadChem Manager position, Grover was left without a position in the new organization.

2.91. Grover went to speak to Boyles and Reynolds regarding his concern that he did not have the opportunity to compete for the RadChem Manager position. Tr. p. 1878, l. 17. Grover testified that Boyles and Reynolds gave him conflicting reasons for the transfer of McArthur into that position. First, Reynolds and Boyles told Grover that the transfer of McArthur into the RadChem Manager position had been conducted properly and within TVA's selection procedures. Tr. p. 1878, l. 20; p. 3597, l. 14. When Grover argued that the position had changed significantly and should have been posted for competition, Boyles and Reynolds stated that McArthur had held the position in the past and therefore was now entitled to it. Tr. p. 1879, l. 5, 15; p. 3597, l. 23. Additionally, Reynolds stated that if the position had been posted and Grover was not selected, he was concerned that Grover would file a complaint against TVA for his nonselection. Tr. p. 1879, l. 20; p. 3597, l. 20. Finally, Reynolds and Boyles admitted that the selection of McArthur had been done improperly. They offered to disallow the selection and then post the position for competition, but Grover declined that offer because he felt that McArthur had already been preselected for the position. Tr. p. 3599, l. 3.

2.92. After Grover complained to Boyles and Reynolds about the non-competitive selection of McArthur as the RadChem Manager, Reynolds agreed to send Grover on a rotation to INPO and to place him in a PG-SR Developmental position upon his return to TVA. Tr. p. 3536,

l. 12. Also, on August 5, 1996, Grover received a memorandum from O.J. Zeringue appointing him to a temporary rotational position at INPO. TVA Exh. 31, p. AF000033. Grover was on loan at INPO from September 1996 through December 1997. Upon his return to TVA in January 1998, Grover remained in the Developmental Position until his termination from TVA on April 26, 2001. TVA Exh. 98.

2.93. Grover was interviewed by the TVA OIG regarding Fiser's 1996 DOL complaint on July 11, 1996. Staff Exhs. 49, 50A and 50B. On September 27, 1996, Grover signed a written statement for a DOL investigator regarding Fiser's complaint. Staff Exh. 51. Fiser's attorney deposed Grover regarding his knowledge of Fiser's 1996 non-selection on January 29, 1998. Staff Exh. 52. Grover was represented at this deposition by TVA counsel. *Id.* at p. 6. Diana Benson of the NRC Office of Investigations (hereinafter "OI") interviewed Grover regarding the NRC's investigation of this violation of 10 C.F.R. § 50.7 on December 18, 1998. Staff Exh. 53. TVA counsel declined to represent Grover at this interview because his statements were contrary to the TVA position in the Fiser case. Staff Exh. 54, p. 72. The TVA OIG investigated Grover for alleged wrongdoing beginning in July 1998. *See* Staff Exh. 180. Grover first learned of the OIG investigation in April of 1999, well after each of the above interviews. Tr. p. 2243, l. 19.

5. Fiser's Involvement in Protected Activities

a. Diesel Generator Fuel Oil Storage Tank Issue

2.94. On August 15, 1989, the four emergency diesel generators at SQN were declared inoperable because the diesel generator fuel oil had not been sampled in accordance with SQN's Technical Specifications. TVA Exh. 126, p. FI000006. This resulted in SQN entering a Limiting Condition for Operation (hereinafter "LCO") under which SQN had 24 hours to complete the required sampling or to shut down the plant. *Id.* at p. FI000007. Tr. p. 4884, l. 17. The mistake related to a chemistry procedure for sampling, which had been written improperly upon the initial licensing of SQN. Tr. p. 4897, l. 1. Additionally, SQN had failed to identify this problem on

occasions prior to the discovery in 1989, most notably when the Chemistry Program conducted a review of all the surveillance instructions prior to SQN restart in May of 1988. Tr. p. 4891, l. 3. Fiser was not the Chemistry Superintendent at SQN at the time this surveillance instruction review was conducted at SQN. Tr. p. 4925, l. 19. David Goetcheus was the SQN Chemistry Superintendent at the time the surveillance instruction review was conducted prior to SQN restart. Tr. p. 5111, l. 17.

2.95. There were two general problems with the procedure for sampling the diesel generator fuel oil. First, the method SQN used to test the fuel oil did not meet the American Society for Testing and Materials (hereinafter "ASTM") standards for sampling. TVA Exh. 126, p. FI000007. Second, the diesel generator fuel oil storage system was not a single tank, but four tanks connected together by a single header. When SQN sampled the tanks, the recirculation pump would only recirculate the fuel oil in portions of the two center tanks, rather than throughout each of the four tanks. Tr. p. 2275, l. 16. TVA Exh. 126, p. FI000007.

2.96. Fiser and members of his Chemistry staff, notably Don Amos and Don Adams, were involved in the official documentation and review of the problems associated with the diesel generator fuel oil storage tanks. Tr. p. 2276, l. 18. See also TVA Exh. 128, TVA Exh. 147. In fact, Fiser was the Event Manager for this issue and was responsible for implementing the corrective action for this problem. TVA Exh. 147, p. FI000262.

2.97. Fiser testified that after he and his staff worked on the resolution of this problem, his supervisor Ron Fortenberry told him that SQN management was considering taking disciplinary action against Fiser for his role in the problem. Tr. p. 1147, l. 2. No one ever spoke to Goetcheus, the man who was in charge of the surveillance instruction review, about his responsibility for the failure to identify the problem with the sample procedure for the diesel generator storage tanks until just prior to his testimony in this proceeding on September 10, 2002. Tr. p. 5112, l. 1. Mark Burzynski, then the SQN Site Licensing Manager, stated that disciplinary action would have been

appropriate because the problem should have been discovered during the technical reviews of this procedure, specifically during the Surveillance Instruction review prior to restart, and at the encouragement of TVA Counsel during direct examination, intimated that Fiser was responsible for the error in the surveillance instruction review. Tr. p. 4909, l. 22.

2.98. However, Burzynski then acknowledged on cross examination that Fiser was not the SQN Chemistry Superintendent who was responsible for that review. Tr. p. 4925, l. 19. Even after admitting that Goetcheus was the responsible manager during the SQN restart, Burzynski continued to place blame on Fiser because of reviews and procedure revisions Fiser and his staff performed after the SQN restart. Tr. p. 4934, l. 17. Even if Fiser had discovered this problem during these reviews, once the restart had taken place, the same LCO would have been encountered. Thus, Goetcheus was the last one who could have found the problem without a resulting LCO. Therefore, the Board credits Fiser's testimony that this is one example of an individual at TVA getting in trouble for engaging in protected activity by documenting a problem and working on its resolution. Tr. p. 2748, l. 13.

b. November 1991 NSRB Meeting

2.99. The NSRB is an organization at TVA designed to provide safety oversight over the three plant sites by reviewing audit reports and LERs, and by concurring with changes to Technical Specifications. Tr. p. 385, l. 5. Each plant site has its own NSRB, with subcommittees which review documents such as INPO evaluations, LERs, and audit reports, looking for areas of concern that the site should address. Tr. p. 380, l. 7; p. 386, l. 4. The NSRB typically meets quarterly for two days. The first day of the meeting begins with a briefing by the plant manager on emerging issues at the site. Tr. p. 389, l. 11. The rest of the day is devoted to subcommittee meetings. The second day of the meeting is reserved for a full board meeting and a discussion of action items. Tr. p. 387, l. 1. After each meeting, the NSRB issues minutes, with an Executive Summary

prepared by the NSRB Chairman that is provided to the TVA Board of Directors and detailed minutes that are provided to the Chief Nuclear Officer. Tr. p. 387, l. 22; p. 388, l. 1.

2.100. The SQN NSRB conducted a quarterly meeting on November 20-21, 1991. Jt. Exh. 3. Present at the Chemistry subcommittee meeting were: Tom Peterson, McArthur, and McGrath of the NSRB; Jocher, the Corporate Chemistry Manager; Fiser, at that time near the end of his rotation on Outage Management from his position as SQN Chemistry Superintendent; and Rob Ritchie, a SQN Chemistry Program Manager. Tr. p. 4683, l. 21; p. 4669, l. 12.

2.101. While Fiser was on rotation in Outage Management, the computers used to generate chemistry trend plots were inoperable and the trend plots were not generated for a period of time. Tr. p. 1016, l. 5, 22. When Fiser discovered that the trends were not being generated, he ensured that the computers were quickly fixed and that the generation of the trends was resumed. Tr. p. 1017, l. 1. According to Ritchie, Jocher and the NSRB thought that the Chemistry program was not performing any trending, rather than simply experiencing a technical difficulty. Tr. p. 4700, l. 3. In reality, the SQN Chemistry organization had been trending a large number of parameters and those trends were sent to Operations and other organizations within the plant. Tr. p. 4699, l. 19.

2.102. At the November 1991 NSRB meeting, Peterson demanded that Fiser draft a procedure that would require the Chemistry program to generate all of the trend plots every day, including weekends and holidays. At some point during the meeting, Peterson got up and left and returned with McGrath. Peterson and McGrath again demanded that Fiser draft a procedure requiring the daily generation of trend plots. Tr. p. 1018, l. 14.

2.103. Fiser informed Peterson and McGrath that he could not comply with their demand to institute a procedure requiring daily trending for a number of reasons. First, Fiser explained to them that he was concerned about what would occur if the computer ever broke again. If the trending was required by procedure and the computer broke, then the Chemistry program would

be in violation of the procedure. Tr. p. 1020, l. 1. Second, Fiser told McGrath and Peterson that incorporating the trending into a procedure would require tremendous overtime by the chemistry technicians who performed the trending, overtime for which Fiser did not have approval. Tr. p. 1021, l. 4. Finally, Fiser was concerned about a potential violation of the procedure because SQN had recently had some problems with procedural violations. Tr. p. 1022, l. 21. When a procedural violation occurs, SQN was required to fill out a corrective action document and ultimately inform the regulatory authority of the violation. *Id.*

2.104. Fiser explained to the NSRB that the Chemistry program was generating the trends about which the NSRB was concerned four days per week, and also was trending the data collected over the weekend. Tr. p. 1024, l. 15. He also reassured them that the Chemistry program would continue to generate the trends and provide them to operations and other plant groups, but that he simply could not put the trending into a procedural requirement. Fiser also told them that he would be able to comply with their demand once the CUP had been approved, and requested the NSRB to assist him in getting the CUP approved. Tr. p. 4358, l. 9, p. 2473, l. 3.

2.105. After Fiser explained to McGrath and Peterson why he could not comply with their demand to institute a procedure requiring daily chemistry trending, McGrath left the meeting. Tr. p. 1023, l. 9. According to Ritchie, the NSRB did not listen to what Fiser had to say about the trending. Tr. p. 4701, l. 3. The NSRB never followed up with Fiser regarding the trending issue, and the SQN Chemistry program continued to generate the trend plots. Tr. p. 1023, l. 22. When Kent assumed responsibility for the SQN RadChem organization in early 1993, the Chemistry organization was still generating the trend plots. Tr. p. 3217, l. 11.

2.106. The executive summary of the minutes informs the TVA Board of Directors of what the significant issues at a particular meeting were. Tr. p. 619, l. 19. Both the minutes for the November 20-21, 1991 NSRB meeting and the executive summary provided to the TVA Board of

Directors indicate that trending was a key issue discussed at that meeting. Jt. Exh. 3, p. CC000093. Tr. p. 885, l. 13.

2.107. Fiser, McArthur, and Ritchie each testified that trending was an important issue at the November 1991 NSRB meeting. Tr. p. 1018, l. 1; p. 1400, l. 6; p. 4701, l. 27 McArthur testified that McGrath was upset about the trending issue and other problems with the Chemistry program at SQN. Tr. p. 1409, l. 13. McArthur also testified that McGrath and Peterson had requested that Fiser institute a procedure requiring daily trending. Tr. p. 1400, l. 19. Only McGrath continues to deny that trending was a key issue at that meeting, despite the fact that he included trending among the key issues in the executive summary he drafted for the Board of Directors. Tr. p. 395, l. 7, 21.

2.108. After this NSRB meeting, McGrath told McArthur that Fiser was not effective as the SQN Chemistry Manager and that he should be removed from that position. Jt. Exh. 27, p. 22; Staff Exh. 168. McArthur told the TVA OIG, during its investigation of Fiser's 1993 DOL complaint, that McGrath left that meeting upset, saying that he would discuss Fiser with Beecken, then the SQN plant manager. Jt. Exh. 24, p. 1. McArthur also told the OIG that soon thereafter, Beecken approached him about instituting a swap between Jocher and Fiser which would send Fiser on rotation to Corporate Chemistry. *Id.* McArthur later told Fiser that McGrath had commented after the NSRB meeting that Fiser should be removed from his position as SQN Chemistry Manager. Jt. Exh. 27, p. 23; Staff Exh. 168.[9]

c. Fiser Letter to Senator Sasser

2.109. After Fiser was reduced in force from his SQN Chemistry Manager position in 1993, he collaborated with Jocher and D.R. Matthews, another TVA employee, in drafting a letter to then-

---

[9] Additionally. Dan Keuter, then the Vice President of Operations Services, informed the TVA OIG that McGrath was opposed to Fiser being rotated downtown to the Corporate Chemistry Manager position in 1992. Staff Exh. 177, Exh. 8, p. 1.

Senator James Sasser. *See* Staff Exh. 29. In that letter, Fiser, Jocher, and Matthews raised a number of issues related to the repressive management structure at TVA. Staff Exh. 29, p. CB000130; Tr. p. 1122, l.1. Fiser informed Sasser of problems he encountered with being involved in the identification and resolution of certain problems in the SQN Chemistry program. Fiser, Jocher, and Matthews also sent a copy of this letter to the Allegations Coordinator at the NRC.[10] Staff Exh. 29, p. CB000136.

2.110. Senator Sasser sent a letter to the TVA IG requesting more information regarding the allegations raised in this letter. Staff Exh. 30, p. AJ667. The TVA IG provided three responses to this letter, one on September 9, 1993, one on October 22, 1993, and one on April 22, 1994. *See* Staff Exhs. 30, 32, and 33. At the time these letters were drafted, McGrath was the Chairman of the NSRB and reported directly to the Chief Nuclear Officer, Oliver Kingsley. Tr. p. 379, l. 3, 18. Each of these responses to Senator Sasser were sent as a blind carbon copy to Kingsley. Staff Exhs. 30, 32, and 33. Copies of these documents were also provided to TVA OGC, including TVA Counsel Marquand and Vigluicci. *Id.*

2.111. On September 22, 1993, a member of the Concerns Resolutions Staff sent a memorandum to McArthur requesting a response to a number of the technical issues raised in the Sasser letter and in Jocher's DOL complaint. Staff Exh. 31. These issues included the problems with the emergency diesel generator storage tanks and the problem with the radiation monitor setpoints. *Id.* at BG000288.

---

[10] In addition to sending this letter to Senator Sasser, Fiser, Jocher, and Matthews each filed a section 211 whistleblower retaliation complaint against TVA with the DOL. *See* Staff Exh. 34 (Fiser complaint); Staff Exh. 32 (Matthews and Jocher filed section 211 complaints on March 5, 1993 and July 13, 1993, respectively). TVA settled the complaints with Fiser and Matthews, but litigated Jocher's complaint before the DOL. *See* Jt. Exh. 34 (Fiser settlement); Staff Exh. 32 (TVA entered into a Memorandum of Understanding and Agreement with Matthews on September 16, 1993); Staff Exh. 173 (Fiser's tapes released to TVA OGC for use in Jocher proceeding).

d. Fiser's 1993 DOL Complaint

2.112. On September 23, 1993, Fiser filed a complaint with the DOL regarding his RIF and termination notice from TVA. Staff Exh. 34. As part of this complaint, Fiser identified a number of concerns, including some concerns that had also been identified in the letter to Senator Sasser.

2.113. First, Fiser explained in detail a problem that occurred with respect to the radiation monitor setpoints, an issue of which he had also informed Senator Sasser. Fiser stated that a 1982 bulletin from the NRC had not been implemented adequately. Fiser questioned plant chemistry and engineering personnel regarding the radiation monitor setpoints, but despite this questioning, the bulletin was not properly implemented. Staff Exh. 34, p. AJ000135. As a result of this failure to properly perform the evaluation, a SCAR was initiated explaining both the problem and the necessary corrective actions. *Id.*

2.114. Fiser also identified the filter change-out scenario as an issue with which TVA management had a problem. Personnel had discovered that containment radiation monitor valves had not been properly aligned after sampling activities. *Id.* at p. AJ000136. As a result of this problem, a SCAR was drafted and placed into the corrective action system, which angered Beecken, who would have preferred that the problem be resolved without reporting it. *Id.*

2.115. The third problem Fiser identified in his 1993 complaint regarded a dispute over the NRC's three hour requirement for conducting PASS analyses. Fiser and Jocher had determined that SQN personnel could not meet the three hour requirement, whereas Site Vice President Jack Wilson disagreed with their interpretation of the requirement. Staff Exh. 34, p. AJ000136. After the NRC confirmed that Fiser and Jocher's interpretation was the correct one, they conducted tests which confirmed that SQN personnel lacked the ability to meet this requirement. *Id.*

2.116. Fiser also stated in this complaint that in July, 1993, Charles Kent, the SQN RadChem Manager, offered him the Chemistry Manager position at SQN. Staff Exh. 34, p. AJ000138. Kent interviewed Fiser for this position, and quoted him a salary and a start date.

However, the offer fell through after upper management protested the offer to then-SQN Vice President Fennech. *Id.*

2.117. TVA and Fiser reached a settlement agreement of the 1993 DOL complaint in April 1994. Jt. Exh. 34. As part of this settlement, Fiser was placed in a PG-8 Corporate Chemistry Program Manager position, with Grover as his immediate supervisor and McArthur as his second line supervisor. Tr. p. 1820, l. 5; p. 1821, l. 9.

2.118. In support of his complaint, Fiser had recorded a number of conversations with his co-workers. *See* Staff Exhs. 168, 169, 178, 179; TVA Exh. 148. Fiser testified that he started taping these conversations because he suspected something was awry, and he wanted to be able to take good notes of his conversations with co-workers. Tr. p. 1050, l. 22. Using these tapes, notes from his Day Planner, and his memory, Fiser compiled a "Sequence of Events" to support his complaint. *See* Jt. Exh. 27. In this sequence, Fiser made personal transcriptions of some of the conversations he recorded. Tr. p. 1051, l. 11. This sequence of events was attached to Fiser's 1993 DOL complaint.

2.119. The TVA OIG conducted an investigation of Fiser's 1993 DOL complaint. As part of this investigation, the OIG requested that Fiser provide copies of the taped conversations he made in 1992 and 1993. Fiser was reluctant to provide copies of his tapes to the OIG because of their sensitive nature. Tr. p. 2281, l. 6. However, the agent from the OIG assured Fiser that the tapes would remain confidential and that the OIG would not release the tapes without Fiser's prior approval. Only upon receiving this confidentiality agreement from the OIG agent did Fiser then provide copies of the tapes and his "Sequence of Events." Fiser never gave TVA OIG permission to release copies of the tapes. Tr. p. 2282, l. 6.

2.120. Despite the agreement with Fiser to keep the tapes confidential, the OIG released copies of the tapes to TVA OGC for use in the litigation of Bill Jocher's DOL complaint without Fiser's permission. Instead, the OIG sent Fiser a letter after it released the tapes, informing him

that it had provided such copies to OGC. Staff Exh. 173. Fiser was concerned about the release of those tapes within TVA because the individuals on the tapes were not aware that he had recorded them, and he felt that knowledge of the tapes could be a detriment to his continued employment at TVA. Tr. p. 2281, l. 25. Upon receipt of the tapes, OGC informed McArthur and Easley that Fiser had recorded conversations with them and showed them the transcript of those conversations. Tr. p. 1188, l. 20; p. 1406, l. 15; p. 2282, l. 6. The release of those tapes occurred approximately a month and a half prior to the 1994 reorganization. *See* Staff Exh. 173; TVA Exh. 24.

2.121. When Fiser returned to TVA employment after settling his 1993 DOL complaint, McArthur told Grover, Fiser's new supervisor, that Fiser had taped conversations with his colleagues prior to filing his complaint. Tr. p. 1850, l. 12. Grover testified that he felt McArthur was attempting to negatively influence his perception of Fiser. Tr. p. 1853, l. 13. Grover stated to McArthur that he was not concerned with incidents that occurred in the past, but that he preferred to form his own opinion of Fiser based upon his performance. Tr. p. 1851, l. 8. McArthur testified that he informed Grover about the taping simply to make him aware of it. Tr. p. 1586, l. 4.

2.122. McArthur gave some conflicting testimony regarding his opinion about Fiser's taping. McArthur initially stated on direct examination by Staff Counsel that he did not feel uncomfortable about having his conversations taped by a co-worker. Tr. p. 1462, l. 17. He also stated on redirect examination that he was not concerned about being taped, and that he simply forgot about it. Tr. p. 1682, l. 5. However, he contradicted these statements at the prompting of TVA Counsel on cross examination, where he stated that he found the taping very offensive, and that he could tell when Fiser was trying to tape conversations with him. Tr. p. 1586, l. 19.

2.123. Grover testified that McArthur also discussed Fiser's past taping with the site RadChem Managers. Tr. p. 1850, l. 22. On one occasion, Grover requested Fiser attend a peer team meeting of the RadChem Managers on his behalf. Tr. p. 1855, l. 6; p. 2311, l. 21. Because

there was no RadChem Manager in Corporate at that time, Grover was a member of the RadChem peer team. Tr. p. 2179, l. 10. During the meeting that Fiser attended, he was asked to leave because the peer team would be discussing sensitive matters and did not wish to do so in Fiser's presence. Tr. p. 2313, l. 17. Afterwards, Fiser told Grover what had transpired at the meeting while he was present, and that he had then been asked to leave for the rest of the meeting. Tr. p. 2314, l. 9. Grover inquired of McArthur why Fiser had been asked to leave. McArthur told him that the RadChem Managers were getting ready to discuss some sensitive issues and that they felt uncomfortable doing so in Fiser's presence because he had taped conversations in the past. Tr. p. 1856, l. 18.

e. Fiser's 1996 DOL Complaint

2.124. On June 17, 1996, McGrath announced at an all-hands meeting that, as part of the reorganization of Operations Support, PWR and BWR Chemistry positions would be advertised for competition. Tr. p. 2339, l. 5. After this meeting, Fiser went to HR to speak to Easley about the posting of the Chemistry Manager positions. Because Fiser had taped conversations with Easley in the past, Easley requested that they have the discussion with Boyles. Tr. p. 1238, l. 17. Fiser explained to Boyles and Easley his position that the posting of the Chemistry Manager positions violated the settlement agreement from his 1993 DOL complaint. Tr. p. 2359, l. 17. Additionally. Fiser stated that the environmental functions that had been added to his position in 1994 had never been performed. Tr. p. 2360, l. 7. Fiser then stated that if the Chemistry Manager positions were advertised for competition, he would file a new DOL complaint. Tr. p. 2360, l. 16.

2.125. Boyles told Fiser that he would investigate whether posting the Chemistry Manager positions would violate the settlement agreement and discuss the issue with his supervisor, Phil Reynolds. Tr. p. 2360, l. 19. Boyles stated that he would get back to Fiser after his investigation was complete. In the meantime, Boyles strongly encouraged Fiser to apply on the VPA for the PWR Chemistry Manager position. Tr. p. 2360, l. 25.

2.126. After this meeting with Fiser, Easley contacted Kathy Welch in Labor Relations for assistance in interpreting the 1994 settlement agreement to determine if the agreement entitled Fiser to the new Chemistry position. Tr. p. 342, l. 10. Welch then contacted Brent Marquand in the TVA OGC after she completed her review of the settlement agreement. Tr. p. 343, l. 2. Both Welch and Marquand concluded that the settlement agreement did not guarantee Fiser a position with TVA for any length of time. Tr. p. 350, l. 12. The settlement agreement itself was silent as to how long Fiser was entitled to the Corporate Chemistry Program Manager position he was granted in the settlement agreement. Tr. p. 344, l. 12. Welch stated that in her review of the settlement agreement, she failed to determine whether the position granted to Fiser in the settlement agreement was the same position that Operations Support was posting for competition. Tr. p. 346, l. 23.

2.127. Welch and Marquand informed Boyles that, in their opinion, posting the PWR Chemistry Manager position would not violate the 1994 settlement agreement. Tr. p. 3995, l. 11. Boyles then contacted Fiser and informed him that the decision to post the PWR Chemistry Manager position was final. Boyles told Fiser that the position had changed and that the settlement agreement did not apply because the PWR Chemistry Manager position was a different job than he was offered in the settlement agreement. Tr. p. 2362, l. 5. As a result of learning of this decision, Fiser filed a DOL complaint on June 25, 1996. Staff Exh. 37.

6. Knowledge of Protected Activities

2.128. Mark Burzynski testified that the problem with the emergency diesel generator fuel oil storage tanks at SQN was a significant event because all four diesel generators were declared inoperable and both units of SQN would have to be shut down if the problem could not be corrected within 24 hours. Tr. p. 4884, l. 17. This event occurred in 1989, prior to McArthur's employment at TVA. However, McArthur later became aware of this problem in 1993. As a result of the letter to Senator Sasser, the Concerns Resolution Staff requested McArthur to investigate and report on

a number of the technical issues raised in that letter. Staff Exh. 31. Included among those issues were the "problems with the emergency diesel generator seven day storage tank recirculation system." *Id.* at p. BG000288. The relevant documentation regarding these problems identifies Fiser as the Event Manager in charge of implementing the corrective action. TVA Exh. 147, p. FI000258, FI000262.

2.129. Both McGrath and McArthur were present at the NSRB subcommittee meeting during which Fiser informed them that he could not institute a procedure which would require trend plots to be generated on a daily basis. Tr. p. 1018, l. 1; p. 1687, l. 25. At this meeting, Fiser informed them that to institute such a procedure would place SQN at risk for further procedural violations. Tr. P. 1022, l. 21. McGrath and McArthur both acknowledged that SQN had recent problems with procedural violations. Tr. p. 401, l. 20; p. 1401, l. 11. *See also* Jt. Exh. 3, p. 000093-000094.

2.130. McArthur was aware of the issues raised by Fiser in the Sasser letter and the existence of the Sasser letter, as indicated in the memorandum requesting him to investigate those issues. Staff Exh. 31. Although McGrath denies knowledge of the Sasser letter, Oliver Kingsley, then McGrath's immediate supervisor, was notified of the letter and copied on all three responses from the TVA IG to Senator Sasser's inquiry. *See* Tr. p. 423, l. 5; p. 379, l.3, 18. *See also* Staff Exhs. 30, 32, and 33. Additionally, Jocher stated in the Sasser letter that he identified to the NSRB that TVA had made a material false statement to the NRC. Staff Exh. 29, p. CB000132. At that time, McGrath was the Chairman of the NSRB. Moreover, McArthur was a subcommittee chairman of the NSRB and frequently interacted with McGrath in that capacity. The Board finds that both McGrath and McArthur were aware of the Sasser letter.

2.131. McArthur was interviewed by the TVA OIG with respect to Fiser's 1993 DOL complaint. Jt. Exh. 24. McArthur also testified that he had been informed by TVA counsel during the course of the Jocher proceeding that Fiser had taped conversations with him during 1992 and

1993. Tr. p. 1406, l. 15. McGrath denied having any knowledge of Fiser's 1993 DOL complaint until 1996, when Fiser raised a concern about posting the PWR Chemistry Program Manager position. Tr. p. 896, l. 3. Kent was also interviewed regarding his knowledge of the event surrounding Fiser's 1993 DOL complaint, and Corey testified that he was aware that Fiser had previously filed a DOL complaint. *See* Jt. Exh. 25; Tr. p. 2877, l. 20.

2.132. McGrath and McArthur were both aware that Fiser filed a DOL complaint prior to the interviews and selection for the PWR Chemistry Manager position. Tr. p. 730, l. 8; p. 1647, l. 9. Kent testified that he was aware of the 1996 DOL complaint, and that he briefly discussed this complaint with McArthur and in the presence of Corey just prior to the SRB interviews for the PWR Chemistry Manager position. Tr. p. 3154, l. 5.

2.133. Thus, the Board finds that TVA managers McGrath, McArthur, Kent, and Corey all had knowledge of Fiser's various protected activities. Additionally, the Board finds that Reynolds had knowledge of Fiser's 1993 and 1996 DOL complaints, and that Boyles had knowledge of Fiser's 1996 DOL complaint and the existence of the 1993 DOL complaint.

7. Adverse Actions Against Fiser

2.134. In 1996, the Operations Support organization underwent reductions as part of a reorganization. During this reorganization, TVA made a number of decisions and took a number of actions which were adverse to Fiser.

2.135. McGrath decided that the Chemistry organization should undergo the entire 40 percent reduction in the first year of the five year reorganization plan, which mandated that one of the three PG-8 Chemistry Managers would lose his position in the organization. Tr. p. 1860, l. 12. Grover had proposed a five year plan which would not have resulted in any of the three incumbents losing his position in the first year of the reorganization plan. Tr. p. 1862, l. 10; p. 2199, l. 16. McGrath rejected this proposal and required Grover to develop a proposal that required one of the incumbents to lose his position. Tr. p. 1860, l. 12.

2.136. McGrath also decided that the remaining two positions should be specialized positions, one for PWR Chemistry and one for BWR Chemistry. Tr. p. 453, l. 17; p. 1699, l. 15; p. 1863, l. 10. The two Chemistry Manager positions were then determined to be different from the Chemistry and Environmental Protection Program Manager positions the incumbents held, and were therefore posted for competition. Tr. p. 1217, l. 1. In those positions, Grover testified that the Chemistry Managers did not perform environmental duties. Tr. p. 1885, l. 22. Fiser, Harvey, Corey, Cox and Kent all confirmed that the three Chemistry and Environmental Protection Program Managers did not perform any environmental duties from 1994 through 1996. Tr. p. 2311, l. 13; p. 5036, l. 19; p. 2841, l. 18; p. 1750, l. 2; p. 3066, l. 7. In making this determination, HR failed to follow its own personnel regulations in that it used inaccurate position descriptions. Moreover, McGrath could have reduced the organization to two PG-8 Chemistry and Environmental Protection Program Manager positions and accomplished the same results. However, since Fiser had seniority on the retention register and would have been retained in such a situation, it was necessary for McGrath to manufacture different position descriptions in order to eliminate Fiser.[11] *See* TVA Exh. 93, p. EH000033.

2.137. After the decision was made to post the Chemistry Manager positions for competitions, Fiser was not selected by McArthur as the PWR Chemistry Manager. McArthur employed an SRB, which was stacked against Fiser in that the RadChem Manager most familiar with his recent work was not included in the process, whereas the RadChem Managers most familiar with Harvey and Chandra's recent work were on the SRB. Additionally, none of the questions, which were written by McArthur, focused on primary chemistry, which is a key part of plant operations and was Fiser's strength. Tr. p. 1915, l. 3. *See also* Jt. Exh. 23,

[11] The Board notes in this regard that, based on the testimony adduced at the hearing, McGrath had all of the positions in the Operations Support organization rewritten so as to require everyone other than McArthur to compete for positions in the new organization, thus circumventing the mandatory RIF procedures.

p. GG000641-GG000642. Instead, each of the technical questions was specifically geared toward secondary chemistry, which was Harvey's strength. Corey testified that there were important primary chemistry issues at the plants at that time, including fuel failures. Corey also stated that good primary chemistry control is paramount to the safety of the plant. Tr. p. 2976, l. 21. Rogers testified that the PWR Chemistry Manager would need both primary and secondary chemistry knowledge in order to successfully interface with the sites. Tr. p. 5209, l. 1. As a result of his nonselection for the PWR Chemistry Manager position, Fiser was given the option of either resigning his TVA employment or going to TVA Services for one year. *See* Jt. Exh. 28.

8. Causal Nexus between Protected Activities and Adverse Actions

a. Disparate Treatment

2.138. The 1996 reorganization was governed by two TVA selection policies: the BP-102 Management and Specialist Selection Process Business Practice and the TVA Personnel Manual Instruction. Jt. Exhs. 63 and 65. The Business Practice requires all vacant positions, from PG-1 through senior management to be posted for no less than seven days. Jt. Exh. 63, p. 1, ¶ 3.1A. The policy does not set forth separate posting requirements for PG-SR positions. The policy requires interviews of the top candidates for each position, and the selection must be based upon the information in the personal history record, interview results, a review of candidate qualifications, input from upper level management, and information obtained from references. Jt. Exh. 63, p. 2, ¶ 3.4B.

2.139. The Personnel Manual Instruction describes TVA's procedures for conducting a RIF. Jt Exh. 65, p. 1. More specifically, the manual sets forth the requirements for determining the competitive level of existing and new positions, as well as delineating when it is appropriate for employees to be transferred into new positions without posting the position for competition. TVA has implemented Office of Personnel Management (hereinafter "OPM") RIF regulations through this personnel manual. Tr. p. 5376, l. 5.

2.140. The Personnel Manual defines competitive level as "all jobs in the same salary or trades and labor job title grade and classification series similar enough in duties, qualifications requirements, and working conditions to allow interchange of employees without loss of productivity." Jt. Exh. 65, p. 14. Under this policy, TVA is supposed to make competitive level determinations by comparing the qualifications as set forth in the official job description, the principal duties, and the standards for fully adequate performance. *Id.* Finally, the policy states that "determinations must be based solely on the content of accurate, up-to-date job descriptions." *Id.* at p. 15.

2.141. Reynolds testified that these selection policies were in effect and used to make the competitive level determinations for the 1996 reorganization of Operations Support, including the determination that the Chemistry Program Manager positions should be posted and the determination that McArthur could be transferred into the RadChem Manager position without competition. Tr. p. 3474, l. 5.

2.142. Easley stated that, in making competitive level determinations, he concludes that positions are interchangeable and therefore do not need to be posted if they have not changed by more than 35 percent. Tr. p. 1201, l. 7; p. 1285, l. 2. If the positions have changed by more than 35 percent, then the positions are not interchangeable and they must be posted for competition. *Id.* With regard to the new Chemistry Program Manager positions, Easley testified that a comparison of the new position descriptions with the existing Chemistry and Environmental Protection Program Manager position descriptions determined that the positions differed by more than 35 percent, and therefore had to be posted for competition. Tr. p. 1216, l. 3.

2.143. Easley could not recall if the 35 percent standard was written in any TVA guidance document. Tr. p. 1287, l. 15. Boyles testified that the standard for making a competitive level determination was not written in a guidance document at TVA, and that it was simply passed down from Labor Relations and TVA OGC. Tr. p. 3745, l. 11. Boyles, who was Easley's supervisor,

testified to a different standard for making competitive level determinations. According to Boyles, TVA looks to whether a "preponderance of the duties" remains the same, but that there is no numerical comparison made of the position descriptions. Tr. p. 3744, l. 21; p. 3745, l. 15.

2.144. Easley testified that he made the determination on the Chemistry positions by reviewing the duties listed in the position descriptions, and that he assumed that the environmental duties were 50 percent of the duties for the Chemistry and Environmental Protection Program Manager positions. Tr. p. 1217, l. 24. Based on this assumption, Easley found that the new Chemistry positions were not interchangeable with the prior positions because they had changed more than 35 percent, and that they therefore must be posted for competition. Tr. p. 1216, l. 3.

2.145. Fiser, Grover, Harvey and each of the RadChem Managers testified that the three incumbent Chemistry and Environmental Protection Program Managers performed 95 percent chemistry duties and at most 5 percent environmental duties. Tr. p. 2311, l. 13; p. 1885, l. 22; p. 5036, l. 19; p. 2841, l. 18; p. 1750, l. 2; p. 3066, l. 7. Grover testified that no one in HR spoke directly to him regarding this breakdown in duties, although he told both Easley and McArthur that there was not a significant change in the chemistry functions from the old position to the new position. Tr. p. 1885, l. 14; p. 1907, l. 8. Therefore, under the Chemistry and Environmental Protection Program Manager position description, the duties were not divided evenly between chemistry and environmental, and under either the Easley or the Boyles standard the positions were interchangeable and the RIF procedures should have been applied.

2.146. Boyles also testified that HR compared position descriptions in making the determination that McArthur was entitled to the RadChem Manager position without competition. Tr. p. 3779, l. 3. At the time, McArthur was the PG-11 RadCon Manager. Tr. p. 3772, l. 19. *See also* Staff Exh. 99. However, according to Boyles, HR was unable to locate a position description for that position. Tr. p. 3786, l. 14. Therefore, Boyles asserted that HR was required to use the "position description of record" to make the competitive level determination. Reynolds defined the

"position description of record" as the most recent position description contained in the employee's personal history record (hereinafter "PHR"). Tr. p. 3368, l. 14. For McArthur, the most recent position description HR found was asserted to be a 1990 position description as the PG-SR Technical Programs Manager. Tr. p. 3778, l. 16. The Technical Programs Manager position had been eliminated in the 1994 reorganization, when McArthur was appointed to the RadCon Manager position. Tr. p. 3794, l. 2. Boyles testified that he knew this position description was out-of-date, but that he was required to use it for the competitive level determination under TVA policy. Tr. p. 3786, l. 14. However, neither he nor Reynolds nor anyone else at TVA ever provided any evidence demonstrating that TVA was required to use known inaccurate documents in determining the statutory rights of employees. Reynolds acknowledged that such a position would have been a loser in front of the Merit Systems Protection Board (hereinafter "MSPB").[12] *See* Tr. p. 3432, l. 2.

2.147. Boyles testified that he and Easley compared the Technical Programs Manager position description with the new RadChem Manager position description after McGrath informed them that McArthur felt that he was entitled to the position. Tr. p. 3776, l. 3. Specifically, Boyles stated that he reviewed the duties listed in each position description and concluded that a preponderance of the duties remained the same. According to Boyles, the two positions were sufficiently similar so as to permit McArthur to transfer into the position without competition. Tr. p. 3918, l. 18.

2.148. Easley testified that he did not agree with the decision to place McArthur in the RadChem Manager position without posting it for competition. Tr. p. 1203, l. 1. Easley also stated that McGrath made the decision to place McArthur in the RadChem Manager position, but that HR should have told him that he was not permitted to do that. Tr. p. 1203, l. 7; p. 1226; l. 7. Easley

---

[12] Neither Boyles nor Reynolds ever explained why McArthur was not RIF'ed immediately when it was discovered that he allegedly occupied a non-existent position.

testified that McArthur had been appointed to the RadCon Manager position during the 1994 reorganization. Tr. p. 1212, l. 8. According to Easley, McArthur wrote a position description for the RadCon Manager position, and that he was never aware that TVA claimed one did not exist until his deposition in this proceeding.[13] Tr. p. 1178, l. 18. Easley stated during his deposition that there was an official position description for McArthur's RadCon Manager position, and that if it is now missing, "someone is covering up." Staff Exh. 27, p. 120. Easley concluded that the RadChem Manager position was more than 35% different from the RadCon Manager position, and therefore should have been posted for competition. Tr. p. 1210, l. 8.

2.149. As a result of a settlement in a race discrimination case, TVA adopted a policy requiring all vacant PG-1 through PG-SR positions to be posted for competition, or to be filled through a waiver process. Tr. p. 1194, l. 4, 17. *See also* Staff Exh. 152. The waiver criteria permit bypassing the posting requirements under certain circumstances for minority employees. *Id.* at p. 1-2. According to Easley, McArthur likely would not have met the waiver criteria. Tr. p. 1203, l. 1. However, TVA could have used this waiver criteria to place Grover, an African-American, into the RadChem Manager position without posting it for competition. Tr. p. 1283, l. 3.

2.150. If Grover had been the RadChem Manager, he would have controlled the selection process for the PWR Chemistry Program Manager position, including choosing who would serve on the SRB and drafting the interview questions. Tr. p. 1359, l. 17. Grover testified that equal representation on the SRB by the site RadChem Managers was important in order to be equitable to all of the candidates. Tr. p. 1919, l. 7; p. 1921, l. 2; p. 1983, l. 3. Grover also stated that the questions asked of the PWR Chemistry candidates should have covered all key areas, including

---

[13] Easley's testimony is corroborated by McArthur, who stated that he drafted a position description for the RadCon Manager position and submitted it to his supervisor for approval. Tr. p. 1568, l. 5. *See also* Staff. Exh. 124. McArthur also testified that he had no doubt in his mind that he was the RadCon Manager from 1994 through 1996. Tr. p. 1484, l. 10. Additionally, the Business Practice applicable to posting vacant positions at TVA requires the selecting manager to provide a current position description for the position to be posted. Jt. Exh. 63, ¶ 3.1C.

primary chemistry. Tr. p. 1915, l. 3; p. 3590, l. 19. Grover stated that if he had to make the selections based upon the past performance of the three incumbent Chemistry Managers, he would have selected Fiser and Chandra. Tr. p. 1932, l. 15. Moreover, Grover had rated Fiser higher than Harvey in his performance appraisals and McGrath testified that he was aware of this difference in appraisals. Tr. p. 528, l. 10. Under these circumstances, the failure to allow Grover to compete for the RadChem Manager position had a predictable direct effect on the selection process, and on Fiser's nonselection.

2.151. A comparison of the Technical Programs Manager position description with the RadChem Manager position description indicates some significant differences, as well as some similarities. Both positions were designated as PG-SR positions, although the compensation planning and analysis contained some minor differences. *See* Staff Exhs. 100, p.1 and 101, p.1. The Technical Programs Manager supervised, directly or indirectly, 635 employees. Staff Exh. 100, p.1. The RadChem Manager supervised only 24 employees. Staff Exh. 101, p. 2. The Technical Programs Manager supervised eight functions: RadCon, Chemistry, Environmental, Fire Protection, Security, Emergency Preparedness, ERMI, and Industrial Safety. The RadChem Manager only supervised four of these functions: RadCon, Chemistry, Environmental, and ERMI. *See* Jt. Exh. 21, p. GG000210. The duties listed for each position have some overlap, but are largely different. Staff Exhs. 100, p. 2, and 101, p. 2-3.

2.152. Finally, the minimum qualifications for the Technical Program Manager require the incumbent to have a Bachelor's degree in a technical discipline (or evidence of equivalent), plus at least 10 years of experience in nuclear power, five years of managerial experience, and three years of direct experience in one or more of the technical program functions. Staff Exh. 100, p. 3. The minimum qualifications for the RadChem Manager position require the incumbent to have a Bachelor of Science degree in engineering or a physical science, with preference for an advanced degree, at least 10 years' professional experience, and five years' RadCon or Chemistry

experience (including RadWaste). Staff Exh. 101, p. 3. Boyles testified that a person who meets the minimum qualifications for the Technical Programs Manager position would not necessarily also meet the minimum qualifications of the RadChem Manager position. Tr. p. 3928, l. 14. Thus, under TVA and OPM rules the positions were not interchangeable.

b. Temporal Proximity between Protected Activities and Adverse Actions

2.153. Fiser engaged in protected activities during 1989 (emergency diesel generator fuel oil storage tanks problem), 1991 (NSRB trending issue), 1993 (Sasser letter and DOL complaint), and 1996 (DOL complaint). Upon his return to TVA employment as a result of the 1994 settlement of his 1993 DOL complaint, McArthur was briefly Fiser's second line supervisor. Tr. p. 1820, l. 5; p. 1821, l. 9. During that time, Grover was Fiser's immediate supervisor. Grover testified that McArthur made some negative comments about Fiser during that time, specifically with regard to the conversations Fiser had tape recorded in the past. Grover testified that he felt that McArthur was attempting to influence his view of Fiser by informing him of Fiser's previous taping. Tr. p. 1853, l. 13. Grover stated that he informed McArthur that he would base his opinion of Fiser upon the work he performed, rather than any past issues. Tr. p. 1851, l. 7. From August 1994 through June 17, 1996, McArthur was not in Fiser's chain of command. *See* Staff Exh. 130.

2.154. In October 1995, McGrath became the acting General Manager of Operations Support, which was Fiser's second-line management. Tr. p. 382, l. 2. At that time, Grover was still Fiser's immediate supervisor. Grover testified that McGrath made some general negative comments about Fiser upon assuming that position, and that those comments were based upon some interaction McGrath had as NSRB Chairman with Fiser when he had worked at SQN. Tr. p. 3611, l. 2; p. 3612, l. 18. Grover told McGrath that he could only base his opinion of Fiser upon his performance, and that he was pleased with Fiser's performance. Tr. p. 1847, l. 15; p. 3612, l. 4.

2.155. On June 17, 1996, McGrath announced at an all-hands meeting that McArthur had been selected as the RadChem Manager, which was the selecting official for the new Chemistry Program Manager positions. Tr. p. 2339, l. 17; p. 2340, l. 17. Six weeks later, on July 31, 1996, McArthur declined to select Fiser for the PWR Chemistry Program Manager position. *See* Jt. Exh. 20, p. GG000022. As a result of this nonselection, Fiser was forced to choose between spending a year in TVA Services or resigning his TVA employment. Jt Exh. 28. Fiser opted to resign from his employment because he felt that he could not risk losing the salary and severance pay. Tr. p. 2374, l. 16.

9. Legitimate Nondiscriminatory Basis for the Adverse Actions

2.156. Boyles testified that the decision to post the Chemistry Program Manager positions was made based upon HR's determination that those positions were in a different competitive level than the Chemistry and Environmental Protection Program Manager positions. Tr. p. 3771, l. 3. McArthur testified that he conducted the selection process in a fair and neutral manner, using a three member SRB to evaluate the candidates. Tr. p. 1497, l. 10; p. 1639, l. 5. Based upon those results, McArthur selected Harvey for the PWR Chemistry Program Manager position. Jt. Exh. 20, p. GG000022. Both McGrath and McArthur testified that their decisions with regard to the reorganization were made in accordance with TVA policies and not with the intent to discriminate against Fiser. Tr. p. 878, l. 16; p. 1533, l. 1.

2.157. In addition to this testimony, TVA introduced the testimony and statistical analysis of Dr. Cary Peters. TVA's purpose in introducing this evidence was to support the other testimony that the selection process was conducted in a fair and neutral manner, and that Fiser's involvement in protected activity did not impact the scores he received from the members of the SRB. Specifically, Peters stated that "the results clearly and strongly indicate that the ratings Fiser received were most likely *not* lower because Corey and Kent knew he was involved in a protected

activity." TVA Exh. 102, p. FB000009. The Board will more fully discuss this testimony and statistical analysis in Section III. I of this opinion.

10. Pretext

a. Preselection of Harvey

2.158. In the spring of 1996, Kent, the SQN RadChem Manager, initiated a request with Grover that Harvey be transferred permanently to the SQN Chemistry organization. Tr. p. 1864, l. 4. Kent initiated this request because his Chemistry Manager, Gordon Rich, was interested in having Harvey at the site, and because Kent felt that Harvey's expertise would be a benefit to the site. Tr. p. 3106, l. 8. Grover stated that he would speak to Harvey about the potential transfer, and then gathered information from HR regarding how to implement such a transfer. Tr. p. 1865, l. 20; p. 1866, l. 20. Harvey testified that when Grover informed him of Kent's request, he told Grover that he would prefer to work at a site and that Grover should pursue the transfer. Tr. p. 4976, l. 15.

2.159. Grover then spoke to Easley in HR to discuss the options for sending Harvey to SQN. Easley informed him that he would need to initiate a request to transfer Harvey with McGrath. Tr. p. 1868, l. 2. Easley told Grover that the appropriate way to do this would be for the site to make a formal written request to McGrath. Tr. p. 1867, l. 15. After speaking to Easley, Grover informed McGrath of Kent's request to transfer Harvey to SQN. Tr. p. 1868, l. 2. McGrath stated that he was opposed to the transfer because he wanted to keep Harvey's expertise in Corporate. Grover testified that McGrath stated that he wanted Harvey available for the PWR Chemistry Program Manager position. Tr. p. 3615, l. 7. However, even if Harvey had transferred to SQN, nothing in TVA's policy would have prohibited him from competing for the Corporate Chemistry positions. Tr. p. 3622, l. 12.

2.160. As a result of his conversation with McGrath, Grover informed Kent and Harvey that McGrath would not approve the transfer. Tr. p. 3623, l. 25. Shortly thereafter, Harvey contacted

David Voeller, the Chemistry Manager at WBN. During this conversation, which occurred the week of June 3, 1996, Voeller testified that Harvey told him that he would be working more closely with Voeller at WBN as the PWR Chemistry Program Manager. Tr. p. 3316, l. 12. When Voeller questioned whether the selection had been made yet, Harvey stated that interviews would be done to "keep it legal" and that he felt sorry for Fiser as the "odd man out." Tr. p. 3318, l. 21; p. 3319, l. 4. Additionally, Harvey stated that he inferred that he would be selected for the PWR Chemistry Program Manager position from McGrath's refusal to permit his transfer to SQN. Tr. p. 3317, l. 25; p. 3318, l. 10.

2.161. After this initial conversation with Harvey, Voeller informed Fiser of what Harvey had said regarding the PWR Chemistry Program Manager position. Tr. p. 3320, l. 20. Fiser testified that he then spoke to Grover, concerned that the selection for the position had already been made. Grover told Fiser that he was not aware that Harvey had been selected for the position, but that he would look into the matter. Grover called Voeller, who relayed what Harvey had said during the June 3 conversation. Tr. p. 3321, l. 3. Grover then spoke to Harvey about his conversation with Voeller. Tr. p. 1924, l. 10.

2.162. After Grover discussed this matter with Harvey, Harvey again called Voeller on June 10, 1996. During this conversation, Harvey stated that he would be working more closely with Voeller in the future or not at all. Additionally, Harvey asked for Voeller's assistance with finding another position should Harvey not be selected for a position in the new organization. Tr. p. 3323, l. 1. Voeller took notes of both of his conversations with Harvey in his Day Planner. Jt. Exh. 36.

2.163. Harvey denied making these statements. Instead, Harvey claimed that he told Voeller that he would be working with him more closely or not at all. Tr. p. 4978, l. 15. Harvey testified that he made the initial phone call to Voeller because he felt confident in his ability to be selected for the PWR Chemistry Program Manager position. Tr. p. 4982, l. 17. Harvey stated that this confidence stemmed from two things: his belief that he was the best candidate for the position,

and the fact that Fiser had told him that he did not wish to work for TVA any longer and that he would accept the early out. *Id.* Tr. p. 4986, l. 10. However, Harvey had the initial conversation with Voeller the week of June 3, 1996, approximately two weeks prior to the announcement on June 17, 1996 that the PWR Chemistry Program Manager position would be posted for competition. Tr. p. 3634, l. 23. In a Declaration submitted to the NRC in support of TVA's presentation at the PEC, Harvey stated that Fiser did not inform him of his lack of desire to remain employed at TVA until a discussion they had after the posting announcement on June 17. TVA Exh. 26, p. 2. Because it occurred two weeks after Harvey's initial conversation with Voeller, Fiser's statement about not wanting to work at TVA could have had no impact whatsoever on Harvey's statements to Voeller. Therefore, the Board credits Voeller's version of the conversation and finds that Harvey was aware prior to the posting that he would be selected for the PWR position.

b. Failure to Follow Procedures

2.164. TVA has two policies which governed the reorganization of Operations Support in 1996. The Personnel Manual Instruction provides requirements for reorganizations which will involve a reduction of employees. Jt. Exh. 65. The Management and Specialist Selection Process Business Practice sets forth requirements for filling vacant positions at TVA Nuclear. Jt. Exh. 63.

2.165. The Business Practice "establishes standardized requirements which must be met when selecting a candidate for a management or specialist position. . ." Jt. Exh. 63, p. BF000850, ¶ 1.0. Specifically, the policy requires that all vacant, permanent PG-1 through senior management positions must be advertised for competition for a minimum of seven days prior to a selection for the position. *Id.* at ¶ 3.1A. When a vacant position is posted, the selecting supervisor is required to provide a current position description for the position. *Id.* at ¶ 3.1C. In making the selection for a vacant position, the selecting supervisor is required to consider: the information contained in the

candidates' PHR; the interview results; a review of the candidates' qualifications; input from upper-level management; and information obtained from references. *Id.* at p. BF000851, ¶ 3.4B.

2.166. With respect to the RadChem Manager position, McGrath testified that the position had been recreated sometime in 1995 and that Allen Sorrelle had been placed in that position on an acting basis. Tr. p. 482, l. 2. When Sorrelle retired, neither McGrath nor any other individual at TVA moved to fill the position. McArthur testified that he performed the duties of the RadChem Manager position at that time, but that his official position was as the RadCon Manager. Tr. p. 1454, l. 2, 15.

2.167. Reynolds testified that the RadChem Manager position was not vacant because HR determined that McArthur had "rights" to that position. Tr. p. 3466, l. 12. However, the position had been vacant from the time of Sorrelle's retirement until the 1996 reorganization, and no one attempted to place McArthur in that position. Tr. p. 907, l. 20; p. 1874, l. 25. *See also* TVA Exh. 6, p. BI000159-BI000160. The evidence is clear that the position was in fact vacant as of June 1996. TVA acknowledged that it did not post the RadChem Manager position for competition and instead transferred McArthur directly into that position. Tr. 3381, l. 18; p. 3784, l. 3. In a statement to NRC OI, Boyles claimed that he had more discretion with regard to whether or not a PG-SR position, such as the RadChem Manager position, had to be posted. Staff Exh. 6, p. 44-45. However, Boyles later recanted this statement upon reading the Business Practice, which clearly states that even senior management positions were required to be posted. Tr. p. 3869, l. 11, 21. *See also* Jt. Exh. 63. Therefore, TVA violated this policy when it did not post the RadChem Manager position and instead non-competitively placed McArthur in that position, and as previously discussed, McArthur did not have "rights" to the position.

2.168. The Personnel Manual Instruction sets forth the procedures for conducting a RIF, including how to make a competitive level determination. Jt. Exh. 65. In order for two positions to be in the same competitive level, they must be interchangeable, meaning the "incumbent of one

job must be able to perform satisfactorily the duties of the interchangeable job and vice versa." Jt. Exh. 65, p. 14. The determination of interchangeability is made considering the qualifications set forth in the official position description, the duties of the position, and the standards for fully adequate performance of the position. *Id.* Additionally, the policy requires that these determinations be made "solely on the content of *accurate, up-to-date* job descriptions." *Id.* at p. 15 (emphasis added).

2.169. Boyles admitted that TVA did not use an accurate, up-to-date position description when making the interchangeability determination that led to McArthur's placement in the RadChem Manager position. Tr. p. 3778, l. 16. Boyles stated that he and others in HR knew that McArthur was no longer in the Technical Programs Manager position, but that he was nonetheless required to use that position description for the determination because it was the "position description of record." Tr. p. 3779, l. 3; p. 3786, l. 14. The policy does not state that TVA should use the "position description of record" to make competitive level determinations, but instead specifically requires the use of accurate and updated position descriptions. Jt. Exh. 65, p. 15. TVA failed to do this, and in doing so, violated its own personnel policy with regard to the assignment of McArthur to the RadChem Manager position. Moreover, as previously discussed, even if TVA had been required to use the "position description of record," due to the difference in minimum qualifications for the two positions, they were not interchangeable.

2.170. Grover testified that in 1994, the Chemistry and Environmental functions were combined into a single position description because the organization wanted to cross-train the employees in those positions. Tr. p. 1826, l. 25. Grover stated that this cross-training was never fully implemented, and that the three PG-8 Chemistry and Environmental Protection Program Managers continued to perform 95 percent chemistry duties. Tr. p. 1885, l. 22. Fiser, Harvey, and the three site RadChem Managers all confirmed that the three incumbents did not perform environmental duties in the period leading up to the 1996 reorganization. Tr. p. 2311, l. 13;

p. 5036, l. 19; p. 2841, l. 18; p. 1750, l. 2; p. 3066, l. 7. Therefore, the position descriptions used to make the determination as to whether the new Chemistry Program Manager positions were interchangeable with the Chemistry and Environmental Protection Program Manager positions were neither accurate nor up-to-date.

2.171. McArthur testified that he considered all of the relevant information when making his selection for the PWR Chemistry Program Manager position. Tr. p. 1521, l. 21. Specifically, McArthur testified that he considered the results of the SRB and also reviewed the PHR's of the candidates after the interviews in making his selection. *Id.* This testimony is contradicted by a statement made by McArthur at his Predecisional Enforcement Conference (hereinafter "PEC") with the NRC, during which he informed the NRC that he had relied solely upon the results of the SRB interviews in making the selections for the Chemistry Program Manager positions. Staff Exh. 134, p. 24. The Board credits McArthur's version as presented at the PEC.

c. Biased Selection Process

2.172. McArthur testified that the selection process conducted for the Chemistry Program Manager positions was both fair and neutral. Tr. p. 1497, l. 10; p. 1639, l. 5. Initially, McArthur suggested using one RadCon Manager, one Chemistry Manager, and one Environmental/RadWaste Manager to serve on the SRB. However, at one of the RadChem peer team meetings between Kent, Corey, Cox, and McArthur, one of the RadChem Managers suggested that they serve on the SRB. McArthur agreed that this was a good idea and discussed it with both McGrath and HR. Tr. p. 1494, l. 14. From 1994 through the reorganization, Harvey provided support primarily to Kent's organization at SQN. During this same time, Chandra provided support primarily to Corey's organization at BFN. Fiser provided support primarily to Cox's organization at WBN. Tr. p. 2365, l. 4, 16.

2.173. Prior to the day of the interviews, Cox informed McArthur that he would be unable to attend the SRB interviews because of a scheduling conflict. Cox testified that he could have

attended the interviews if they had started first thing in the morning or if they were rescheduled, but because they would run into the evening, he could not attend. Tr. p. 1758, l. 16. McArthur stated that he attempted to find a replacement for Cox from WBN, but that he was unable to find anyone who could serve on the SRB that day. Tr. p. 1495, l. 3. McGrath then suggested that McArthur use Heyward Rogers, the Maintenance Support Manager in the Corporate organization. Tr. p. 557, l. 5; p. 1495, l. 13. The final members of the SRB included Kent, Corey, and Rogers, with McArthur sitting in the interviews as the selecting official and an HR representative, Milissa Westbrook, who facilitated the interviews for the Chemistry Program Manager positions. *See* Jt. Exhs. 20, 21, 22 and 23.

2.174. McArthur testified that he did not consider rescheduling the SRB interviews for a time at which Cox could attend because that would have been too complicated. Tr, p. 1738, l. 17. McArthur also claimed that, even if Cox could have attended, he might need to be excluded because he had preselected Fiser. Tr. p. 1615, l. 8. McArthur stated that he told McGrath, when he found out that Cox could not attend the SRB, that Cox had stated that he favored Fiser for the PWR Chemistry Program Manager position and that Cox had also preselected another of the positions for which interviews were being conducted that day. *Id.* McGrath told McArthur that this preselection would eliminate Cox from consideration as a member of the SRB. Tr. p. 840, l. 12; p. 1615, l. 16.

2.175. On the day of the interviews, the RadChem Managers held a peer team meeting, which was attended by McArthur, Kent, Corey, and Cox. Tr. p. 1760, l. 11. At the conclusion of this meeting, Cox stated to the other RadChem Managers that he felt that Fiser had performed well for him at WBN, for whatever that information was worth. Tr. p. 1760, l. 21. Cox testified that he did not state that he would have selected Fiser if he had served on the SRB or that the SRB was unnecessary and that McArthur could simply select the best candidate. Tr. p. 1759, l. 9. Rather, he simply informed the other RadChem Managers of Fiser's strong performance at WBN. Both

Kent and Corey testified that they did not believe that Cox had preselected Fiser for the PWR Chemistry Program Manager and that he would have rated the candidates fairly had he served on the SRB. Tr. p. 3153, l. 2; p. 2877, l. 4. The Board credits Cox's testimony in this matter and believes that McGrath and McArthur's statements were after the fact justification for not rescheduling the interviews.

2.176. McArthur, as the selecting official, drafted the interview questions for the PWR Chemistry Program Manager position. Tr. p. 1499, l. 11. The SRB members then determined which of the questions would be asked and also added a question about molar ratio control. Tr. p. 1499, l. 13. Some of the questions focused on managerial skills, while others focused more closely upon the technical knowledge of the candidates. None of the technical questions focused specifically on primary chemistry, which was Fiser's main area of expertise. *See* Jt. Exh. 23, p. GG000641-GG000642. Three of the questions, including the question about molar ratio control that had been suggested by Kent, focused specifically on secondary chemistry, which was Harvey's area of expertise. Tr. p. 1917, l. 10. Grover testified that although the secondary chemistry questions were important and should have been asked, that the SRB should not have excluded questions in the area of primary chemistry because primary chemistry is an important part of PWR plant chemistry. Tr. p. 1915, l. 3; p. 1963, l. 10. Corey testified that there were important primary chemistry issues at the TVA plants at that time. Tr. p. 2976, l. 21. Rogers also testified that the PWR Chemistry Manager would need to understand both primary and secondary chemistry issues in order to successfully interface with the sites, but that despite this importance, there were no primary chemistry questions asked during the interviews. Tr. p. 5209, l. 1.

2.177. Each of the members of the SRB testified that they received no guidance on how to rate the candidates except that they were supposed to rate them on a scale of one to ten. Tr. p. 2881, l.1; p. 3146, l. 11; p. 5210, l. 21. McArthur did not provide them with any information regarding what criteria were important in rating the candidates. Tr. p. 1515, l. 25. This resulted

in completely subjective and uneven application in the ratings of the candidates. For example, each of the members of the SRB testified as to what response to each question would have garnered a high score. On some of the questions, the SRB members were looking for substantially different answers to garner a high rating.[14] Additionally, at least one of the SRB members, Rogers, stated that he considered the candidates' demeanor as important as the substantive answers to the questions. Tr. p. 5173, l. 1.

2.178. Kent testified that interpersonal skills were important for the PWR Chemistry Program Manager position because the individual in that position would have to interact frequently with the Chemistry staff at both SQN and WBN. Tr. p. 3145, l. 18. Despite this importance, Kent did not consider problems that his staff identified with Harvey's interpersonal skills. Kent testified that he discussed the possibility of transferring Harvey to SQN with members of his staff. Tr. p. 3073, l. 12. Kent stated that he received some negative feedback from the staff related to Harvey's management or interpersonal skills. Tr. p. 3074, l. 2.

2.179. McArthur also excluded key and relevant information about Harvey's people skills from consideration in the selection process. Tresha Landers worked in the Corporate Chemistry organization as a co-operative student during 1995 and 1996. Tr. p. 2042, l. 17. During her time in that organization, she experienced problems with Harvey's behavior toward her. Landers testified that these problems included Harvey entering her cubicle, expelling gas, then leaving; scratching his genital area in her presence; commenting that she would not be hired permanently because she was simply a co-op student; and patting his stomach and referring to it as his "tool

---

[14] For example, Corey testified that to garner a high score on the denting question, the candidate had to define denting, as well as an explanation of how to prevent it and proposals to address denting concerns. Tr. p. 2896, l. 4. On the other hard, Kent stated that a complete answer to the denting question would not require an explanation of how to prevent denting, although he acknowledged that he might give bonus points for such an answer. Tr. p. 3169, l. 16. Additionally, none of the SRB members could explain their rating criteria for the question that asked about the candidates' weaknesses. Tr. p. 2888, l. 23; p. 5216, l. 11.

shed." Tr. p. 2044, l. 2; p. 2050, l. 9. *See also* Jt. Exh. 55. Fiser testified that he witnessed Harvey engage in such behavior in front of other TVA employees, including Landers. Tr. p. 2356, l. 7; p. 2357, l. 6, 14.

2.180. Landers also experienced some specific problems working with Harvey. Landers was assigned to write a daily chemical report, which was supposed to be completed by lunch. In order to complete these reports, Landers needed Harvey to fax her information from SQN. Tr. p. 2062, l. 5. As a result of Harvey's refusal to fax her the necessary information, Landers was frequently unable to produce the report on time. Tr. p. 2062, l. 15. In a second example, the Corporate Chemistry organization was moving its offices to a new location. Landers testified that during this move, Harvey went into her cubicle, removed shelving racks, and placed them in his cubicle. Tr. p. 2073, l. 19; p. 2074, l. 11. After this incident, Landers went to Easley in HR to complain about Harvey's behavior. Tr. p. 2074, l. 16.

2.181. Landers testified that she spoke directly to Harvey regarding his rude and offensive behavior. Harvey's reaction was that she would not be hired because she was simply an intern, and it did not matter whether or not she liked his behavior. Tr. p. 2044, l. 11. After she discussed this with Harvey, his behavior did not change, but instead got worse. Tr. p. 2044, l. 20. Landers then decided to raise her concerns about Harvey's behavior to her supervisor, Grover. Landers testified that she spoke to Grover regarding Harvey's behavior a number of times; after each time, Grover would speak to Harvey and Harvey's behavior would temporarily improve. However, Harvey would always revert back to his boorish behavior after a few days. Tr. p. 2045, l. 12; p. 2046, l. 2, 14.

2.182. In spring of 1996, Landers decided to speak to Easley in HR about the potential of filing a harassment complaint against Harvey for his behavior. Landers told Easley that she felt Harvey was engaged in harassment and intimidation against her and that she wanted to take whatever course of action would result in the cessation of that harassment. Tr. p. 2048, l. 6.

Landers then filed a complaint against Harvey, but later decided to drop that complaint. Tr. p. 2048, l. 25.

2.183. Grover, McArthur, Boyles and Easley held a meeting with Harvey to discuss his behavior towards Landers. During this meeting, Harvey acknowledged that he had removed the shelving racks from Landers' cubicle and stated that he would apologize to her for that incident. Tr. p. 5001, l. 18. Additionally, his supervisors decided that Harvey should take some sensitivity training in order to avoid such incidents in the future. Tr. p. 2141, l. 1. Grover drafted a memorandum to Boyles detailing this meeting and the actions which would be taken to respond to Landers' concerns. Staff Exh. 67; TVA Exh. 152. Grover testified that the intent of this memorandum was to defuse the situation without the need for pursuing a formal complaint. Tr. p. 2128, l. 7; p. 2144, l. 15.

2.184. After Grover and McArthur met with Harvey, Landers decided that she did not wish to pursue a formal harassment complaint against Harvey. Landers stated that she had left the Chemistry organization and would no longer be working directly with Harvey. Tr. p. 2048, l. 23. Landers also testified that she did not want to initiate a formal complaint because she feared for her future employment at TVA. Specifically, Landers testified that when an individual at TVA files any sort of complaint, a stigma is attached to that person that follows them throughout their TVA employment. Tr. p. 2050, L. 25. As a new and young TVA employee, Landers stated that she did not pursue her complaint because plant gossip "put more of a fear factor in me that my chances for seeking employment after graduation would be slimmer if I continued through with this." Tr. p. 2052, l. 8.

2.185. McArthur stated that he did not consider Harvey's harassment of Landers when making his selection for the PWR Chemistry Program Manager position because Landers dropped the charges and Harvey denied them. Tr. p. 1536, l. 2. Information about the harassment was also not part of the selection notebooks received by the members of the SRB. *See* Jt. Exhs. 20,

21, 22, and 23. Therefore, this particularly poor aspect of Harvey's interpersonal skills was not considered at all in the selection process for a position in which interpersonal skills were exceedingly important.

11. Kent's Statement Regarding Fiser's DOL Activities

2.186. The morning of the SRB, the RadChem Managers from the three sites and Corporate had a peer team meeting, after which the interviews were conducted. At the conclusion of this meeting and approximately 30 minutes before Fiser's interview, Kent made a statement in the hallway in the presence of McArthur, Corey, and Cox. Tr. p. 2879, l. 8; p. 3154, l. 5. Kent addressed the issue of Fiser's 1996 DOL complaint with McArthur, and stated that he "thought it would be best" if McArthur did not actively participate in the SRB. Tr. p. 3154, l. 10.

2.187. Kent stated that Fiser had told him about his 1996 DOL complaint some time earlier, and mentioned that McArthur was involved with the complaint. Tr. p. 3154, l. 20. Kent concluded that because McArthur had been involved with both the 1996 complaint and the earlier complaint, that he should not participate in the SRB in order to remove any perception of a problem with McArthur's objectiveness. Tr. p. 3154, l. 20; p. 3155, l. 1. *See also* Tr. p. 3157, l. 14; p. 3158, l. 1.

2.188. Although Kent claims that the comment was directed towards McArthur, Cox noted that Kent said that the three of them (Corey, Cox, and McArthur) should be "sensitive to the fact that Mr. Fiser has filed a DOL case" and that McArthur possibly should not be directly involved with the SRB. Tr. p. 3154, l. 10. *See also* Tr. p. 1762, l. 23; p. 1763, l. 1. Corey and Cox both overheard the conversation, but said that they were unaware of Fiser's 1996 DOL complaint, and thought that Kent was referring to Fiser's 1993 complaint. Tr. p. 1763, l. 4. *See also* Tr. p. 2877, l. 20; p. 2878, l. 1. However, McArthur testified that Kent asked "are you guys aware of Gary Fiser's recent DOL complaint?" Tr. p. 1640, l. 20.

2.189. Corey noted that "when you know that someone makes a comment about something like that, you need to be as impartial as you possibly can be when you go in for a SRB."

Tr. p. 2878, l. 1. McArthur said that he told Kent that Fiser's DOL complaint was not an appropriate topic to talk about and that he didn't want the DOL complaint to enter into the selection review process. Tr. p. 1502, l. 11.

2.190. McGrath, after initially indicating that he saw no problem with Kent's comment, then agreed that it would normally be inappropriate to bring up a DOL complaint prior to a SRB. Tr. p. 576, l. 9. McGrath speculated that Kent could have been under the impression that because Fiser was telling others about his DOL complaint, Corey already knew about it and was cautioning that they should not let his complaint influence the process. Tr. p. 574, l. 20; p. 575, l. 1. McGrath testified that TVA holds DOL information close and only provides it to those with a need to know, and Corey did not have a need to know about Fiser's DOL complaint before the SRB. Tr. p. 897, l. 13.

2.191. Kent suggested that McArthur should not be a voting member, and McArthur agreed. However, McArthur was still the final decision-maker. Tr. p. 1502, l. 25; p. 1503, l. 1-6. McGrath thought that McArthur would work with him and Human Resources to ensure that the process would be fair, and McGrath thought that McArthur would be fair and would not be influenced by Fiser's complaint. Tr. p. 913, l. 21; p. 914, l. 1.

D. Witness Credibility

2.192. The Board will address here certain issues of witness credibility. Each of the parties has argued that certain witnesses lack credibility for various reasons, including prior inconsistent statements and bias against TVA. Specifically, the Board will address the credibility of five key witnesses: McGrath, McArthur, Kent, Boyles, and Grover.

1. Credibility of McGrath

2.193. Throughout his testimony, McGrath has denied that the issue of chemistry trending at SQN was an important issue discussed at the November 1991 peer team meeting. Tr. p. 395, l. 7; p. 400, l. 5. McGrath testified that trending was not a significant issue, and that no one from

the NSRB demanded that Fiser institute a procedure to require trending on a daily basis. Tr. p. 400, l. 25; p. 661, l. 12. McGrath is the only person present at the meeting who testified in this manner. The other three witnesses present at that meeting, Fiser, Ritchie, and McArthur, all stated that trending was a significant issue at that NSRB meeting and that members of the NSRB did request that Fiser institute a trending procedure. Tr. p. 1018, l. 1; p. 1400, l. 6; p. 4701, l. 27. Additionally, McArthur testified that McGrath was upset about the trending issue and other problems with the SQN Chemistry program. Tr. p. 1409, l. 13.

2.194. Documentary evidence also supports the conclusion that trending was a key issue at the November 1991 NSRB meeting, and that McGrath was upset with Fiser after this meeting. The minutes for the November 1991 meeting, which were drafted and compiled by McGrath, indicate that trending was a significant issue discussed at that meeting. Jt. Exh 3, p. CC000093. McGrath testified that the executive summary of the NSRB minutes informs the TVA Board of Directors of the significant issues at that meeting. Tr. p. 619, l. 19. The November 1991 executive summary identifies trending as one of the key issues at that meeting. Jt. Exh. 3; Tr. p. 885, l. 13.

2.195. Additionally, McArthur told the TVA OIG during its investigation of Fiser's 1993 complaint that McGrath left the NSRB meeting very upset and went to speak to Beecken, then the SQN Plant Manager. Jt. Exh. 24, p. 1. McArthur also told Fiser, in one of the conversations Fiser recorded, that McGrath left that meeting and stated that they could not have Fiser in the SQN Chemistry Manager position. Jt. Exh. 27, p. 22; Staff Exh. 168.

2.196. Based on the testimony of Fiser, Ritchie, and McArthur, as well as the documentary evidence, the Board concludes that McGrath's testimony that he was not upset about the trending issue at the November 1991 NSRB meeting is not credible. The Board finds that McGrath was upset about Fiser's refusal to implement a trending procedure and that he sought to have Fiser removed from his position as SQN Chemistry Manager as a result of that meeting.

2.197. The Board is also concerned about McGrath's repeated assertions that he had no knowledge of the Sasser letter. In this letter, Jocher makes an allegation that he informed the NSRB about a material false statement someone from TVA made to the NRC. Staff Exh. 29, p. CB000132. At the time this letter was sent, McGrath was still serving as the Chairman of the NSRB. A copy of each of the response letters sent to Senator Sasser was provided to McGrath's supervisor, Oliver Kingsley. *See* Staff Exhs. 30, 32, and 33. McArthur, who was then a subcommittee chairman on the SQN NSRB, also received information regarding the allegations in the Sasser letter. *See* Staff Exh. 31. Despite the fact that copies of the response letters sent to Senator Sasser from TVA were also sent to the people to whom McGrath reported and that one of his NSRB subordinates received information about that letter, McGrath continued to deny that he had any knowledge of the Sasser letter. Tr. p. 422, l. 21; p. 424, l. 1. The Board finds it unlikely that Kingsley would not have notified the Chairman of the NSRB when TVA received an allegation that an employee identified a material false statement to that organization.

2.198. Finally, McGrath testified that, in order to ensure that the selection process for the PWR Chemistry position was fair and neutral, he did not want anyone "intimately involved" with Fiser's 1993 DOL complaint involved in the selection process. Tr. p. 568, l. 10. McGrath claimed that he meant that he did not want anyone who was accused of wrongdoing or was otherwise a key part of that case involved. Tr. p. 568, l. 23. Despite these protestations, McGrath permitted McArthur and Kent to participate in the selection process for the Chemistry positions, when a simple review of the complaint and the investigation of that complaint would have indicated that neither should be involved in the 1996 selections. McArthur was interviewed by the TVA OIG for Fiser's case, and was Fiser's supervisor when he received the RIF notice for the SQN Chemistry Manager position. *See* Jt. Exh. 24. Kent was also interviewed by the TVA OIG for Fiser's 1993 complaint, and opted not to hire Fiser in 1993 in part because of negative feedback he received

from McArthur. *See* Jt. Exh. 25. In light of these facts, McGrath's claim that he wanted to ensure a fair selection process seem disengenuous.

2. Credibility of McArthur

2.199. The Board also has some concerns about the credibility of McArthur. McArthur attempted to portray himself as an individual who did nothing wrong, and who was simply trying to do the best thing when faced with difficult decisions. According to McArthur, he was the "fuzzy guy," because he did not like to confront people with problems. Tr. p. 1552, l. 7. Consistent with that personality trait, the evidence indicates that, in his quest to be nonconfrontational, McArthur would tell an employee one thing, and then do the opposite behind his back. Fiser testified that during the 1992-1993 time period, he viewed McArthur as an ally because McArthur stated that he would assist him in finding a position within TVA. Tr. p. 1120, l. 20. However, when McArthur had the opportunity to assist Fiser in being hired as the SQN Chemistry Manager, rather than supporting him, he undercut him and derailed the job offer. Specifically, Kent testified that he contacted McArthur to discuss the possibility of hiring Fiser as the SQN Chemistry Manager. McArthur provided Kent negative feedback, and stated that Corporate management did not think highly of Fiser's management skills and past performance. Additionally, McArthur told Bynum and Keuter, two of the people involved in Fiser's removal from SQN, about the job offer from Kent. Tr. p. 2346, l. 6. Fiser testified that McArthur looked him in the face and told him that he would help him, but then did the opposite. Tr. p. 2347, l. 2. Although the Board recognizes that McArthur had the right to give a negative opinion regarding Fiser to Kent, the Board also recognizes that McArthur lied to Fiser when he said he would support him in finding a new position.

2.200. McArthur also gave conflicting testimony regarding his opinion of Fiser's taping. When being questioned by Staff Counsel on direct and re-direct examination, McArthur stated that he was not concerned that Fiser had tape recorded conversations with him in the past and that he was not uncomfortable being recorded. Tr. p. 1462, l. 17; p. 1682, l. 5. However, when TVA

Counsel questioned him about the same topic, McArthur vehemently stated that he found the taping very offensive, and that he could tell when Fiser was trying to tape their conversations. Tr. p. 1586, l. 19. The Board is disturbed by McArthur's ability to state different opinions based upon who is asking the question. McArthur's opinion on the matter should not be governed by whether he is being questioned by the Staff or questioned by TVA.

2.201. McArthur testified that he informed McGrath that Cox had made a statement indicating that he would have preselected Fiser for the PWR Chemistry Program Manager position. Tr. p. 1615, l. 8. McArthur felt that Cox's statement was pertinent information that needed to be communicated to McGrath. Staff 98, p. 96. He and McGrath also claimed that the SRB should not have been rescheduled so that Cox could attend because it would be inappropriate to have someone who had preselected serve on the SRB. Tr. 1615, l. 8.

2.202. There are three problems with this argument. First, Cox testified that he did not state that he had preselected Fiser. Tr. p. 1759, l. 9. Instead, Cox told the members of the RadChem peer team that Fiser had performed well for him at WBN, for whatever that information might be worth. Tr. p. 1760, l. 21. Also, Cox testified that he made this statement on the morning of the interviews. McArthur asked Rogers to serve on the SRB in place of Cox prior to the day of the interviews. If Cox did not make this statement prior to the day of the interviews, then McArthur and McGrath could not have refused to reschedule the interviews and instead asked Rogers to serve on the SRB because of the alleged preselection of Fiser.

2.203. Second, McArthur's concern that Cox would favor Fiser if he served on the SRB seems suspicious in light of the fact that he apparently had no concern about allowing Kent to serve on the SRB. Shortly before the 1996 reorganization, Kent had made an effort to have Harvey, one of the candidates for the PWR Chemistry Program Manager position, transferred to SQN because he had performed well at SQN and had good secondary chemistry expertise. Tr. p. 3106, l. 8. At a minimum, this would suggest that Kent was predisposed to want Harvey

selected as the individual who would serve his site in the new Corporate organization. Despite this fact, neither McArthur nor McGrath saw any problem with allowing Kent to serve on the SRB.

2.204. Finally, the Board finds it peculiar that McArthur felt that Cox's statement about Fiser should be reported to McGrath, but failed to take any action after Kent made a reference to Fiser's protected activity in front of one of the other members of the SRB. McArthur testified that he told Kent that such a discussion was inappropriate, yet he took no actions to ensure that the statement did not adversely affect the selection process. Tr. p. 1502, l. 7. *See also* Tr. 1640, l. 4. Each of these incidents indicates that McArthur was willing to exclude someone from the SRB who might have preferred Fiser over Harvey, but that he had no problems permitting someone to serve on the SRB who clearly favored Harvey or who made statements which could have adversely affected Fiser in the selection process.

2.205. The Board would also like to address an inconsistency in McArthur's statements about the selections he made after the SRB interviews were concluded. During the hearing, McArthur testified that he went back after the interviews and reviewed the candidates' personnel files and performance appraisals before making his final decision, as required by the TVA Business Practice. Tr. p. 1521, l. 21. Jt. Exh. 63. However, in prior statements, McArthur stated that he simply chose the candidate that the SRB scored the highest for each position. Specifically, at his PEC in November 1999, McArthur stated in response to a question from Staff Counsel that he simply took the SRB scores as the result. Staff Exh. 134, p. 24. It was only after Staff Counsel pointed out to McArthur that the Business Practice required him to review the personnel files and performance appraisals of the candidates that McArthur claimed that he did that. McArthur also claimed that his hearing testimony was not inconsistent with his statement at the PEC, despite the fact that the two statements are diametrically opposed. Tr. p. 1525, l. 5. Under these circumstances, the Board concludes that McArthur's statements on this matter at the hearing are not credible.

2.206. McArthur testified that he believed that Fiser had limited experience prior to working at TVA, and that he was concerned about this limited experience because it is important to communicate with other plants to determine what significant issues at those plants are. Tr. p. 1559, l. 9. However, this statement ignored Fiser's 14 years of experience at ANO prior to his employment at TVA. Tr. p. 1653, l. 13. McArthur also argued that Harvey had more experience, including management experience, and was technically more competent. Tr. p. 1654, p. 1; p. 1655, l. 1. McArthur completely ignored Fiser's prior management experience at ANO, and downplayed his supervisory duties during his tenure there. Tr. p. 1656, l. 9. By contrast, McArthur claimed that Harvey, who actually had less experience and fewer years as a manager, was more experienced than Fiser. Tr. p. 1659, l. 4. This claim, in light of the evidence, demonstrates that McArthur was biased against Fiser, and clearly favored Harvey for the PWR Chemistry position.

2.207. Finally, McArthur provided some troubling testimony regarding Fiser's involvement in INPO evaluations for SQN. In the performance appraisal McArthur gave Fiser in FY 1992, he noted that there had been no INPO findings for SQN that year, which was a record. Jt. Exh. 33. McArthur claimed during his testimony that, although he included the successful INPO review on Fiser's appraisal, the success of that review could not be attributed to Fiser because he had not been in charge of the SQN Chemistry program during that time. Tr. p. 1555, l. 13. McArthur then claimed that the next INPO review was the one which would most accurately reflect Fiser's performance at SQN, and that there were a number of deficiencies noted by INPO at that review. Tr. p. 1556, l. 12. This statement is disingenuous, as Fiser never returned to SQN Chemistry after his rotation downtown as Corporate Chemistry Manager. This testimony demonstrates that McArthur will say anything to blame Fiser for problems that did not occur during his tenure, and to discredit the successes that did occur while he was in charge of the SQN Chemistry Program.

3. Credibility of Kent

2.208. The Staff has challenged the credibility of Kent in two areas, both related to the attempted transfer of Harvey to a position at SQN. First, the Staff has challenged Kent regarding the existence of a vacant position at SQN into which Harvey could have transferred. Second, the Staff has questioned Kent's credibility with regard to who initiated the attempted transfer of Harvey. A comparison of Kent's hearing testimony with his prior statements in this matter indicates that the Staff's challenge to Kent's credibility is well founded.

2.209. During his hearing testimony, Kent gave contradictory information regarding the existence of a vacancy at SQN during that time. During his direct examination by Staff Counsel, Kent admitted that he had a vacancy in the Chemistry organization that had been vacated by an individual who had left to work at Carolina Power & Light. Tr. p. 3080, l. 9; p. 3092, l. 13; p. 3093, l. 1. However, on the same day of testimony, Kent also denied having a vacant position on his organizational chart into which Harvey could have transferred. Tr. p. 3132, l. 17. TVA has also taken the position that SQN lacked a vacancy into which Harvey could have been transferred.

2.210. A review of Kent's prior statements assists in resolving this contradiction in his hearing testimony. Kent addressed this issue in three statements, to three different authorities, regarding Fiser's 1996 DOL complaint prior to NRC enforcement action against TVA: one to TVA OIG; one to a DOL investigator; and one to NRC OI. *See* Staff Exhs. 70-73. On August 15, 1996, just a few months after the discussions of the Harvey transfer occurred, Kent told the TVA OIG that he had a vacancy that had been open for over a year and that he was looking for someone to fill that position. Staff Exh. 70, p. 1.[15] On April 18, 1997, Kent told the DOL investigator that he had

[15] Throughout this proceeding, TVA witnesses have asserted that TVA OIG Record of Interview statements may not be perfectly accurate because they are a summary of their interviews with the OIG. However, a review of the transcript of Kent's interview demonstrates that he did inform the OIG agent of the vacancy in his organization into which Harvey could have transferred. Staff Exh. 71.

a vacancy in the SQN Chemistry organization from an individual who had left TVA and that he had not yet filled that position. Staff Exh. 72, p. 2. Again, on October 22, 1998, Kent told an NRC OI agent in an interview under oath that he had a position which had been vacated by Bruce Fender, who had left TVA. Staff Exh. 73, p. 14.[16]

2.211. Despite this early consistency with regard to the existence of a vacant Chemistry position at SQN, Kent backtracked during the December 10, 1999 TVA PEC. During the PEC, Kent stated for the first time that he did not have a vacant position in which to transfer Harvey. Staff Exh. 135, p. 107. Kent also stated that he was "confused" about whether or not he had a vacancy on his organizational chart at that time, but that a review demonstrated that he did not in fact have a vacancy. Staff Exh. 135, p. 110-111. During his deposition in this proceeding, Kent wavered as to whether or not he had a vacant position in his organization at that time. First he claimed that he did not have a vacant position. Staff Exh. 74, p. 108. Next, he stated that he could not remember whether or not he had a vacancy on paper, but that he did not feel that he had the authority to fill any vacancies at that time. Staff Exh. 74, p. 114. Shortly thereafter, Kent stated that the position which Bruce Fender had previously held had not been filled and was vacant at the time he was pursuing the transfer of Harvey. Staff Exh. 74, p. 118. In fact, Kent stated during his deposition that the technical support manager position which Fender vacated and into which Harvey could have been transferred still exists at SQN today. Staff Exh. 74, p. 117-118.

2.212. Although Kent has made inconsistent statements regarding the existence of a vacant position at SQN during the spring of 1996, there is sufficient evidence in the record to conclude that Kent believed in 1996 that he had a vacant Chemistry position into which Harvey

---

[16] The Board notes that Kent was represented by TVA Counsel Marquand in the NRC OI interview, and despite an opportunity to clarify any incorrect statements, Marquand did not ask Kent to clarify whether or not he actually had a vacant position. Staff Exh. 73. TVA first disputed the existence of a vacant position at the 1999 Predecisional Enforcement Conferences before the NRC.

could have been transferred. This is supported by the statements Kent made most contemporaneously to the attempted transfer in his TVA OIG interview and his DOL interview. Staff Exhs. 70- 72. The Board gives little weight to Kent's statement at the TVA PEC that he did not have a vacancy at that time because that statement was based upon Kent's review of organizational charts prior to the PEC. *See* Staff Exh. 135, p. 110-111. Additionally, this statement was a part of TVA's presentation to convince the Staff that it had not discriminated against Fiser. As noted earlier, the relevant factor is whether Kent believed at the time that he had a vacant position into which Harvey could have transferred, not whether TVA could at some later date attempt to prove that such a vacancy did not exist. Therefore, the Board concludes that SQN did have a vacant Chemistry position into which Harvey could have been transferred had McGrath not obstructed the transfer. The Board further concludes that the blocked transfer is evidence of the preselection of Harvey for the PWR Chemistry Program Manager position.[17]

2.213. There is also conflicting evidence regarding who initiated the attempted transfer of Harvey to SQN. Kent testified that he could not recall whether he initiated the request or whether Grover, then Harvey's supervisor, initiated the transfer. This point is relevant because of its potential effect on the selection process: if Kent was actively seeking to have one of the candidates transferred to his site permanently, it is logical that he would be predisposed to selecting that candidate during the interviews (a result which is supported by the fact that Kent scored Harvey the highest for the PWR Chemistry Manager position).

---

[17] TVA has demonstrated that it is capable of preselecting an individual for a position when it desires that person to be placed in that position. In 1993, Kent requested McArthur to transfer Gordon Rich, then the Corporate Chemistry Manager, to SQN because he desired Rich to fill the SQN Chemistry Manager position. McArthur approved the transfer. Soon thereafter, Kent posted the VPA for the Chemistry Manager position, and Rich applied and was selected for the position. *See* TVA Exh. 12, p. EE000082. Reynolds testified that he did not believe it was appropriate to fill a vacancy in such a manner. Tr. p. 3507, l. 17.

2.214. Grover testified that Kent and Rich, then the SQN Chemistry Manager, requested that he look into transferring Harvey to the site because they had a vacant position and they were interested in Harvey's expertise at the site. Tr. p. 1864, l. 4. This testimony is consistent with statements Kent provided to the TVA OIG, DOL, and NRC OI. Kent told the TVA OIG during its investigation of Fiser's 1996 complaint that he wanted to keep Harvey's expertise in support of SQN, and that he and Rich initiated a verbal request to Corporate seeking the transfer. Staff Exh. 70, p. 1. Kent again told a DOL investigator that he made a request to Grover about the possibility of transferring Harvey to SQN. Staff Exh. 72, p. 2. In 1998, Kent told an NRC OI agent that he approached Harvey's supervisors and asked if Harvey could be transferred to SQN, because it would solve Corporate's problem with head count and SQN had a vacant position. Staff Exh. 73, p. 15. Again, Kent changed his story at the December 10, 1999 TVA PEC, where he stated that Grover approached him about the transfer. Staff Exh. 135, p. 106. At his deposition, he reverted back to acknowledging that he approached Grover at the site and asked if Corporate would be willing to transfer Harvey to SQN. Staff Exh. 74, p. 108. During his hearing testimony, Kent yet again changed his story and stated that he did not initiate the discussion regarding Harvey's transfer, but that Grover initiated the conversation about the transfer. Tr. p. 3071, l. 9; p. 3073, l. 1.

2.215. The Board finds that Kent's testimony as to whom initiated the attempted transfer of Harvey at the hearing is not credible. It appears to the Board that Kent changes his story in order to fit within TVA's theory of the case, rather than simply telling the truth. Therefore, the Board finds that Kent initiated the transfer of Harvey.

4. Credibility of Boyles

2.216. Boyles testified at length regarding the transfer of McArthur into the RadChem Manager position without posting that position for competition. The Board's trouble with Boyles' credibility on this matter is twofold. First, Boyles has given a number of inconsistent statements

in the past regarding the reason for the transfer of McArthur into the RadChem Manager position. Second, even in the face of incontrovertible evidence that TVA improperly placed McArthur in that position, Boyles continued to argue that TVA's decision was appropriate under TVA policy.

2.217. Over the years since Fiser filed his 1996 DOL complaint, Boyles has told a number of different stories regarding the reasons for the transfer of McArthur into the RadChem Manager position. Boyles told a DOL investigator that HR reviewed McArthur's 1990 and 1994 position descriptions in making the determination that McArthur could be rolled over into the RadChem Manager position. Staff Exh. 4, p. 1-2. The following year, Boyles told an NRC OI agent that McArthur was placed in the RadChem Manager position because he had supervised those functions earlier, and that the RadChem Manager position was essentially his previous position. Staff Exh. 6, p. 21-22. The NRC OI agent pointed out to Boyles that, following this same rationale, Fiser should have had rights to the PWR Chemistry Program Manager position because it was essentially the same position with the same duties that he had occupied prior to the 1994 reorganization. Boyles also claimed that he had more discretion in making posting determinations for senior manager positions. *Id.* at p. 21.

2.218. It was not until the December 10, 1999 TVA PEC that Boyles, or anyone else, claimed that McArthur lacked a 1994 position description and that HR was therefore required to use McArthur's "position description of record" to make the determination that McArthur had rights to the RadChem Manager position. According to Boyles, McArthur's "position description of record" was the 1990 Technical Programs Manager position description. Staff Exh. 135, p. 43. Boyles reiterated his "position description of record" argument at his deposition, but also acknowledged that the information he provided to NRC OI regarding the flexibility in posting senior manager positions was inaccurate. Staff Exh. 7, p. 41, 57-58. In his hearing testimony, Boyles again argued that McArthur's "position description of record" was interchangeable with the RadChem Manager position description. Tr. p. 3930, l. 20.

2.219. The Board notes that Boyles did not come forward with the "position description of record" argument until the TVA PEC, when TVA Counsel presented the argument that the MSPB requires TVA to use the "position description of record" when making competitive level determinations. The Board will address the legal argument in Section III.J.2. of this opinion. For now, it suffices that the Board attaches very little weight to Boyles' testimony on this matter.

2.220. Boyles further undermined his credibility by insisting that TVA made the correct decision regarding McArthur despite irrefutable evidence to the contrary. Boyles acknowledged that a position that had higher or different minimum qualifications would not be interchangeable with a position that had lower minimum qualifications. Tr. 3928, l. 14. A review of the Technical Programs Manager and RadChem Manager position descriptions demonstrates that they have different, non-fungible minimum qualifications. *See* Staff Exhs. 100 and 101. Even after being presented with this evidence, Boyles clung to his argument that the positions were interchangeable based on the similarities of the functions being supervised. Tr. p. 3930, l. 20. Under these circumstances, the Board has little trouble rejecting Boyles' testimony on this matter.

5. Credibility of Grover

2.221. TVA has attempted to attack the credibility of Grover by arguing that he is biased against TVA because his TVA employment was terminated, allegedly for misconduct. Grover's termination was based upon a TVA OIG investigation, which commenced in July 1998. Staff Exh. 180. Grover testified that he first learned of this investigation in April 1999. Tr. p. 2243, l. 19. Prior to his learning of this investigation, Grover made four statements in support of Fiser: a July 11, 1996 statement to TVA OIG; a September 27, 1996 statement to a DOL investigator; a January 29, 1998 deposition by Fiser's attorney; and a December 18, 1998 statement to an NRC OI agent. Staff Exhs. 49-53. Although the Board will not review each and every aspect of Grover's testimony and prior statements, a review of these statements indicates that they are consistent with Grover's hearing testimony in all relevant aspects.

2.222. Grover testified at the hearing that the incumbent Chemistry and Environmental Protection Program Managers performed 95 percent chemistry duties and only five percent environmental duties. Tr. p. 1885, l. 22. He also testified that the functions performed by the incumbents in the Chemistry and Environmental positions would change very little as a result of the reorganization into two Chemistry Program Manager positions. Tr. p. 1883, l. 17. Grover has provided this same testimony from the start. Grover told the TVA OIG in 1996 that the functions performed by the managers would not change a great deal, and that the new job description was only a little different from the old job description. Staff Exh. 49, p. 2. Grover stated in his 1996 DOL statement that the BWR and PWR positions were a little different from the old positions, but that the basic functions performed were the same. Staff Exh. 51, p. 6. Grover again stated that the chemistry functions largely stayed the same from the old positions to the new positions, and that less than five percent of the duties under the old position description were environmental duties. Staff Exh. 52, p. 22, 25. Grover's hearing testimony on this subject is consistent with the statements he provided before the alleged basis for his bias arose. Therefore, the Board finds Grover's testimony on this subject credible.

2.223. Grover testified that, during the course of his supervision over Fiser, both McArthur and McGrath made negative comments about Fiser. Specifically, Grover stated that McArthur made some comments regarding Fiser's past tape recording, and that McGrath stated that he did not have a high opinion of Fiser stemming from an incident with the NSRB while Fiser was at SQN. Tr. p. 1847, l. 15; p. 1850, l. 12; p. 2215, l. 7. Again, a review of Grover's past statements indicates that he has not changed his testimony on this subject. In his statement to the DOL, Grover stated that McGrath made negative comments about Fiser on two or three occasions, and that Grover told him that he wanted to come to his own opinion on Fiser based upon his job performance. Staff Exh. 51, p. 2. He also said that McArthur distrusted Fiser because of Fiser's past tape recording, and that both McArthur and McGrath had a negative undercurrent about Fiser. *Id.* at 3. In his NRC

OI interview, Grover stated that McArthur told him about Fiser's taping during his 1993 DOL complaint. Grover told McArthur that he would base his opinion on what he saw from that day forward, not based upon what had occurred in the past. Staff Exh. 53, p. 55-56. Grover also stated that McArthur told him that Fiser could not be trusted. *Id.* at 69. Again, the Board finds that Grover's testimony on this matter is consistent with his prior statements, and will credit that testimony.

2.224. Grover testified that he communicated SQN's request to transfer Harvey to the site to McGrath, who stated that he did not want Harvey to transfer to SQN because he wanted to keep his expertise in Corporate Chemistry and because he wanted Harvey available to compete for the PWR Chemistry Program Manager position. Tr. p. 1870, l. 4; p. 3615, l. 7. Grover told the TVA OIG that McGrath wanted to keep Harvey's expertise in the Corporate organization and that he rejected the idea of a transfer right away. Staff Exh. 49, p. 4. Grover also stated that McGrath wanted to keep Harvey in the Corporate organization because he would be qualified for the new PWR position. *Id.* Grover again stated to the DOL investigator that McGrath did not agree with the proposed transfer of Harvey because he wanted Harvey in the PWR Chemistry position in Corporate. Staff Exh. 51, p. 5. In his DOL deposition, Grover stated that McGrath mentioned that he preferred to keep Harvey in the Corporate organization and wanted to have Harvey fill one of the remaining Chemistry positions. Staff Exh. 52, p. 49-50. Grover's hearing testimony on this subject is consistent with his prior statements, therefore the Board finds this testimony credible.

2.225. Grover testified at the hearing that Fiser told him about a conversation Harvey had with Voeller, the WBN Chemistry Manager, during which Harvey stated he would be working more closely with Voeller in the future. Tr. p. 1923, l. 7. Grover also testified that, although he had not heard that anyone had been preselected for a position, that this conversation suggested to him that Harvey may have known something about the selections that he did not know. Tr. p. 1927, l. 4. Additionally, Grover stated that he discussed the conversation with Voeller, and then with Harvey.

Tr. p. 1924, l. 10. Grover told the TVA OIG that Fiser contacted him, upset about Harvey's phone conversation with Voeller. Grover then called Voeller, who repeated the contents of his conversation with Harvey. Grover also stated that there might be a perception from this conversation that a preselection had occurred. Staff Exh. 49, p. 5. The transcription of that interview indicates that Grover's statement about preselection was even stronger: Grover stated that "it sounds like it's some - - a smoking gun as far as some pre-selections." Staff Exh. 50B, p. 56. *See also* Staff Exh. 50A. During his DOL deposition, when asked if there was anything which indicated that Harvey may have been preselected for the PWR Chemistry Program Manager position, Grover identified Harvey's conversation with Voeller. Staff Exh. 52, p. 98. Grover stated in his NRC OI interview that he discussed this conversation with Voeller, and then he had a conversation with Harvey about what he said during that conversation. Staff Exh. 53, p. 29-31. Yet again, Grover's testimony has not changed since the event that would lead to his alleged bias against TVA. Therefore, the Board will credit his testimony on this issue.

2.226. Grover testified during the hearing that he had requested Fiser to attend a meeting of the RadChem peer team on his behalf. Tr. p. 1855, l. 6. Fiser attended this meeting, but was asked to leave midway through the meeting. Tr. p. 1856, l. 3. Grover testified that he inquired of McArthur as to why Fiser was asked to leave, and that McArthur's response was that the peer team did not wish to discuss sensitive matters in front of Fiser because he had previously recorded conversations. Tr. p. 1856, l. 18. Grover also discussed this matter in his prior statements. Grover informed the DOL investigator that when he asked McArthur why Fiser had been asked to leave the peer team meeting, McArthur stated that they did not want to discuss certain information with Fiser present, not because of the subject matter, but because of Fiser personally. Staff Exh. 51, p. 3. This is consistent with Grover's hearing testimony.

2.227. Although there are innumerable other areas into which the Board could look to determine Grover's credibility, the Board finds that Grover's testimony has been consistent in all

relevant aspects since the start of this case in 1996. Therefore, the Board rejects TVA's argument that Grover's testimony is not credible because he is biased against TVA. The Board instead finds that Grover's testimony should be given great weight in light of his great consistency over the years.

III. CONCLUSIONS OF LAW

A. NRC Authority over Whistle blower Retaliation Claims.

3.1. Subsections 161(c) and 161(o) of the Atomic Energy Act of 1954, as amended,42 U.S.C. §§ 2011 *et. seq.* (hereinafter "AEA"), give the Commission broad authority to establish standards as necessary to protect the public health and safety. In 1973, the Atomic Energy Commission promulgated 10 C.F.R. § 19.16(c) under the authority of section 161 of the AEA. This rule provided that:

> (c) No licensee shall discharge or in any manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under the regulations in this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such worker on behalf of himself or others of any option afforded by this part.[18]

This provision was limited to complaints dealing with radiological working conditions. 10 C.F.R. § 19.16(a).

3.2. In *Union Electric Company* (Callaway Plant, Units 1 and 2), LBP-78-31, 8 NRC 366 (1978), the Atomic Safety Licensing Board held that the AEA provided the NRC with the authority to take action where a licensee, including a contractor of a licensee, discriminated against a worker for raising a safety issue.

3.3. The licensee appealed the decision to the Atomic Safety and Licensing Appeal Board. Prior to the Appeal Board decision, Congress enacted section 210 of the Energy

---

[18] Section 19.16(c) was subsequently replaced by 10 C.F.R. § 19.20.

Reorganization Act of 1974, 42 U.S.C. § 5851,[19] on November 6, 1978 to fill a gap in the regulatory structure pertaining to whistle blowers. The AEA provided the Commission with authority to take action against a licensee, but it did not address any personal remedy for an employee who had been subjected to discrimination. Section 210 addressed this gap by providing an individual remedy to victims of discrimination through a process administered by the DOL. During debate on the conference report for section 210, Senator Hart, a principal sponsor of the provision, stated that:

> [While new Section 210 of the Energy Reorganization Act of 1978 provides the Department of Labor with new authority to investigate an alleged act of discrimination in this context and to afford a remedy should the allegation prove true, it is not intended to in any way abridge the Commission's *current authority* to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendency of a proceeding before the Department of Labor pursuant to new Section 210 need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954.

124 Cong. Rec. S15,318 (daily ed. September 18, 1978) (emphasis added).

3.4. In its decision in *Callaway*, the Appeal Board upheld the Staff's position that the Commission had the authority to take enforcement action against a licensee, but declined to decide

---

[19] The pertinent portions of Section 210 as enacted were:

(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor, or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges or employment because the employee (or any person acting pursuant to a request of the employee) --

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding; or

(3) assisted or participated in or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

whether the Commission had the authority to grant an individual remedy to the wronged employee. *Union Electric Company* (Callaway Plant, Units 1 and 2), ABAB-527, 9 NRC 126, 138, 144 (1979). The Appeal Board noted that the remarks of Senator Hart "effectively undercut the idea that Congress passed Section 210 either because it thought the Commission lacked such power or because it wanted to strip away that authority." *Id.* at 144.

3.5. After *Callaway*, the Commission promulgated employee protection regulations in Parts 30, 40, 50, 60, 70, and 72 of the regulations to broadly prohibit discrimination against individuals who have engaged in specified protected activities.[20] The regulations were promulgated under the authority of both the section 161 of the AEA and section 210 of the ERA. 47 Fed. Reg. 30452 (July 14, 1982). The Staff believed that the rules were necessary in order to make violations subject to the civil penalty provisions of section 234 of the AEA.

3.6. Subsequently, the Commission became aware of the potential for settlement

---

[20] The text of the rules in each Part was identical. For example, section 50.7 provided in pertinent part:

(a) Discrimination by a Commission licensee, permittee, an applicant for a Commission license or permit, or a contractor or subcontractor of a Commission licensee, permittee, or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in section 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to --

(i) Providing the Commission information about possible violations of requirements imposed under either of the above statutes;

(ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; or

(iii) Testifying in any Commission proceeding.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation . . .

agreements in discrimination cases at the DOL to impose restrictions on the freedom of employees or former employees to raise issues, participate in proceedings, or otherwise provide information to the Commission on issues of potential regulatory concern. Therefore, in 1990, the Commission amended its rules to add a new section in each Part which prohibited such agreements, as well as any agreements which would restrict the exercise of protected activities. 55 Fed. Reg. 10405 (Mar. 21, 1990). The language in each part was identical. For example, 10 C.F.R. § 50.7(f) provides:

> (f) No agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 210 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit, restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section, including, but not limited to, providing information to the NRC on potential violations or other matters within NRC's regulatory responsibilities.

3.7. In 1992, Congress replaced Section 210 of the ERA with Section 211. PL. 102-486 (106 Stat 3123) (Oct. 24, 1992). The new section added three additional areas of protected activity. The new provisions prohibit discrimination against an employee who:

> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);
> (B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954. . . .

3.8. In addition, section 211 set forth the burden which an employee must meet to establish a violation of the section, and a separate standard for the showing necessary by an employer to avoid the ordering of a remedy for the violation. Specifically, subsections 211(b)(3)(C) and (D) provide, respectively, that a violation is established if the employee demonstrates that protected activity was a contributing factor in an unfavorable personnel action, and that no relief shall be granted to the employee for the violation if the employer demonstrates by clear and convincing evidence that it would have taken the same action without regard to the protected

activity. 42 U.S.C. §§ 5851(b)(3)(C) and (D). Following the promulgation of Section 211, the Commission amended its employee protection regulations to add the new protected activities. 58 Fed. Reg. 52406 (Oct. 8, 1993).

3.9. Section 50.7 does not set forth a particular standard of proof for determining whether a violation has occurred. The Board adopts the standard of proof under section 211 of the ERA and Title VII, as amended by the Civil Rights Act of 1991 as the standard of proof in a case involving a violation of 10 C.F.R. § 50.7. Under these statutes, the appropriate standard of proof is proof by a preponderance of the evidence that the complainant's protected activity was a contributing factor in the adverse action against the complainant.[21]

3.10. The NRC promulgated 10 C.F.R. § 50.7 pursuant to its authority under the AEA. Therefore, neither the Commission nor the Board is bound by DOL's interpretation of section 211 of the ERA when construing section 50.7. Rather, DOL decisions construing section 211 are instructive when analyzing a violation of 10 C.F.R. § 50.7. DOL decisions regarding what constitutes protected activity under section 211 are especially useful given that section 50.7 specifically references the protected activities identified in section 211.

3.11. Section 211 is one of seven whistle blower protection statutes administered by the Secretary of Labor prohibiting employment discrimination against individuals who engage in certain

---

[21] The preponderance of the evidence standard has already been adopted by the Commission in an enforcement proceeding. In *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), the Commission stated that NRC administrative proceedings have generally relied upon the preponderance of the evidence standard in reaching the ultimate merits of an enforcement proceeding. Similarly, the Commission concluded that it had never adopted a clear and convincing evidence standard in an enforcement proceeding, nor does the AEA or the Administrative Procedure Act require it to adopt such a standard. 39 NRC at 302, n.22.

protected activities.[22] The operative language of each of the seven employee protection provisions is similar to that set forth in section 211 of the ERA:

> (a)(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity].

42 U.S.C. § 5851. This language is almost identical to that found in section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, which states that:

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

3.12. The language of section 211 also tracks the language of Title VII with regard to the standard for demonstrating a violation. Congress enacted the Civil Rights Act of 1991, amending Title VII to provide that:

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). One year after adopting this language in Title VII, Congress enacted the Energy Policy Act of 1992. This act amended then section 210, renumbering it as section 211 and adding the standard for determining whether a violation of the section has occurred:

---

[22] *See* Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Federal Water Pollution Control Act, 22 U.S.C. § 1367; Toxic Substances Control Act, 15 U.S.C. § 2622; Solid Waste Disposal Act, 42 U.S.C. § 6971; Clean Air Act, 42 U.S.C. § 7622; Energy Reorganization Act of 1974, 42 U.S.C. § 5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610. *See also* Federal Aviation Administration Authorization Act of 1994, as amended, 49 U.S.C. § 42121.

> The Secretary may determine that a violation of subsection (a) has occurred only if the complainant had demonstrated that any [protected activity] described in subparagraphs (A) through (F) of subsection (a)(1) was *a contributing factor* in the unfavorable personnel action alleged in the complaint.

42 U.S.C. § 5851(b)(3)(C) (emphasis added).

3.13. The Board will follow the mandate of these statutes and concludes that the appropriate standard of proof applicable to a 10 C.F.R. § 50.7 case is whether the Staff can prove by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an adverse action.[23]

B. Application of Federal Discrimination Case Law to a Section 50.7 Violation

3.14. Because the operative language of the whistle blower protection statutes is similar to the language of Title VII, DOL has generally adopted the case law developed by the Supreme Court under Title VII and other anti-discrimination statutes. The Board likewise looks to Supreme Court and other relevant case law under Title VII and other anti-discrimination statutes when analyzing a violation of 10 C.F.R. § 50.7. The Supreme Court and DOL have both recognized circumstantial evidence of discrimination in employment discrimination and whistle blower retaliation cases. The Board will also recognize such evidence of discrimination.

3.15. Because a complainant often lacks direct evidence of discrimination, the Supreme Court has adopted a burden shifting method of proving discrimination based on circumstantial evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Court first set forth the appropriate elements and the

---

[23] Specific intent is not a required element in a 10 C.F.R. § 50.7 case. Section 50.7 only requires that the complainant's protected activity be a contributing factor in the adverse action. Ignorance is not a defense to a section 50.7 violation. For example, if a supervisor took an adverse action against an employee because he had raised a safety concern to the NRC, the fact that the supervisor lacked knowledge that this constitutes a violation of section 50.7 is not a defense to a violation of that section.

allocation of the burdens of proof for Title VII discrimination cases in *McDonnell Douglas,* and further clarified those elements and burdens in *Burdine.*

3.16. Under the *McDonnell Douglas/Burdine* construct, as applied by DOL to whistle blower discrimination cases, the complainant must initially establish a prima facie case of discrimination by showing: 1) that the complainant engaged in protected activity; 2) that the employer took an adverse action against the complainant; 3) that the decision makers had knowledge of the complainant's protected activity; and 4) that there is a nexus between the complainant's protected activity and the adverse action. *Bechtel Constr. Co. v. Secy. of Labor,* 50 F.3d 926, 933-34 (11th Cir. 1995); *Darkey v. Zack Company of Chicago* , 82-ERA-2, 1983 DOL Sec. Labor LEXIS 17 (Apr. 25, 1983).[24] *See also Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991) and *Overall v. Tennessee Valley Authority*, 97-ERA-50, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001).

3.17. Once a prima facie case of discrimination has been established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. This is a burden of production, not of persuasion. *Burdine*, 450 U.S. at 254-55. The employer's burden is satisfied if it explains what it did or produces evidence of a legitimate, nondiscriminatory reason for its action. *Id.* at 256. In the context of a section 50.7 case, once the employer meets this burden, the Staff must establish that the reason proffered by the employer is a pretext for discrimination. The Staff may satisfy this burden by producing evidence that a discriminatory reason motivated, at least in part, the employer to take the adverse action or by demonstrating that the proffered reason was false. *Id.*, and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

---

[24] In citing to cases from the Department of Labor, the Staff has used a Lexis citation where available. Cases that lack a Lexis cite can be located by case name and ERA case number on the following web site: www.oalj.dol.gov.

C. Standard of Proof in a Dual Motive Case

3.18. The phrase "dual motive" refers to a discrimination case in which both lawful and unlawful motives played a factor in an adverse action against the complaining employee. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that when gender plays a motivating part in an employment decision, the employer defendant can avoid a finding of liability under Title VII by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Congress specifically overturned *Price Waterhouse* by enacting the Civil Rights Act of 1991 (Pub.L. 102-166), which amended Title VII to provide that it is a violation of the statute if discrimination was a motivating factor in the adverse action even if lawful motives were also used in reaching the decision. Under the amended language of section 703, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The legitimate motives for the adverse action become relevant only at the remedy phase of a Title VII dual motive case. Once the complainant establishes a violation under section 703, if the defendant employer demonstrates that it would have taken the same action in the absence of the unlawful motive, then the court is limited to awarding declaratory and/or injunctive relief and attorney's fees, but may not award damages, reinstatement, hiring, promotion, or payment to the employee. 42 U.S.C. § 2000e-5(2)(B).

3.19. The following year, Congress enacted section 2902 of the Energy Policy Act, which amended and renumbered section 210 as section 211. These amendments changed the burdens involved in dual motive cases in a manner similar to the changes Congress had made to Title VII. 42 U.S.C. § 5851(b)(3)(C). The statutory language of section 211 clearly delineates the difference between a violation of the section and the remedies available. A violation of the section occurs "if the complainant has demonstrated that [protected activity] was a contributing factor in the

unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3(C). However, "[r]elief may not be ordered [to the employee]. . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of" the complainant's protected activity. 42 U.S.C. § 5851(b)(3)(D).

3.20. DOL has acknowledged the distinction between a violation of section 211 and the ability to award relief to an employee based on that violation. In *Overall v. Tennessee Valley Authority*, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001), the ARB concluded that a violation of section 211 occurs if the complainant's protected activity was a contributing factor in the adverse action. However, the ARB noted that, once a violation is found, "[r]elief nevertheless may not be ordered 'if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of [protected] behavior." *Id.* at 30 (citations omitted). This distinction was also noted in *Yule v. Burns International Security Service*, 93-ERA-12, 1995 DOL Sec. Labor LEXIS 173 (Sec'y May 24, 1995). In that case, the Secretary concluded that the employer had violated the ERA because the complainant's protected activities were a contributing factor in the decision to discharge her. However, despite the violation, the complainant was not entitled to relief because her employer demonstrated by clear and convincing evidence that it would have discharged her in the absence of her protected activity.[25] *Id.* at 17.

---

[25] Federal courts analyzing Title VII cases have also recognized the distinction between a violation of that statute and the availability of remedies. In *Hashimote v. Dalton*, 118 F.3d 671 (9th Cir. 1997), the court held that an adverse employment reference "violated Title VII because it was a 'personnel action' motivated by retaliatory animus. That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability." *Id.* at 676, *citing Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C.Cir. 1981) ("The questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination . . . is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [remedies].") *See also EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (9th Cir. 1997).

3.21. TVA argued in its pretrial legal brief that 10 C.F.R. § 50.7(d) permits it to avoid liability for a violation if it can establish by clear and convincing evidence that it would have taken the same adverse action in the absence of discrimination. That regulation is inapposite in a dual motive case. 10 C.F.R. § 50.7(d) states:

> Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations.

This provision does not provide an employer with the opportunity to avoid a violation of section 50.7 in a dual motive case if it establishes that it would have taken the adverse action in the absence of the complainant's protected activity. This regulation simply recognizes that there are legitimate reasons for taking an adverse action and that a complainant is not immune from an adverse action based solely on a legitimate reason just because he has previously engaged in protected activity.

3.22. A violation of section 50.7 does occur, however, if the adverse action was taken in part because of that protected activity. More specifically, this section defines what *is not* a violation: *an adverse action based solely upon nondiscriminatory reasons, even if taken against an individual who previously engaged in protected activities.* More specifically, the regulation does not state that a licensee can avoid a violation if it takes an adverse action based, at least in part, upon discriminatory actions, so long as it also can demonstrate that it had a legitimate, non-discriminatory reason for the action. Such a result would permit NRC licensees to avoid liability for violating regulations simply by ensuring that they also have a legitimate reason for the action. The Board will not permit such an end-run around the Commission's regulations.

3.23. In sum, in a case involving a violation of 10 C.F.R. § 50.7, the determination of whether the employer violated the regulation involves only the first part of the dual motive analysis. Since the NRC is not seeking relief for a wronged employee, but rather a penalty for violation of

its regulation, whether a licensee can prove that it would have taken the same action for legitimate reasons alone is not relevant. Whistleblower provisions such as section 211 of the ERA and 10 C.F.R. § 50.7 "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals" for engaging in protected activity. *Passaic Valley Sewerage Comm'rs v. Dept. of Labor*, 972 F.2d 474, 478 (3d Cir. 1993). Enforcement action against employers who take an adverse action against an employee based at least in part upon his protected activities is warranted in order to promote such an environment. Therefore, the Board concludes under 10 C.F.R. § 50.7 that any dual motive case is *per se* a violation of the regulation.

D. Complete and Accurate Information Requirements

3.24. NRC regulations at 10 C.F.R. § 50.9 require that information submitted to the Commission by a licensee be complete and accurate in all material respects. This expectation of accuracy is not limited to written information submitted in support of a license application, but extends to any communication, oral or written, made by the licensee to the Commission during the term of the license. *See* Statement of Consideration, "Completeness and Accuracy of Information," 52 Fed. Reg. 49362 (Dec. 31, 1987). Additionally, omissions of information are actionable to the same extent as incomplete or inaccurate statements. *Id.* The statement or omission need not be intentional, but must involve information that has the ability to influence the agency in the conduct of its regulatory responsibilities. *Id.*

3.25. A Commission licensee is required to provide complete and accurate information at a Predecisional Enforcement Conference regarding a potential violation of the Commission's regulations. Pursuant to 10 C.F.R. § 50.9, a licensee is required to proffer all legitimate reasons for taking the alleged action, and may not provide incomplete or inaccurate information about its

reasons at either the PEC or at hearing before the Board.[26] TVA was aware of this requirement prior to the December 10, 1999 Predecisional Enforcement Conference. Tr. p. 4945, l. 10.

E. Fiser Engaged in Protected Activities

3.26. NRC regulations at 10 C.F.R. § 50.7 prohibit a Commission licensee from discriminating against an employee for engaging in certain protected activities. The regulation enumerates five specific areas of protected activity:

> (i) Providing the Commission or his or her employer information about alleged violations of [the AEA or ERA] or possible violations of requirements imposed under either of those statutes;
>
> (ii) Refusing to engage in any practice made unlawful under [the AEA or ERA] or under these requirements if the employee has identified the alleged illegality to the employer;
>
> (iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;
>
> (iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of [the AEA or ERA];
>
> (v) Assisting or participating in, or is about to assist or participate in, these activities. 10 C.F.R. § 50.7(a)(1).

3.27. The regulation specifies that the protected activities include, but are not limited to, the above areas and specifically refers to the protected activities identified in section 211 of the ERA 10 C.F.R. 50.7(a)(1). Additionally, these activities are protected even if a formal proceeding is not initiated as a result of the employee's assistance or participation. 10 C.F.R. § 50.7(a)(2).

---

[26] A Severity Level IV violation was recently issued to the United States Enrichment Corporation (USEC) for its failure to provide complete and accurate information pursuant to 10 C.F.R. § 76.9 in a letter supplementing its presentation at a predecisional enforcement conference. The language of section 76.9 is identical in all material respects to that language of section 50.9(a). The Staff further warned USEC that future incidents of providing incomplete or inaccurate information may result in escalated enforcement action. *Response to January 3, 2001, Notice of Violation; Notice of Violation; and Alleged Discrimination*, EA-99-256, EA-00-047, EA-00-048, January 17, 2002.

3.28. The Board concludes that Fiser engaged in numerous activities protected by 10 C.F.R. § 50.7. These activities include: raising concerns about the diesel generator fuel oil storage tanks; refusing to incorporate trending procedures as requested by the NSRB and which would likely have resulted in a violation of the requirements of the AEA or the ERA; sending a letter raising concerns to Senator Sasser; and filing two DOL complaints in 1993 and 1996.

3.29. Questioning safety procedures and raising safety issues internally constitute protected activity. *Gibson v. Arizona Public Service Co.*, 90-ERA-29, 1995 DOL Sec. Labor LEXIS 78 at 4 (Secy Sept. 18, 1995), *citing Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). Additionally, the fact that other employees also raised the same or similar internal safety concerns does not render the complainant's concerns unprotected. *Gibson*, 1995 DOL Sec. Labor LEXIS 78 at 5. Under these cases, the complainant is not required to be the sole person who is involved with raising or identifying an internal safety concern.

3.30. Fiser was involved with identifying some of the problems associated with the emergency diesel generator storage tanks, specifically with identifying the problem with the design of the tanks. Tr. p. 2275, l. 16. In his role as SQN Chemistry Superintendent, Fiser was the Event Manager for reporting on this problem and was designated as the individual responsible for implementing the necessary corrective actions. TVA Exh. 147. Moreover, it was Fiser who was threatened with removal for his role in this issue. The Board therefore concludes that Fiser's involvement in the identification and resolution of the emergency diesel generator fuel oil storage tank problems is activity protected under 10 C.F.R. §50.7.

3.31. Refusal to engage in activity which would violate the AEA or ERA constitutes protected activity. In *Harrison v. Stone and Webster Engineering Group*, 93 ERA-44, 1995 DOL Sec. Labor LEXIS 125 (Sec'y Aug. 22, 1995), the Secretary of Labor held that the complainant's communications with a work crew, which resulted in the crew's refusal to work without proper fire

protection, was protected activity. The Secretary stated that, "[d]iscrimination against [the complainant] because of his role in the crews' work refusal is prohibited. The ERA accords employees the right to refuse 'to engage in any practice made unlawful by [the Act]." *Id.* (citations omitted). Fiser's refusal to implement a procedure which required trending every day is protected activity because his refusal was based upon a belief that such a requirement would cause a violation of NRC regulations. This was a valid concern for Fiser because SQN had recently had numerous problems with procedural violations. Tr. p. 890, l. 6; p. 1022, l. 6. Section 50.7 requires that the employee identify the alleged illegality to the employer before his refusal to engage in the unlawful activity. Fiser did inform the members of the NSRB meeting that the procedure which they requested would result in procedural violations as he lacked the staff to perform the trending and the computer used to perform the trending did not always work properly. Tr. p. 1020, l. 1

3.32. In order to constitute protected activity, the complainant is not required to demonstrate that the act which he opposed would in fact cause a violation of the AEA or ERA. Rather, the complainant need only have a reasonable, good faith belief that the requested action would violate the law. *See Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d. Cir. 1990). It is not sufficient for the complainant to allege that his belief was honest, but the record must also demonstrate that the belief, even if mistaken, was objectively reasonable. *Harper v. Blockbuster Entertainment Corp.*, 139, F.3d 1385, 1388 (11th Cir. 1998). Fiser testified that he reasonably believed that the request made by McGrath and Peterson to institute a procedure that would require the trending on a daily basis would cause SQN to have procedural violations and that SQN had recently had problems with procedural violations. Tr. p. 1022, l.6. The record demonstrates that this belief was objectively reasonable in a number of ways. First, just prior to this meeting, the computer used to perform the trends had suffered from problems which prevented the performance of the trends. Tr. p. 1015, l. 21. If the trending had

been required by a procedure at that time, SQN would have been in violation. Second, both McArthur and McGrath conceded that SQN had suffered from a spate of recent procedural violations, demonstrating that Fiser had a valid concern. Tr. p. 890, l. 6; p. 1401, l. 11. The Board finds that Fiser's refusal to implement the trending procedure as requested was a refusal to engage in an activity made unlawful by the AEA or ERA, and is therefore protected activity.

3.33. Informing the NRC, either formally or informally, of safety concerns constitutes protected activity under 10 C.F.R. § 50.7. *See Klock v. Tennessee Valley Authority*, 95-ERA-20, 1996 DOL Ad. Rev. Bd. LEXIS 15 (ALJ Sept. 29, 1995) (ARB May 30, 1996). In his letter to Senator Sasser, Fiser identified a number of safety concerns at SQN during his tenure as Chemistry Superintendent. Fiser also sent a copy of this letter to the Chairman of the NRC, as well as to the NRC Region II Allegation Coordinator. *See* Staff Exh. 29. Such a communication with the NRC is a protected activity under 10 C.F.R. § 50.7.

3.34. Finally, filing a section 211 complaint with DOL constitutes protected activity. *See Zinn v. University of Missouri*, 93-ERA-34, 93-ERA-36, 1996 DOL Sec. Labor LEXIS 8 at 17 (Sec'y Jan. 8, 1996) ("Zinn's filing of his complaint under the ERA in April 1993 constitutes protected activity.") Fiser filed two complaints with the DOL, one in 1993 and one in 1996. Staff Exhs. 34 and 37. The Board concludes that the filing of these complaints is protected activity under 10 C.F.R. § 50.7.

3.35. TVA has argued throughout this proceeding that Fiser was not the individual who initially raised the issues he discussed in either the Sasser letter or his 1993 DOL complaint, and that therefore, these are not protected activities. TVA is wrong on two accounts. First, the acts of filing the 1993 DOL complaint and sending the Sasser letter, as noted above, are in themselves protected activities. Second, the letter and the DOL complaint identify issues as safety concerns. There is no requirement in either 10 C.F.R. § 50.7 or section 211 of the ERA that an individual can

only state safety concerns which he was the first to discover. Therefore, the Board rejects TVA's argument that Fiser did not engage in protected activities.

F. TVA Took Adverse Actions Against Fiser

3.36. Adverse action is a shorthand term used to refer to the statutory and regulatory prohibitions against any unfavorable changes in the terms, privileges, or conditions of employment. The term encompasses a broad array of unfavorable personnel actions. Section 50.7 states that an adverse action includes "discharge and other actions that relate to compensation, terms, conditions, or privileges of employment." 10 C.F.R. § 50.7(a). Section 211 of the ERA contains nearly identical language. Title VII explains what an unlawful employment action is in more detail:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a).

3.37. The Merit Systems Protection Board (hereinafter "MSPB") has held that a Federal employee has a substantive right to be placed in a properly-constituted competitive level during a reduction in force. *Jicha v. Dept. of the Navy*, 65 MSPR 73 (1994). This substantive right is clearly one of the privileges of Federal employment, the denial of which falls within the definition of an adverse action under 10 C.F.R. § 50.7. As part of the 1996 reorganization, TVA made a competitive level determination regarding the Chemistry Program Manager positions which adversely affected Fiser's rights. If the competitive level determination had been conducted properly, then the PWR Chemistry Program Manager position would have been filled through use of the retention register. Fiser had seniority over both Harvey and Chandra and thus would not

have been released from his TVA employment as a result of the reorganization.[27] The Board therefore finds that the decision to advertise the PWR Chemistry Program Manager position constituted an adverse action against Fiser.

3.38. Nonselection for a position constitutes an adverse action under federal discrimination law. *See Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002). After the SRB interviews were conducted, McArthur failed to select Fiser for the PWR Chemistry Program Manager position, thus leaving him without a position at TVA. *See* Jt. Exh. 28. The Board concludes that TVA took an adverse action against Fiser when it failed to select him for the PWR Chemistry Program Manager position.

G. The Relevant Decision Makers Had Knowledge of Fiser's Protected Activities

3.39. In establishing that an adverse action was based upon the complainant's protected activity, it must be demonstrated that his employer had knowledge of the protected activity. However, the complainant is not required to prove actual knowledge of the protected activity; constructive knowledge of the protected activity is sufficient to support the complainant's prima facie case. *Simon v. Simmons Foods*, 49 F.3d 386, 389 (8th Cir. 1995). *See also Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 715 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077 (2001). General corporate knowledge of the complainant's protected activity is sufficient to establish that the defendant had knowledge. *See Gordon v. New York City Board of Education*, 232 F. 3d 111, 116-17 (2d Cir. 2000), *citing Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Alston v. New York City Transit Authority*, 14 F.Supp. 2d 308, 311 (S.D.N.Y. 1998). The knowledge requirement can be met even if the decision maker denies knowledge of the protected activities if there are circumstances that evidence knowledge of the protected activities. *Gordon*, 232 F. 3d at 117.

---

[27] The Board will address TVA's failure to make proper competitive level determinations in the 1996 reorganization in Section III.J.2 of this opinion.

3.40. Mark Burzynski testified that the problem with the diesel generator fuel oil storage tanks was a significant event at SQN because it placed the plant in a 24 hour shutdown mode. Tr. p. 4884, l. 17. A review of the corrective action documents also reveals that the problem was identified to TVA Corporate and each of the three plant sites. *See* TVA Exh. 126, p. FI000005. Under these circumstances, it is reasonable to impute corporate knowledge of the diesel generator fuel oil issue and SQN Chemistry's involvement in the corrective action process on that problem.

3.41. McArthur was instructed in 1993 to investigate a concern raised in the Sasser letter regarding the diesel generator fuel oil storage tank problem in 1989. Staff Exh. 31. The documents related to that problem clearly indicate that Fiser had responsibility for investigating the problem and for implementing necessary corrective actions. *See* TVA Exhs. 128 and 147.

3.42. Both McArthur and McGrath were present at the NSRB meeting during which Fiser informed them that instituting a trending procedure would result in violations in the event that the computers did not work or he lacked the staff to perform the trends. Tr. p. 1021, l. 4. Therefore, both McArthur and McGrath had actual knowledge that Fiser had refused to institute a trending procedure because he believed it would result in a procedural violation. The Board concludes that TVA had knowledge of this protected activity.

3.43. McArthur was familiar with the technical concerns and issues raised in the Sasser letter through the memorandum from the Concerns Resolution Staff in 1993. In this memorandum, McArthur was instructed to investigate a number of the concerns raised by Fiser in that letter. Staff Exh. 31. Therefore, the Board finds that McArthur had knowledge of the safety concerns raised in the Sasser letter.

3.44. McGrath claims that he had no knowledge of the Sasser letter and had never seen the letter until his deposition in this proceeding. However, McGrath's supervisor, Oliver Kingsley, received a copy of each of the TVA IG responses to Sasser's inquiry. *See* Staff Exhs. 30, 32, and 33. Additionally, Jocher stated in the Sasser letter that he informed the NSRB that someone at

TVA had made a material false statement to the NRC. Staff Exh. 29, p. CB000132. It strains credibility that McGrath, the Chairman of the NSRB, had no knowledge of a letter in which such an allegation appeared. The Board also finds it unlikely that McGrath's supervisor, Kingsley, would not have shown him a letter in which such an allegation was made. Furthermore, as indicated above, McArthur, who was a subcommittee chairman under McGrath to the SQN NSRB, had knowledge and it is extremely unlikely that everyone above and below him had knowledge but that McGrath did not. Under these circumstances, the Board concludes that McGrath had knowledge of the Sasser letter.

3.45. McArthur was interviewed by the TVA OIG with respect to Fiser's 1993 DOL complaint and was aware of the 1996 DOL complaint filed by Fiser prior to the SRB interviews. Tr. p. 1647, l. 9; Jt. Exh. 24. McGrath denies having knowledge of the 1993 DOL complaint prior to 1996, but was informed of the 1996 complaint prior to the interviews for the Chemistry Program Manager positions. Tr. p. 683, l. 18; p. 896, l. 3. Two of the three members of the SRB had some knowledge of Fiser's DOL activities, as Kent was interviewed for the 1993 complaint and was aware of the 1996 complaint and Corey testified that he was aware of at least one of the DOL complaints. Tr. p. 2877, l. 20; p. 3154, l. 5; Jt. Exh. 25. The Board therefore concludes that TVA had knowledge of Fiser's 1993 and 1996 DOL complaints.

3.46. The Board concludes that TVA as a corporate entity has knowledge of each of the five areas of protected activity in which Fiser engaged.[28] In addition, the Board is cognizant of the fact that this is the fourth recent discrimination case in which TVA argued that the decision makers lacked knowledge of the complainant's protected activity. In each of the first three cases, tried

---

[28] TVA filed a Motion for Summary Decision before DOL in its case against Fiser. The Board notes that TVA did not argue in that motion that McGrath lacked knowledge of Fiser's 1993 DOL complaint. Staff Exh. 147. Additionally, although the decision by the ALJ is in no way binding upon the Board, the Board also notes the ALJ, in denying the Motion for Summary Decision, concluded that this element of the prima facie case was not in dispute. Staff Exh. 148, p. 5.

before the Department of Labor, both the ALJ and the ARB rejected TVA's ignorance defense and concluded that the relevant decision makers had knowledge of the complainant's protected activity by virtue of their positions at TVA. *See Overall v. Tennessee Valley Authority*, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ALJ Apr. 1, 1998) (ARB Apr. 30, 2001); *Jocher v. Tennessee Valley Authority*, 94-ERA-24 (ALJ July 31 1996) (ARB June 24, 1996); and *Klock v. Tennessee Valley Authority*, 95-ERA-20, 1996 DOL Ad. Rev. Bd. LEXIS 15 (ALJ Sept. 29, 1995) (ARB May 30, 1996). The Board likewise rejects TVA's ignorance defense in this case.

H. There is a Causal Nexus between Fiser's Protected Activities and the Adverse Actions

3.47. Causal nexus between the complainant's protected activity and the adverse action can be demonstrated through the use of circumstantial evidence. Disparate treatment of the complainant as compared to a similarly situated employee demonstrates a discriminatory intent. Additionally, temporal proximity between the complainant's protected activity and the adverse action gives rise to an inference of discrimination.

1. TVA Engaged in Disparate Treatment of Fiser

3.48. The Supreme Court has recognized that disparate treatment of a complainant may result when an employer commits employment decisions to the subjective discretion of its supervisors. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988). The Court has used the disparate treatment theory of discrimination in reviewing employment decisions based upon the application of "inherently subjective criteria." *Id., citing Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

3.49. The disparate treatment theory of discrimination requires the complainant to show that the defendant employer treated a similarly situated employee differently. In making a *prima facie* case of discrimination based upon disparate treatment, the complainant must share sufficient employment characteristics with the comparator employee such that they can be considered similarly situated. *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001). In *McGuinness*, the

court concluded that the plaintiff, who had been terminated from her position and offered two weeks' severance pay, was similarly situated to a co-worker who had also been terminated from his position but offered 12 weeks' severance pay. An employee need not be similarly situated in all respects, but "must be similarly situated in all material respects." *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997).

3.50. The law does not require that a similarly situated individual be in an identical situation to the complainant. *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001), *citing Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999) (Kennedy, J., concurring). The court concluded that when no objective criteria was applied in the employer's decision making process, "similarly situated evidence is particularly relevant because inferences of discriminatory motive depend upon the application of subjective criteria." 253 F.3d at 564. The court also rejected the argument as a matter of law that whenever two different supervisors are involved in the decision-making process, similarly situated evidence could not be demonstrated. *Id.* at 566.

3.51. In *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285 (7th Cir. 1999), the court concluded that the plaintiff had raised a genuine issue of material fact regarding his race discrimination claim. The court based its decision in part on similarly situated evidence. The plaintiff had taken food from an open bag in the employees' break room and had been terminated for theft, despite the fact that Wal-Mart's policy did not require termination for theft. However, a Caucasian employee who lied to her supervisor about work absences was counseled and allowed to keep her job, despite a Wal-Mart policy that mandated termination for dishonesty. *Id.* at 291. Although the plaintiff and the Caucasian employee committed different offenses, the court found that "the leniency exhibited to the Caucasian worker was evidence that race played a role in Stalter's termination." *Id.*

3.52. The Board concludes that when considering evidence of disparate treatment, the complainant and the comparator employee do not have to be in identical situations. It is sufficient that they are similarly situated in all material respects. When considering two employees who are

subject to a reorganization, it is sufficient if both employees' positions were eliminated, the same decision makers were involved in determining whether they would be required to compete for a new position, and the same selection policies were applicable to both employees.

3.53. The decisions related to the 1996 reorganization, specifically the decisions that the Chemistry Program Manager positions had to be posted for competition whereas McArthur could be rolled over into the RadChem Manager position without competition, were within the subjective discretion of the decision makers. The HR managers who testified as to these decisions each indicated a different standard for making the determination of whether a position should be posted for competition. Boyles testified that he used a "preponderance of the duties" standard, whereas Easley testified that the appropriate standard was whether or not the position had changed by more than 35 percent. Tr. p. 3744, l. 21; p. 3745, l. 17; p. 1201, l. 7; p. 1285, l. 12. Additionally, both testified that there was no written standard or guidance by which to make these decisions. Tr. p. 1287, l. 17; p. 3745, l. 11. Under these circumstances, the Board concludes that the decisions to post the Chemistry positions but not post the RadChem Manager position were made using "inherently subjective criteria." *Watson*, 487 U.S. at 988.

3.54. The Staff has demonstrated that TVA treated a similarly situated employee differently than it treated Fiser. McArthur was similarly situated in all material respects because he was subject to the same reorganization as Fiser, the same individuals who made the decisions with regard to posting the Chemistry Program Manager positions also made the decision not to post the RadChem Manager position, and those individual testified that they applied the same selection policy to making the determination to post the Chemistry positions as they applied to the determination not to post the RadChem Manager position. Tr. p. 3771, l. 20. The Board finds that McArthur is an appropriate comparator employee for making the determination of disparate treatment.

3.55. TVA treated Fiser differently than it treated McArthur in that Fiser was required to compete for a position, whereas McArthur was permitted to roll over into a new position without competition. The selection policy which governs these determinations was not followed in making the determination that McArthur could roll over into the RadChem Manager position because HR knowingly used a position description for a position that McArthur was not occupying.[29] Tr. p. 3778, l. 16. Additionally, McArthur was given the position despite the fact that the old position description for the Technical Programs Manager position was not interchangeable with the position description for the RadChem Manager positions. Tr. p. 3928, l. 14.

3.56. TVA has argued throughout the hearing that Fiser was treated the same as hundreds of other employees during this reorganization. TVA introduced summaries of retention registers from Corporate and the three plant sites in an attempt to show that all TVA employees were subject to the 1996 reorganization. *See* TVA Exhs. 83-96, 109, and 110. However, this argument is without merit, because TVA provided no evidence that these employees were similarly situated to Fiser, other than that their positions were being eliminated as part of a reorganization. These retention registers show only numbers, not the individual circumstances of each decision made during the reorganization. There is no way for the Board to determine from this information whether any of these other employees had engaged in protected activities, whether the same procedures were applied (and whether they were applied correctly), and whether position descriptions were used to make competitive level determinations in the same manner as was the case for Fiser. Furthermore, it was Fiser who had seniority and thus what happened to other employees who did not have seniority is not relevant. Therefore, the Board finds that this information is completely irrelevant in rebutting evidence of disparate treatment.

---

[29] The Board will address TVA's failure to follow its own internal procedures in Section III.J.2 of this opinion.

3.57. The disparate treatment becomes even clearer when examining Reynolds' testimony regarding the 1993 RIF of Fiser and why he settled the 1993 DOL complaint. In 1993, Fiser was RIF'ed from his SQN Chemistry Superintendent position, a position which still existed. Tr. p. 3436, l. 20. According to Reynolds, he settled Fiser's 1993 DOL complaint because he believed that Fiser was inappropriately RIF'ed from that position. Tr. p. 3362, l. 14. The basis for that decision was his conclusion that Fiser was no longer in the SQN Chemistry Superintendent position, but actually occupied a position in the Corporate Chemistry organization. Tr. p. 3363, l. 3. Specifically, Reynolds testified that Fiser "was in that position [SQN Chemistry Manager] based on his position description of record, but he wasn't actually occupying the position." Tr. p. 3364, l. 1. The only reason that Fiser was RIF'ed was because the paperwork on his position descriptions had not caught up, and he was mistakenly RIF'ed from a position he no longer occupied. Tr. p. 3363, l, 13; Staff Exh. 110, p. 2. Reynolds decided to settle the case because he did not think that they would have a strong case on these facts before the MSPB. Tr. p. 3365, l. 5.

3.58. Reynolds then testified that this is what happened to McArthur in 1996: he was in a new position, the RadCon Manager position, but his position description had not been caught up in his PHR, and therefore he received the benefit of this administrative error. Tr. p. 3469, l. 8. Reynolds' explanation of this only further supports the determination that McArthur should not have been placed in the RadChem Manager position without competition. Reynolds' rationale for settling Fiser's early case was that a decision during a reduction in force had been made using inaccurate information, and that he did not feel he would be successful before the MSPB in such a situation. Tr. p. 3365, l. 5; p. 3401, l. 9. However, Reynolds later claimed that they would have lost before the MSPB if they had not transferred McArthur into the RadChem Manager position. Tr. p. 3384, l. 2. These arguments are completely contradictory. If HR had followed the same logic in 1996 that Reynolds followed in 1993 in settling Fiser's case, the competitive level determination for the

RadChem Manager position would not have been made on the basis of McArthur's outdated position description, but would have been made on the basis of the position he actually occupied.

2. There is Temporal Proximity between Fiser's Protected Activities and the Adverse Actions

3.59. Temporal proximity between protected activity and an adverse action may permit an inference that the protected activity was the likely reason for the adverse action. *Kachmar v. Sungard Data Systems, Inc.*, 109 F. 3d 173, 177 (3d Cir. 1997) (*citing Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990)). The Supreme Court briefly addressed this issue in *Clark County School District v. Breeden*, 523 U.S. 268 (2001). In that case, the Court stated:

> [t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close."

Id. at 273 (citations omitted). The Court noted that an adverse action taken 20 months after the employer became aware of the protected activity, by itself, did not suggest causation between the protected activity and the adverse action. *Id.* at 274. The Court did not state that a 20 month period was, as a matter of law, always insufficient to establish causation, nor did it conclude that an absence of temporal proximity automatically precludes a finding of causation. Instead, the Court simply concluded that a 20 month period, without other evidence of causation, was not sufficient in that case to establish causation.

3.60. Although temporal proximity between the complainant's protected activity and the adverse action may provide an inference of causation, "the passage of time is not legally conclusive proof against retaliation." *Robinson v. SEPTA*, 982 F.2d 892, 894 (3d Cir. 1993). The *Kachmar* court succinctly addressed this issue:

> It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of

> causation, which necessarily involves an inquiry into the motives of an employer, is highly content-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

Kachmar, 109 F. 3d at 178.

3.61. An important factor in considering the temporal proximity between the complainant's protected activity and the adverse action is whether there is a valid reason why the retaliatory action could not have been taken sooner. *Id.* In *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert. denied*, 116 S.Ct. 2552 (1996), the court held that an inference of retaliatory motive may be justified when the adverse action closely follows the complainant's protected activity. However, the court also noted that "the phrase 'closely followed' must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the [claims] and only culminates later in actual discharge." *Id.* In *Bowers v. Bethany Medical Center*, 959 F.Supp. 1385, 1392 (D.Kan. 1997), the court cited *Marx* in finding a causal nexus between a complainant's action and her discharge where one and a half to two years had passed between the protected activity and the discharge. The court noted that the complainant had been absent from work during the relevant time period, and had been discharged within three weeks of her return. *Id.*

3.62. The Tenth Circuit reiterated this rationale in an unpublished decision. *Richmond v. Oklahoma University Board of Regents*, 1998 U.S. App. LEXIS 26600 (10th Cir. Oct. 20, 1998) (unpublished). *See* Attachment One. In that case, the complainant argued that her employer did not have the opportunity to retaliate against her until she had been reinstated to employment. In accepting the complainant's argument, the court cited to the *Kachmar* proposition that there may be valid reasons why the adverse action was not taken immediately. *Id.* at 8.

3.63. TVA has argued that the Staff failed to prove causation because of the lack of temporal proximity between Fiser's protected activity and the adverse action. This argument is flawed for a number of reasons. First, as noted above, although temporal proximity may

demonstrate causation in a discrimination case, the lack of temporal proximity, where there is other evidence of discrimination, does not bar a finding of discrimination. *See Kachmar*, 109 F.3d at 178; *Robinson*, 982 F.2d at 894. Therefore, the Board rejects TVA's argument that the three years between Fiser's 1993 DOL complaint and his 1996 DOL complaint demonstrate a lack of causal nexus.

3.64. In this case, there was a valid reason why the retaliatory action was not taken sooner than 1996. *Kachmar*, 109 F.3d at 178. Prior to that time, neither McArthur nor McGrath had the opportunity to eliminate Fiser's position or terminate him.[30] However, upon becoming Fiser's first and second line supervisors, McArthur and McGrath immediately took action which resulted first in Fiser being required to compete for a position and then which resulted in his nonselection for that position. This action occurred within one to two months of McArthur being designated as the selecting official for the Chemistry Manager positions. Under these circumstances, the Board finds that there is sufficient temporal proximity between Fiser's protected activity and the retaliatory action taken against him.

3.65. In addition, the Board concludes that there is temporal proximity between Fiser's 1996 DOL complaint and his nonselection for the PWR Chemistry Program Manager position. Fiser filed his complaint on June 25, 1996. Staff Exh. 37. Just prior to the interviews for that position on July 18, 1996, Kent discussed Fiser's complaint with McArthur, the selecting official, and in the presence of Corey, another member of the SRB who previously had no knowledge of Fiser's new complaint. Tr. p. 2877, l. 16. A one month period between protected activity and the

---

[30] Although McGrath did not take a retaliatory action against Fiser until 1996, he did attempt to have him removed soon after the 1991 NSRB meeting at which Fiser refused to implement a trending procedure as requested. McArthur told both Fiser and the TVA OIG that, after the NSRB meeting, McGrath stated that Fiser should be removed from his position as Sequoyah Chemistry Superintendent and that he would discuss that with Beecken. Jt. Exhs. 24 and 27; Staff Exh. 168. According to McArthur's statement, Beecken came to him soon after to implement the rotation between Fiser and Jocher. Jt. Exh. 24, p. 1.

adverse action is clearly adequate to demonstrate a temporal proximity between the protected activity and the retaliatory action. *See Farrell v. Planters Lifesavers Co.*, 206, F.3d 271, 280 (3d Cir. 2000) (three to four week period sufficient to show temporal proximity).

3.66. The Board concludes that the disparate treatment of McArthur and the temporal proximity of Fiser's protected activities and the adverse actions taken against him demonstrate a causal nexus between Fiser's protected activity and the adverse actions taken against him.

I. TVA Has Presented a Legitimate Nondiscriminatory Basis for the Adverse Actions

3.67. Because the Staff has established a prima facie case of discrimination, the burden now shifts to TVA to produce a legitimate, nondiscriminatory reason for taking the adverse action. This is a burden of production, not of persuasion. *Burdine*, 450 U.S. at 254. A defendant employer meets this burden if the evidence raises a genuine issue of fact as to whether it discriminated against the complainant. The employer must set forth the reasons for the adverse action through the introduction of admissible evidence. *Id.* at 254-55. An articulation of a legitimate reason for the adverse action that has not been admitted into evidence is not sufficient to meet this burden. Therefore, assertions or arguments by counsel in pleadings are not sufficient to meet the employer's burden. *Id.* at 255.

3.68. TVA has asserted that the decision to compete the PWR Chemistry Program Manager position was in accordance with its selection policies. Boyles and Easley testified that they believed they were following the required TVA policies and guidelines when making the determination that the position had to be posted for competition. Tr. p. 1216, l. 3 (positions had changed by more than 35 percent, so they had to be posted); Tr. p. 3771, l. 3 (the jobs had to be posted because the position descriptions were different). TVA has also asserted that Fiser's nonselection was based upon the outcome of the SRB interviews, in which each of the interviewers rated Fiser third. *See* TVA Exh. 102, p. FB000016.

3.69. As part of its case, TVA introduced the hearing testimony and statistical analysis of Dr. Cary Peters, a Program Manager for Performance Management at TVA. Through this testimony, TVA was attempting to demonstrate that Fiser's involvement in protected activities had no impact upon his nonselection for the PWR Chemistry Program Manager position. Peters stated that he conducted an analysis of variance (hereinafter "ANOVA") using the following information provided to him by TVA Counsel: the scores given to each of the candidates by each member of the SRB; the candidates' involvement or lack thereof in protected activities; and the knowledge of the SRB members of the candidates' involvement in such protected activities. Tr. p. 4513, l. 12. TVA Exh. 102, p. FB000008.

3.70. In conducting his ANOVA, Peters started with the hypothesis that knowledge of Fiser's protected activities affected his scores by the SRB in a negative manner. Tr. p. 4514, l. 19. Peters' analysis concluded that knowledge of Fiser's involvement in protected activities did not adversely affect his SRB scores, and found that there was a less than five percent probability that this result was caused by chance. Tr. p. 4535, l. 23. TVA Exh. 102. Specifically, Peters relied heavily upon the fact that Rogers, who lacked knowledge of Fiser's involvement in protected activities, gave Fiser lower scores that either Kent or Corey. Tr. p. 4541, l. 17; p. 4543, l. 13; p. 4563, l. 6. Peters testified that he did not consider any other factors when performing his statistical analysis, including the familiarity of the SRB members with the candidates or the possibility of the championing effect. Tr. p. 4527, l. 16. After conducting this analysis, Peters stated that the results "clearly and strongly indicate the ratings Fiser received were most likely not lower because Corey and Kent knew he was involved in a protected activity . . . ." Tr. p. 4568, l. 16. *See also* TVA Exh. 102, p. FB000009.

3.71. Taken alone, Peters' testimony on direct examination could lead the Board to conclude that Fiser's involvement in protected activities had no affect on the SRB process.

However, a review of Peters' testimony on cross examination by Staff Counsel reveals a number of flaws with his analysis.

3.72. Peters claimed during his direct examination that his statistical analysis demonstrated that Corey and Kent's knowledge of protected activities did not affect Fiser's low scores. However, twice during cross examination, Peters acknowledged that he could not draw a statistical conclusion that either Corey or Kent did not give Fiser the lowest score because of his involvement in protected activities. Tr. p. 4613, l. 1.; p. 4662, l. 26. More specifically, Peters twice admitted that he could not state that knowledge of Fiser's protected activities was not one of the reasons that he received a low score from either Corey or Kent or both. Tr. p. 4616, l. 3; p. 4664, l. 25. Additionally, Peters stated that he did not consider whether or not the scores given to Fiser by Rogers had any effect on the final outcome of the interviews because he did not consider that as relevant to his analysis. Tr. p. 4579, l. 16; p. 4624, l. 27. In other words, Peters completely failed to address the issue of whether Corey and Kent, the two SRB members who knew of Fiser's involvement in protected activities, could have controlled the outcome of the interviews by their scores alone.

3.73. During Peters' testimony, the Board posed a number of questions regarding the effect that familiarity or "championing" of a particular candidate could have had on the SRB scores. Peters initially stated that familiarity could have elevated the ratings given by Corey and Kent to Chandra and Harvey, but that he did not consider that as a factor because he felt it was a peripheral issue. Tr. p. 4532, l. 1. However, Peters later acknowledged that a prior working relationship could be a fairly significant determinant and likely would have an impact upon the scores. Tr. p. 4556, l. 13; p. 4604, l. 6. A review of the scores indicates that it is possible, if not likely, that championing had an effect on the scores Corey gave to Chandra and Kent gave to Harvey. Corey gave Chandra (Candidate B) the highest overall score, and scored him highest on eight of the nine questions asked, and scored him the same as Harvey on the ninth question. *See*

TVA Exh. 102, p. FB 00016. Kent scored Harvey highest overall, and gave him the highest score on seven of the nine questions, the same as Chandra on one question, and lower than Chandra on one question. *Id.* This would indicate that Kent and Corey may have been subtly influenced by the prior work Harvey and Chandra had performed at their sites.

3.74. Upon questioning as to whether the outcome might have been different had the third member of the SRB been a champion for Fiser rather than Rogers, Peters stated that, even if Fiser had a champion, he would have still had the lowest overall score because of the scores he received from Kent and Corey. Tr. p. 4640, l. 9; p. 4644, l. 5. This testimony completely undercuts Peters' conclusion that knowledge of Fiser's involvement in protected activities did not have an effect upon his SRB interview scores. The same individual who earlier claimed that knowledge of Fiser's involvement in protected activity had no impact upon the outcome of the SRB scores thus later admitted that Fiser could not have received the highest score because *the two people with knowledge of his involvement in protected activities* rated him sufficiently low that even a champion for Fiser could not have altered that result.

3.75. Under these circumstances, the Board finds that Peters' testimony and statistical analysis do little to support TVA's argument that the SRB was impartial and fair. Instead, the Board concludes that Peters' testimony regarding a champion for Fiser indicates that Fiser's involvement in protected activities may have had a negative effect upon the scores he received from Corey and Kent.

3.76. The Board would like to address here one additional point regarding a potential legitimate nondiscriminatory reason for Fiser's nonselection for the PWR Chemistry Program Manager position. Throughout this proceeding, TVA has argued that Fiser was a poor performer during his years as the SQN Chemistry Superintendent. While the Board notes that there is significant evidence to rebut that argument, it will not go into detail as to that evidence because it is not relevant to the issues raised by this proceeding. On three separate occasions, TVA Counsel

stipulated that Fiser's performance had no effect upon either the decision to post the Chemistry Program Manager positions or Fiser's nonselection for one of those positions. Tr. p. 2476, l. 2; p. 4388, l. 21; p. 4392, l. 8. Additionally, neither McArthur nor McGrath testified that they took any adverse action against Fiser based upon his prior performance as SQN Chemistry Superintendent. Under these circumstances, the Board will not consider evidence or arguments by TVA Counsel that Fiser was a poor performer.

J. TVA's Nondiscriminatory Basis is a Pretext for Discrimination

3.77. Because TVA has produced a legitimate, nondiscriminatory reason for the adverse action, the ultimate burden shifts back to the Staff to demonstrate that the proffered legitimate reason for the action is a pretext for discrimination. Pretext can be demonstrated in a number of ways. Pretext can be shown by demonstrating that the employer's explanation for the adverse action is false and therefore discrimination is likely the real reason for the action. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Evidence that an individual other than the complainant was preselected for the position for which the complainant was not selected provides evidence of pretext. *Goostree v. State of Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986). Pretext can also be demonstrated by showing that the employer failed to follow proper procedures in taking the adverse action. *Floyd v. Missouri Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999).

3.78. In *St. Mary's Honor Center*, the Supreme Court held that rejection of the employer's explanation for the adverse action, combined with the evidence set forth in the prima facie case, may be sufficient to show intentional discrimination. 509 U.S. at 511. The Court strengthened this conclusion in *Reeves*. In that case, the Court stated

> the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact-finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'

530 U.S. at 147 (citations omitted). DOL adopted this rationale in *Overall v. Tennessee Valley Authority*, in which the ARB concluded that the complainant refuted each "legitimate" reason posited by TVA for its actions, and therefore found that these reasons were a pretext for discrimination against Overall.[31] 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001).

1. Harvey was Preselected as the PWR Chemistry Manager

3.79. Evidence that another candidate for a position was preselected to the detriment of the complainant may also prove that the employer's legitimate reason for the complainant's nonselection is a pretext for discrimination. *Goostree v. State of Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986). In *Goostree*, the Sixth Circuit held that "[e]vidence of preselection operates to discredit the employer's proffered explanation for its employment decision." *Id.* (citations omitted). *See also Coble v. Hot Springs School District*, 682 F.2d 721, 728 (8th Cir. 1982).

3.80. The evidence in the record indicates that Sam Harvey was preselected for the PWR Chemistry Program Manager position. Prior to the announcement of the final reorganization, Kent and Gordon Rich at SQN requested that Harvey be transferred to a position in SQN Chemistry. Kent has stated on numerous occasions that he had a vacant position in the SQN Chemistry organization into which Harvey could have been transferred. *See* Staff Exhs. 70-73.

3.81. Kent testified that he had a conversation with Grover, Harvey's supervisor, about transferring Harvey to SQN. Tr. p. 3073, l. 1. Grover discussed the potential transfer with Harvey, who told Grover that he would prefer to work at SQN than in the Corporate Chemistry organization. Tr. p. 4976, l. 15. Thereafter, Grover inquired of Easley in HR regarding how to implement the transfer. Easley told Grover that he should speak to McGrath for his approval, and that the site should submit a formal written request for the transfer to McGrath. Tr. p. 1866, l. 20. When Grover

---

[31] See Attachment Two for a further discussion of the issue raised in *Hicks* and *Reeves*.

relayed Kent's request to McGrath, McGrath was adamant that Harvey should not be transferred to SQN. Grover testified that McGrath told him that he wanted Harvey's expertise to remain in Corporate Chemistry and that he wanted Harvey available to compete for the PWR Chemistry Program Manager position. Tr. p. 1870, l. 4; p. 3615, l. 7. McGrath denied making such statements, but acknowledged that he was not in favor of the transfer because he thought it might violate TVA policies. Tr. p. 542, l. 19. If Harvey had transferred to SQN Chemistry, then none of the PG-8 Chemistry and Environmental Protection Program Managers would have necessarily lost their position in the 1996 reorganization. McGrath's blocking of Harvey's transfer necessitated that one of the three incumbents would be surplused from his position in the reorganization. The Board concludes that this evidence suggests that McGrath blocked the transfer because he wanted Harvey, and not Fiser, as the PWR Chemistry Manager.

3.82. The Board discussed prior inconsistent statements by Kent regarding whether or not he had a vacant position into which Harvey could be transferred in Section II.D.3 of this opinion. Kent has given a number of prior statements in this matter. In each of the first three statements Kent provided, one to the TVA OIG, one to a DOL investigator, and one to NRC OI, he acknowledged having such a vacancy. *See* Staff Exhs. 70-73. Kent only denied having a vacant position at the TVA PEC, although he hedged on this issue in both his deposition and hearing testimony. Staff Exh. 135, p. 107; Staff Exh. 74, p. 108, 114, 117. As noted above, the Board will credit those statements given most contemporaneously to the events in this case, as they are the most credible reflection of Kent's state of mind at the time he was considering the transfer of Harvey.

3.83. TVA has argued that there was no vacant position in the SQN Chemistry organization at that time. TVA misses the relevant point: it does not matter whether TVA could claim in 2002 that there was not in fact a vacant chemistry position at SQN (a fact which is disputed by the evidence in the record). The relevant inquiry is whether Kent, and ultimately McGrath,

believed in 1996 there was a vacant position into which Harvey could have been transferred. Although the evidence indicates that there was a vacant position at SQN, theoretically it is possible that Kent could have attempted a transfer into a vacant position in a manner which may have violated one of TVA's selection policies. However, no one will ever know whether that would have been the outcome, because McGrath stopped the inquiry upon learning of it because he wanted Harvey in Corporate Chemistry. It makes no difference whether Kent could have achieved the transfer, because McGrath never gave him the opportunity to try. Under these circumstances, the Board concludes that TVA did have a vacant position at SQN into which Harvey could have transferred in the spring of 1996.

3.84. Kent raised another argument as to why Harvey could not transfer to SQN. Kent claimed during his hearing testimony that he was seeking a transfer of Harvey's function from Corporate to SQN, along with the budget and the headcount for that function, and that he was not willing to post a vacancy if this transfer could not be accomplished. Tr. p. 3138, l. 2. According to Boyles, a transfer of Harvey could not have been implemented in this manner without transferring all of the Corporate Chemistry functions to the sites. Tr. p. 3962, l. 14. The Board does not credit this argument. Kent did not argue that he was seeking a transfer of function until the TVA PEC, which was also the first time that he claimed that he did not have a vacancy into which Harvey could have been transferred. Staff Exh. 135, p. 107. It is clear from his earlier statements that his intent was to transfer Harvey into a vacant SQN Chemistry position, not create a new position for him after the transfer. *See* Staff Exhs. 70-73. Under these circumstances, the Board rejects the argument that Kent was seeking a transfer of function, which would have been improper under TVA policies.

3.85. McGrath announced that the Chemistry Program Manager positions would be advertised for competition on June 17, 1996 at an all hands meeting. Tr. p. 2339, l. 5. However, two weeks prior to that meeting, Harvey called David Voeller, the Chemistry Manager at WBN, and

informed him that he would be working more closely with Voeller because he would be the PWR Chemistry Program Manager. Tr. p. 3316, l. 12. According to Voeller, Harvey stated that he felt sorry for Fiser as the odd man out, and that interviews for the position would be conducted to "keep it legal." Tr. p. 3318, l. 21; p. 3319, l. 4. Additionally, Harvey told Voeller that he felt that the failure to transfer him to SQN meant that Corporate intended to place him in the PWR Chemistry Program Manager position. Tr. p. 3317, l. 25. One week after this initial conversation with Voeller and after Grover discussed that conversation with him, Harvey called Voeller again and backtracked on his earlier statements. In this conversation, Harvey told Voeller he would either be working with him more closely or not at all, and that he might need assistance finding another position if he was not selected for the PWR position. Tr. p. 3323, l. 1.

3.86. Harvey now claims that Voeller misunderstood the first conversation. Harvey testified that he did not state that he would be working more closely with Voeller, but instead that he told him he would be working more closely with him or not at all. Tr. p. 4978, l. 15. Harvey stated that he was simply extremely confident that he would get the position because of his abilities and because Fiser had told him that he did not want to continue with TVA employment. Tr. p. 4982, l. 17. However, this statement is disingenuous, as Harvey's earlier statements, specifically his Declaration filed before the NRC as part of TVA's PEC presentation, indicate that Fiser did not tell Harvey that he no longer wished to work for TVA until the day of the all hands meeting at which McGrath announced the reorganization. TVA Exh. 26, p. 2. The date of that meeting was June 17, 1996, two weeks after Harvey's initial conversation with Voeller. Therefore, the Board concludes that Harvey's explanation for his conversation with Voeller is not credible. The Board finds that Harvey's initial statements to Voeller about feeling sorry for Fiser as the odd man out and that interviews would be done to "keep it legal" evidence that Harvey was preselected for the PWR Chemistry Program Manager position.

2. TVA Failed to Follow its Selection Procedures

3.87. A defendant employer's failure to follow its own selection procedures may also constitute evidence of a discriminatory animus. *Floyd v. Missouri Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999). *See also Landry v. St. James Parish School Board*, 2000 U.S. Dist. LEXIS 14141, at 25 (E.D.La. Sept. 20, 2000), *aff'd* 260 F.3d 621 (5th Cir. 2001). To create an inference of pretext based on an employer's failure to follow its selection procedures, the complainant must establish that the failure to follow procedures affected him differently from other employees involved in the selection. *Floyd*, 188 F.3d at 937.

3.88. TVA failed to follow its selection procedures during the 1996 reorganization of Operations Support. TVA presented two policies which govern selections in its nuclear organization, the Personnel Manual Instruction and BP-102, "Management and Specialist Selection Process." Jt. Exhs. 63 and 65. Fogleman, the senior manager for HR at TVA, testified that these selection policies implemented the relevant OPM regulations relating to reductions-in-force. Tr. p. 5376, l. 5. Those regulations are found at 5 C.F.R. Part 351. TVA did not follow either its own policies or the OPM regulations with regard to the selections in the Corporate RadChem organization.

3.89. Boyles and Reynolds both testified that in determining whether a new position is interchangeable with an existing position, the Personnel Manual Instruction section on competitive levels applies. Tr. p. 3474, l. 1; p. 4049, l. 9. *See* Jt. Exh. 65, p. 14. The first paragraph of that policy states that "[i]nterchangeability is a two-way street." *Id.* Under this policy and the parallel OPM regulation, "in order for positions to occupy the same competitive level, it does not matter that the individuals in the positions could qualify for a particular position but that anyone who qualified for one position could qualify for all." *Bateman v. Dept. of the Navy*, 64 MSPR 464, 1994 MSPB LEXIS 1305 at *6-7 (September 23, 1994), *citing Estrin v. Social Security Administration*, 24 MSPR 303, 307 (1984). *See also* 5 CFR § 351.403(a)(1). With regard to the determination that

the Technical Programs Manager and the RadChem Manager were in the same competitive level, the relevant determination is whether any person who qualified for the Technical Programs Manager position could also qualify for the RadChem Manager position.

3.90. Boyles testified that McArthur was placed into the RadChem Manager position without competition because his "position description of record," the 1990 Technical Programs Manager position, was interchangeable with the new RadChem Manager position description. Tr. p. 3778, l. 16. However, on cross-examination, Boyles acknowledged that an individual who met the minimum qualifications of the Technical Programs Manager position would not necessarily meet the minimum qualifications of the RadChem Manager position because the Technical Programs Manager position covers a broader range of functions than does the RadChem Manager position. Tr. p. 3928, l. 14. For example, someone with Fire Protection experience would meet the minimum qualifications for the Technical Programs Manager position, but would not meet the minimum qualifications for the RadChem Manager position. Despite this admission, Boyles continued to assert that the transfer of McArthur into the RadChem Manager position was in accordance with TVA's selection policy and OPM regulations because a comparison of the organizations supervised by each position demonstrated that the positions were sufficiently similar as to be interchangeable. Tr. p. 3930, l. 20.

3.91. A review of the two position descriptions in question reveals that the positions are far from interchangeable. The Technical Programs Manager supervised eight different functions: RadCon, Chemistry, Environmental, Fire Protection, Security, Emergency Preparedness, ERMI, and Industrial Safety. Jt. Exh. 21, p. GG000210. By contrast, the RadChem Manager position supervised only five functions: RadCon, Chemistry, Environmental Protection, RadWaste, and ERMI. Staff Exh. 101. More specifically, the listed duties for the Technical Programs Manager position lists only two of seven duties in the areas which overlap with the RadChem Manager position. Staff Exh. 100, p. 2. Additionally, as the Technical Programs Manager, McArthur

supervised 635 employees, either directly or indirectly, and controlled an operating budget of $12.2 million with another $25.9 million designated for payroll. Staff Exh. 100, p. 1. As the RadChem Manager, McArthur supervised 24 employees and controlled an operating budget of only $4 million.[32] Staff Exh. 101, p. 2.

3.92. Given the testimony of Boyles and Easley that to roll over a person into a new position requires that the new position be substantially the same as the prior position, it strains credibility that TVA continues to assert that McArthur's transfer into the RadChem Manager position was required by its selection policies because it was interchangeable with the Technical Programs Manager position. An impartial review of the position descriptions indicates that the positions vary greatly, and that although McArthur obviously qualified for both positions and performed RadChem duties in both positions, he should not have been permitted to transfer into that position without competition. Additionally, Fogleman, one of TVA's HR witnesses, testified that after examining the position descriptions, he might not have made the decision to transfer McArthur into the RadChem Manager position without competition. Tr. p. 5613, l. 21; p. 5633, l. 1. The Board therefore concludes that the transfer of McArthur into that position without competition violated the selection policy and is evidence of pretext.

3.93. The Personnel Manual Instruction also requires that the determinations of competitive levels "be based solely on the content of *accurate, up-to-date job descriptions.*"

---

[32] *See Anderson v. Tennessee Valley Authority*, 77 MSPR 271, 1998 MSPB LEXIS 140 at *9 (Jan. 23, 1998), in which the MSPB looked at a number of similar factors which "shed light" upon the position description. These factors include: pay schedule, working conditions, qualifications, and duties. 1998 MSPB LEXIS at *9-11. Although this decision was rendered after Fiser's 1996 RIF, it concerns the Board that TVA continues to claim that the MSPB requires it to use the "position description of record" when this case (in which TVA was the defendant agency) specifically states that other evidence may be relevant in reviewing a competitive level determination. *Id.* at *9. *See also Bateman v. Department of the Navy*, 64 MSPR 464, 1994 MSPB LEXIS 1305 (Sept. 23, 1994); *Simonton v. Department of the Army*, 62 MSPR 30, 1994 MSPB LEXIS 457 (Apr. 12, 1994); *Marcinowsky v. General Services Administration*, 35 MSPR 6, 1987 MSPB LEXIS 360 (Sept. 15, 1987); *Lover v. Department of Health and Human Services*, 23 MSPR 407, 1984 MSPB LEXIS 815 (Oct. 1, 1984).

Jt. Exh. 65, p. 15 (emphasis added). In neither the determination that McArthur could be transferred into the RadChem Manager position nor the determination that the Chemistry Program Manager positions had to be posted did TVA use accurate, up-to-date job description, thus violating their own policy. TVA has claimed repeatedly throughout the course of this NRC proceeding that the MSPB requires them to use the "position description of record" to the exclusion of evidence to the contrary when making competitive level determinations. Tr. p. 3550, l. 18; p. 3791, l. 21. *See also* Staff Exh. 135, p. 61, 63. TVA defines the "position description of record" as the last position description contained in the individual's PHR, even if it is a position description for a position which the employee does not occupy.[33] Tr. p. 3368, l. 14.

3.94. A review of MSPB case law and TVA's own asserted interpretation of that law demonstrates that at no time has the MSPB required TVA or any other employer to use a position description for a competitive level determination that the employer knows is inaccurate and out-of-date. In *Townsel v. Tennessee Valley Authority*, 36 MSPR 356, 1988 MSPB LEXIS 196 (Mar. 24, 1988), the MSPB stated that it "has long held that it is the official position occupied by an individual which determines the competitive level in which he is properly placed." 1988 MSPB LEXIS at *7. This is consistent with the Supreme Court's pronouncement in *United States v. Testan*, 424 U.S. 392, 402 (1976), that a Federal employee is not entitled to the benefit of a position until he has been appointed to that position.

3.95. The MSPB considers the duties and responsibilities listed in the official position description as "an appropriate and necessary means by which to determine the composition of a competitive level." *Simonton v. Dept. of the Army*, 62 MSPR 30, 1994 MSPB LEXIS 457 at *8-9 (Apr. 12, 1994). However, the MSPB has repeatedly stated that other evidence may be relevant to a competitive level determination. *Id. See also Bateman v. Dept. of the Navy*, 64 MSPR 464,

---

[33] This is also not the position which TVA took in Fiser's 1993 RIF and the subsequent settlement of his DOL complaint based on that RIF.

1994 MSPB LEXIS 1305 at *7 (Sept. 23, 1994); *Marcinowsky v. General Services Administration*, 35 MSPR 6, 1987 MSPB LEXIS 360 at *6-8 (Sept. 15, 1987); *Lover v. Dept. of Health and Human Services*, 23 MSPR 407, 1984 MSPB LEXIS 815 (Oct. 1, 1984). Under these circumstances, TVA's claim that the MSPB requires it to use the "position description of record" for making competitive level determinations even when it knows that the position description is inaccurate is absurd.[34] Nor has TVA ever explained why McArthur was not immediately RIF'ed when HR discovered that he allegedly occupied the Technical Programs Manager position, which had been abolished in the 1994 reorganization, nor have they explained why McArthur would have rights to a position based upon a position description for a position that he did not occupy. It defies credibility to argue that a person occupying a non-existent position has "rights" to eliminate another employee during a RIF.

3.96. TVA also violated the Personnel Manual Instruction when making the competitive level determination for the Chemistry Program Manager positions. As noted earlier, the Manual requires the use of accurate, up-to-date job descriptions. Grover, Fiser, and Harvey each testified that the position descriptions under which Fiser, Harvey, and Chandra were working were not accurate because they were not performing environmental duties. Tr. p. 1885, l. 22; p. 2311, l. 13; p. 5036, l. 19. This testimony was supported by the three site RadChem Managers, each of whom testified that the Chemistry Managers performed little if any environmental duties. Tr. p. 3066, l. 7; p. 1750, l. 2; p. 2841, l. 18. TVA has argued that it violated the procedure as to everyone, but this argument loses force when considering that the failure to follow the procedure worked only to

---

[34] The *Lover* case cited above is a perfect example of the MSPB using other relevant evidence in reviewing a competitive level determination when the official position description is not accurate. In that case, the position description for Lover's position of record stated that she only supervised one employee, whereas the newly created position description stated that the individual would supervise three employees. The MSPB considered evidence provided by Lover that she did in fact supervise three employees in her earlier position, despite the language contained in the official position description. The MSPB therefore concluded that the two positions were identical. 1984 MSPB LEXIS 815 at *2-3.

the detriment of Fiser, who was senior on the retention register, and to the benefit of Harvey and Chandra, both of whom were lower on the register than Fiser.

3.97. TVA has also argued that it is not relevant what percent of the duties actually performed were environmental versus chemistry, but that the relevant factor is what percent of the duties in the position description were environmental versus chemistry. However, the MSPB has held that evidence of the duties performed under the position description may shed light upon the determination of a competitive level. In *Simonton v. Dept. of the Army*, 62 MSPR 30, 1994 MSPR LEXIS 457 (Apr. 12, 1994), the MSPB remanded the appeal to the administrative judge to "allow the parties to present testimony regarding the actual duties performed in the positions in question, but only to the extent that such evidence is material and relevant to an understanding of the appropriate position descriptions, critical elements and performance standards." 1994 MSPB LEXIS 457 at *11. Reynolds testified that when evaluating position descriptions for interchangeability purposes, each of the listed duties should not be weighted equally, but the HR manager conducting the evaluation should inquire of the manager what the primary and secondary duties of the positions are. Tr. p. 3517, l. 15. Therefore, the testimony by Fiser, Grover, and the site RadChem Managers regarding the duties actually performed under the PG-8 Chemistry and Environmental Protection Program Manager position descriptions is relevant to the adequacy of TVA's competitive level determination on those positions.

3.98. As noted above, Fiser, Grover, Harvey and the three site RadChem Managers all testified that the duties performed under the PG-8 Chemistry and Environmental position descriptions were 95 percent chemistry, and at most five percent environmental. Tr. p. 1750, l. 2; p. 1885, l. 22; p. 2311, l. 13; p. 2841, l. 18; p. 3066, l. 7; p. 5036, l. 19. Easley testified that he did not consider this factor when making the competitive level determination for the PG-8 Chemistry Program Manager positions. Tr. p. 1216, l. 24. Instead, Easley has stated that he believed that 50 percent of the duties of the Chemistry and Environmental positions were being eliminated, and

thus the new positions were not interchangeable. Tr. p. 1288, l. 15; p. 1217, l. 24. However, an examination of the position descriptions considering the balance of duties would demonstrate that the duties remained substantially the same. *See* Jt. Exh. 42; Staff Exh. 64. This conclusion would have benefitted Fiser as the senior person on the retention register. By allowing HR to make this determination without an accurate breakdown of the duties, TVA conveniently bypassed the retention register and was ultimately able to select individuals lower on the retention register than Fiser for the remaining Chemistry positions.

3.99. The Board concludes that TVA violated its own selection policies as well as OPM regulations when it transferred McArthur into the RadChem Manager position. This failure to follow appropriate procedures, combined with the evidence of the disparate treatment of Fiser, is evidence that TVA's asserted reason for the adverse actions against Fiser is a pretext for discrimination.

3. TVA's Legitimate Basis for the Adverse Actions is False

3.100. Under *St. Mary's Honor Center* and *Reeves*, the fact-finder is permitted to infer discrimination based on the evidence set forth in the prima facie case and evidence that the employer's proffered legitimate reason for the adverse action is false. *St. Mary's Honor Center* and *Reeves* also raised the issue that, even if the complainant established that his employer's proffered reasons for the adverse action were false, there could be other nondiscriminatory reasons for the action which the defendant did not proffer. This concern is not applicable in a NRC enforcement proceeding. NRC regulations require all licensees to submit complete and accurate information to the Commission. *See* 10 C.F.R. § 50.9.[35] Pursuant to this regulation, a licensee is required to

[35] As noted previously, a Severity Level IV violation was recently issued to the United States Enrichment Corporation (USEC) for its failure to provide complete and accurate information pursuant to 10 C.F.R. § 76.9 in a letter supplementing its presentation at a predecisional enforcement conference. *Response to January 3, 2001, Notice of Violation; Notice of Violation; and Alleged Discrimination*, EA-99-256, EA-00-047, EA-00-048, January 17, 2002.

proffer all legitimate reasons for taking the adverse action, and may not provide incomplete or inaccurate information about its reasons. TVA was aware of this requirement at the PEC and throughout the course of this proceeding. Tr. p. 4945, l. 10. Therefore, if the Staff demonstrates that all of the alleged legitimate reasons are not credible, then the only conclusion left to be drawn is that discrimination was the real reason for the action. The Board cannot substitute another reason for the adverse action taken against Fiser without rewarding TVA for violating 10 C.F.R. § 50.9. Moreover, Burzynski testified that TVA presented to the Staff all of its reasons for taking the adverse actions against Fiser at the PEC. Tr. p. 4945, l.10. Therefore, the Board cannot supply a reason for the adverse actions that is completely unknown to TVA.

3.101. When considering TVA's legitimate, nondiscriminatory basis for the adverse actions taken against Fiser, it is important to look both at the testimony adduced at the hearing and the statements made by the witnesses earlier in this case. Although the Board would normally give greater weight to hearing testimony, the Board will give less weight to that testimony where the witness has provided prior inconsistent statements on a particular subject.

3.102. TVA has argued that there was no disparate treatment of Fiser because the decision to transfer McArthur to the RadChem Manager position was made by the same people and under the same selection policies as the decision to post the Chemistry Program Manager positions. However, TVA has told a number of stories over the years regarding the basis for McArthur's transfer into the RadChem Manager, some of which contradict the hearing testimony by TVA witnesses. TVA now claims that McArthur was placed into the RadChem Manager position without competition because his "position description of record" was interchangeable with the RadChem Manager position. The relevant inquiry is what was the basis on which TVA decision makers based their decision in 1996, not what rationale they developed for that decision since then.

3.103. Boyles was first questioned regarding the transfer of McArthur into the RadChem Manager position by the DOL investigator in May 1997. Staff Exh. 4. In that statement, Boyles

explained that HR reviewed McArthur's 1990 *and 1994* position descriptions to the new position description and concluded that the new position was similar in duties to his old positions. Staff Exh. 4, p. 1-2. At that time, Boyles stated that HR looked at the preponderance of duties to determine that the positions were sufficiently similar. *Id.* at p. 2. At no time in this statement does Boyles state that TVA relied solely upon McArthur's "position description of record" or that HR was unable to locate a position description for his current position.

3.104. In October 1998, Boyles was interviewed under oath by NRC OI regarding the 1996 Fiser DOL complaint. Staff Exh. 6. In that statement, Boyles stated that McArthur was placed in the RadChem Manager position because McArthur had supervised those functions earlier, then in a 1994 reorganization had been placed in a different position. However, soon after that reorganization, TVA reconstituted a similar position and placed an individual in that position, who later retired. Staff Exh. 6, p. 21. Boyles stated that, after discussing it with Easley and his supervisor, he determined that the RadChem Manager position was basically his previous position and that he had more leeway under TVA policy as to posting senior level positions. Staff Exh. 6, p. 21-22. Boyles further explained that the policy for making decisions to post at McArthur's level of management was different from the policy for making decisions to post at Fiser's level of management. Staff Exh. 6, p. 23-24.[36] Again, at no time during this interview did Boyles state that the reason McArthur was transferred into the RadChem Manager position was because his "position description of record" was for the 1990 Technical Programs Manager position. Instead, Boyles reiterated that McArthur was placed in the position because it had been reconstituted soon after the 1994 reorganization and because he had more flexibility with regard to posting senior

---

[36] This statement was confirmed to the NRC OI agent by TVA Counsel Marquand later during that interview, and Counsel even asked a series of questions designed to explain the difference between senior level management and lower level management. Staff Exh. 6, p. 33, 42-45. Despite this exchange, the selection policy in effect in 1996 clearly states that all positions PG-1 through PG-Senior are required to be posted. Jt. Exh. 63.

manager positions. Staff Exh. 6, p. 40-41, 45. In fact, when questioned about the position descriptions, Boyles acknowledged that the position McArthur was holding before the reorganization was different from the position he was transferred into, and he did not mention anything about the position descriptions being interchangeable or similar. Staff Exh. 6, p. 20, 22. When questioned by TVA Counsel about the McArthur transfer, Boyles again completely failed to mention that he compared position descriptions and concluded that they were interchangeable. Instead, he stated that because the position had been reconstituted soon after the 1994 reorganization, that transferring McArthur into that position "was the right thing to do." Staff Exh. 6, p. 40.

3.105. TVA presented the argument regarding McArthur's "position description of record" at the 1999 PEC with the NRC. At the TVA PEC, TVA asserted that the decision that McArthur was entitled to the RadChem Manager position was based upon a comparison of his job description of record and the existing RadChem Manager job description. Boyles explained that HR had to use a 1990 position description for McArthur because McArthur had not been issued a position description during the 1994 reorganization. Staff Exh. 135, p. 43. In fact, this statement contradicts Boyles' 1997 statement to the DOL investigator and McArthur's interview with NRC OI, both of which mention the 1994 RadCon Manager position description. Staff Exh. 4, p. 1; Staff Exh. 97, p. 32. Easley's deposition testimony also supports that McArthur was issued a position description for the RadCon Manager position. Easley stated that an official position description was issued for that position, and that a cover-up had occurred if anyone is now stating that the position description does not exist. Staff Exh. 27, p. 120.

3.106. The PEC was also the first time that TVA argued that the MSPB requires it to use the "position description of record" for competitive level determinations. In response to an NRC request, TVA provided an explanation of its policy for declaring positions to be surplus, in which it argued that the MSPB requires it to use the "position description of record" for competitive level

determinations. TVA Exh. 111. TVA cites a number of MSPB cases which state that the competitive level determinations should be made by comparing the qualifications and duties as set forth in the official position descriptions. However, in the cases cited by TVA, the issue was not whether the agency is required to use a position description which it knows is inaccurate, nor whether the other evidence is relevant in making competitive level determinations. Instead, each of the cases cited by TVA involve an employee arguing that his own personal qualifications are interchangeable, as opposed to the qualifications as set forth in the position description. These cases are inapposite, as neither party has argued before this Board that TVA should have made competitive level determinations based on the individual qualifications of McArthur, Fiser, Harvey, or Chandra. The more relevant case law, as discussed above, is that the MSPB permits agencies to rely upon evidence outside of the position description when making competitive level determinations. *See* Paragraph 3.95 above. Clearly these MSPB cases do not set forth a requirement that an agency use a position description which it knows is inaccurate, out-of-date, and for a position which the employee does not occupy to make a competitive level determination.[37]

3.107. In his deposition, Boyles stated again that HR compared the RadChem Manager position description with McArthur's 1990 Technical Programs Manager position description and determined that the positions were interchangeable. Staff Exh 7, p. 37. Boyles also acknowledged at that time that the TVA selection policy in effect at that time did not distinguish between senior level managers and lower level managers; both types of positions had to be posted for competition. Staff Exh. 7, p. 57-58. Therefore, TVA did not have leeway with respect to whether or not to post the RadChem Manager position, as Boyles had claimed in his 1998 NRC OI interview.

---

[37] TVA's repeated assertions that the MSPB *requires* it to use the "position description of record," even if inaccurate, are troublesome. In its explanation of its practice, TVA cites to a number of cases and to Peter Broida, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE at 1928-1933 (1999). TVA Exh. 111. However, following that cited discussion is a discussion, with specific case law cites, to MSPB cases which look to other relevant evidence in making competitive level determinations. This selective reading is extremely troubling to the Board.

3.108. Finally, in his hearing testimony, Boyles again claimed that McArthur was transferred into the RadChem Manager position because his "position description of record" was interchangeable with the RadChem position description. Tr. p. 3930, l. 20. As noted earlier, the two positions are not interchangeable under either TVA selection policies or OPM regulations. However, despite being faced with incontrovertible evidence that the two positions were not interchangeable, Boyles insisted upon arguing that they were. *See* Tr. p. 3929, l. 16.

3.109. TVA, and specifically Boyles, have provided different, sometimes contradictory, explanations for why McArthur was transferred into the RadChem Manager position without competition. As stated earlier, the relevant inquiry is what reason TVA had for taking this action in 1996, when it occurred, as opposed to an explanation it developed six years later. In light of the prior inconsistent statements by Boyles, as well as the fact that TVA did not argue that McArthur lacked a 1994 position description until after the NRC invited it in for an enforcement conference, the Board has concluded that TVA's presently proffered reason for McArthur's transfer should be given little weight and credits the Staff's position that McArthur was transferred into the RadChem Manager position because it was known that Grover favored Fiser over Harvey, and that Grover's minority status may have been a significant impediment to placing McArthur in the position without competition.

3.110. In its pretrial legal brief, TVA had argued that as a result of the 1994 reorganization of the Corporate Technical Support organization, "McArthur was assigned to serve as the Manager of Radiological Control. However, he was never officially appointed to that position nor was an approved position description ever placed in his official personal history record."[38] Throughout the course of the hearing, TVA has attempted to demonstrate that McArthur was not officially in that position because he lacked a position description. TVA makes this argument to support its theory

---

[38] "Tennessee Valley Authority's Prehearing Brief," March 1, 2002, p. 10.

that Fiser was not treated any differently from McArthur under TVA policies. This argument is completely unsupported by the evidence in the record, and specifically by the testimony of TVA's own witnesses.

3.111. First, and most importantly, McArthur testified that he had no doubt that he was officially placed in the PG-11 RadCon Manager position as a result of the 1994 reorganization, and that his previous PG-SR Technical Programs Manager position had been abolished. Tr. p. 1450, l. 23; p. 1451, l. 12; p. 1484, l. 10. More damaging to TVA's argument, however, is the testimony of Reynolds and Alex Sewell regarding the official personnel systems at TVA. TVA has argued that McArthur was never officially appointed to the RadCon Manager position because he lacked a position description for that position in his personal history record. Both Reynolds and Sewell testified that the PHR is not the governing personnel system at TVA. Reynolds testified that personnel actions at TVA, such as pay actions, promotions or demotions, are documented in the Human Resources Information System (hereinafter "HRIS"). Tr. p. 3349, l. 1.

3.112. Sewell, a witness called by TVA to explain its personnel systems, confirmed that the HRIS was the official statement of employee actions at TVA. Tr. p. 4480, l. 20. Sewell went on to state that the information contained in the PHR was actually copied from the HRIS and that HR relied upon HRIS for maintaining accurate personnel records. Tr. p. 4483, l. 11. Sewell confirmed that Staff Exhibit 99 was an HRIS printout of employee actions taken with regard to McArthur. Tr. p. 4483, l. 19. When asked what governs if the HRIS system contains a personnel action that has not been documented in the PHR, Sewell stated that the information in the HRIS governs. Tr. p. 4485, l. 19. The HRIS for McArthur indicates that he changed from a PG-SR position to a PG-11 position in 1994, and received a promotion back to a PG-SR position in 1996. Staff Exh. 99. Based on this evidence, the Board concludes that TVA's argument that McArthur was not officially appointed to the RadCon Manager position in 1994 is false, and is evidence of pretext.

4. The Selection Process was Biased Against Fiser

3.113. TVA has argued that the selection process was conducted in a fair and impartial manner and that the SRB which interviewed the candidates was neutral. The evidence indicates that the selection process was tilted against Fiser and in favor of Harvey and Chandra for the Chemistry Program Manager positions.

3.114. Initially, McArthur decided that the SRB for the new positions he would be supervising should be the three site RadChem Managers, Corey from BFN, Kent from SQN, and Cox from WBN. Each of these managers was recently familiar with the work of one of the incumbent Chemistry and Environmental Protection Program Managers. However, Cox later informed McArthur that he would be unable to participate in the SRB on the date scheduled because of a conflict. Cox stated that he could have attended the SRB had it started first thing in the morning or had been rescheduled for a different time. Tr. p. 1758, l. 18. Cox was the RadChem Manager most familiar with Fiser's most recent work at the sites, as Fiser worked most frequently at WBN. Tr. p. 2365, l. 2. McArthur and McGrath testified that they refused to reschedule the SRB so that Cox could attend because rescheduling would pose administrative difficulties.[39] Tr. p. 553, l. 5; p. 1738, l. 17 . Although McArthur and McGrath attempted to find a replacement for Cox from WBN, they were unable to locate someone and instead asked Rogers to serve on the board. Tr. p. 557, l. 5; p. 1495, l. 13.

3.115. TVA has asserted that the purpose of an SRB is not a popularity contest, and therefore the absence of Cox on the SRB was not to Fiser's detriment. Cox testified that he thought highly of Fiser's work at WBN, whereas neither Kent nor Corey were familiar with Fiser's most recent work. Tr. p. 1760, l. 21. However, both human nature and the scores submitted by the SRB

---

[39] None of the TVA witnesses could explain why Cox could not share the SRB duties with another individual, just as McArthur had shared his SRB duties with Pat Hughes during the interviews for the Chemistry and Environmental Program Manager positions for the 1994 reorganization. *See* TVA Exh. 24.

demonstrate that the SRB members favored the incumbent who worked at their site. A review of the scores given by Corey and Kent indicate that Corey scored Chandra, who worked most frequently at BFN, the same or higher than both Harvey and Fiser for every question rated. Kent scored Harvey, who worked most frequently at SQN, the same or higher than both Chandra and Fiser for every question rated. See TVA Exh. 102, p. FB000016 (Chandra is designated as Candidate B and Harvey is designated as Candidate A on this document). This indicates, at a minimum, that there may have been a subtle bias by Kent and Corey in favor of the Chemistry manager who worked directly at their sites. This also suggests that Cox's absence worked to the detriment of Fiser. As previously noted, this conclusion is supported by the testimony of TVA's own statistical expert, who testified that even if Fiser had a champion on the SRB, he would have lost because the two people with knowledge of his protected activity rated him third. Tr. p. 4640, l. 9; p. 4644, l. 5.

3.116. In addition, Fiser testified that he was concerned about the absence of Cox from the SRB because of Cox's knowledge of his work at WBN. Tr. p. 2365, l. 4. Members of the SRB have testified that they were unimpressed with Fiser's demeanor during the interview, and stated that he could have expressed himself in a stronger manner. Tr. p. 2941, l. 17; p. 3258, l. 15; p. 5231, l. 3. TVA has attempted to explain this demeanor as Fiser tanking the interview in order to support his DOL complaint. A more logical explanation, in light of Fiser's testimony, is that Fiser was disappointed with Cox's absence and felt that the interview process was stacked against him from the start. *See* Tr. p. 2365, l. 4; p. 2404, l. 19.

3.117. TVA has also argued that, even if Cox had been available to serve on the SRB, that he would have been excluded because he had preselected Fiser for one of the Chemistry positions. McGrath claimed that when McArthur informed him that Cox had a scheduling conflict, that he also informed him that Cox has indicated a bias toward Fiser for one of the Chemistry positions and for another individual for one of the environmental positions, and that this would have disqualified him

from the SRB. Tr. p. 840, l. 12; p. 1615, l. 16. TVA also argued that the interviews should not have been rescheduled to accommodate Cox because of this bias toward Fiser.

3.118. As noted in Section II.D.2 of this opinion, Cox did not inform Kent, Corey, and McArthur *until the morning of the interviews* that his opinion, for what it was worth, was that Fiser had performed well at WBN. Tr. p. 1760, l. 11. Cox denied stating that he would have selected Fiser if he had sat on the SRB. Tr. p. 1759, l. 9. If Cox did not express his opinion regarding Fiser until the day of the interviews, then clearly TVA's decision not to reschedule the interviews to accommodate Cox could not have been based upon this alleged bias toward Fiser. The Board also concludes that it is disingenuous for McArthur and McGrath to claim that they were concerned about Cox having preselected Fiser, yet had no concern at all about permitting Kent to serve on the SRB or McArthur to serve as the selecting official after he had recently requested a transfer of Harvey to SQN on a permanent basis because he was pleased with his work at the site. Tr. p. 3106, l. 8. Additionally, McGrath testified that he did not want anyone "intimately involved" with Fiser's 1993 DOL complaint to be involved in the 1996 selection process, yet he was not concerned with allowing McArthur and Kent, both of whom played a key role in the 1993 case, to be involved in the selection process. Tr. p. 568, l. 10. *See* Jt. Exhs. 24 and 25. Under these circumstances, the Board concludes that the selection process was neither fair nor neutral, and that the failure of McGrath and McArthur to ensure a fair selection process demonstrates pretext.

3.119. The questions asked of the candidates for the PWR Chemistry Program Manager position focused on one technical aspect of the position, secondary chemistry, to the exclusion of the other technical aspect of the position, primary chemistry. Although the Board finds that it was not inappropriate to ask questions about secondary chemistry issues, the Board finds it suspicious that McArthur, who was aware that Harvey's expertise lay in secondary chemistry whereas Fiser was stronger in primary chemistry, chose to focus on those technical areas within Harvey's expertise.

3.120. Kent testified that interpersonal skills were important for the PWR Chemistry Program Manager. Tr. p. 3145, l. 18. Despite this importance, both Kent and McArthur chose to ignore pertinent information regarding Harvey's interpersonal skills. First, McArthur did not include any information about Harvey's harassment and intimidation of Landers to the members of the SRB. Additionally, McArthur stated that he did not consider that information when making his final selection for the PWR Chemistry position. Tr. p. 1536, l. 2.

3.121. Kent testified that he asked employees in the SQN Chemistry organization about whether they would want Harvey transferred to SQN. According to Kent, he got some significant negative feedback about Harvey, specifically as it related to his ability to interact well with others. Tr. p. 3087, l. 7; p. 3098, l. 21. Despite this knowledge, Kent stated that he did not consider that a factor in rating Harvey during the interviews, and in fact, rated Harvey the highest of the three candidates. *See* TVA Exh. 102, p. FB000016.

3.122. McArthur also failed to consider information relevant to Harvey's interpersonal skills in making his selection for the PWR Chemistry Program Manager position. Landers, then a co-operative student, had raised issues of harassment and intimidation by Harvey over a period of time leading up to the 1996 reorganization. Tr. p. 2048, l. 6. McArthur attended a meeting with Grover, Boyles, and Harvey to discuss Harvey's behavior, and the managers recommended that Harvey take sensitivity training in order to avoid such complaints in the future. Tr. p. 2141, l.1. McArthur testified that he did not consider Harvey's harassment of Landers when making the selection because Landers dropped the complaint and Harvey contested the charges she raised against him. Tr. p. 1536, l. 2. McArthur also failed to provide information about the harassment to the members of the SRB. *See* Jt. Exhs. 20-23. As a result, Harvey's poor interpersonal skills were not considered by any of the relevant decision makers.

3.123. The Board concludes that the absence of Cox from the SRB and the unwillingness of McArthur and McGrath to ensure his presence, the absence of questions related to primary

chemistry, and the failure of any of the decision makers to consider Harvey's poor interpersonal skills are evidence that the selection process was biased against Fiser. Therefore, the Board rejects TVA's proffered reason that the selection process was both neutral and fair.

K. Kent's Statement Regarding Fiser's DOL Activities is a Violation of Section 50.7

3.124. In *Earwood v. Dart Container Corp.*, 93-STA-0016 (Secy Dec. 7, 1994), the Secretary of Labor considered whether a negative comment about the complainant's protected activity provided during an employment reference constituted a violation of the employee protection provision of the Surface Transportation Assistance Act of 1982. The Secretary concluded that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment activities as a result." *Id.* at 3. The Secretary reaffirmed that holding and further noted in *Gaballa v. The Atlantic Group*, 94-ERA-9, 1996 DOL Sec. Labor LEXIS 9 (Secy Jan. 18, 1996) that "[d]iscriminatory referencing violates the [Energy Reorganization Act] regardless of the recipient of the information." *Id.* at *3. *See also Remusat v. Bartlett Nuclear, Inc.*, 94-ERA-36, 1996 DOL Sec. Labor LEXIS 21 at *11 (Secy Feb. 26, 1996).

3.125. The NRC's employee protection regulations, as well as other employee protection laws, are designed in part to promote an environment in which employees feel safe to raise concerns to their employers. The evidence demonstrates that TVA does not promote such an environment. Tresha Landers, a co-worker of Fiser's testified that people at TVA would talk about people who filed complaints who were then "out the door," or interns who "had a problem" and were subsequently not hired. She thought that it would be better to get away from Harvey and to not work around him. Tr. p. 2050, l. 24; p. 2051, l. 1. Landers further noted that listening to plant gossip put a "fear factor" in her that her chances of employment after graduation would be "slimmer" if she continued through with her complaint. Tr. p. 2052, l. 5.

3.126. One of TVA's own witnesses, Sam Harvey, stated twice during his testimony that, prior to 1997, he feared retaliation if he raised issues regarding harassment and intimidation. Tr. p. 5054, l. 24; p. 5057, l. 20. Harvey stated that he waited until after Jack Bailey became part of his supervisory chain of command because he felt Bailey would be open to the issues of harassment and intimidation. Tr. p. 5058, l. 14. Harvey also specifically testified that he had not raised some of the issues in his November 27, 1997 memorandum on a prior occasion because he feared retaliation from his supervisors, including McArthur. Tr. p. 5058, l. 3.

3.127. In two conversations that Fiser recorded, McArthur acknowledged that TVA has a work environment that is hostile toward those who find and document problems or file complaints. On April 9, 1993, Fiser and McArthur engaged in a conversation during which McArthur related an incident where he documented a fire protection problem, and received a negative performance appraisal as a result. Jt. Exh. 27, p. 71. Specifically, McArthur stated, "[h]ow do you do this, if you find a problem, do you just not say anything? That is the message you kind of get." *Id. See also* Staff Exh. 178. In another conversation three months later, Fiser suggested to McArthur that he was considering taking legal action against TVA for his RIF. McArthur warned him about taking such an action, because people "don't want somebody that is a troublemaker. . . . a lot of companies will not hire you if you have a legal history." Jt. Exh. 27, p. 80. *See also* Staff Exh. 169. Both of these statements indicate that McArthur was well aware of the hostile attitude at TVA toward individuals who engage in protected activities.

3.128. Fiser's testimony regarding the problem with the diesel generator fuel oil storage tanks is an excellent example of the attitude TVA management exhibits towards those who document and resolve safety concerns. Fiser testified that, after he worked on the corrective actions for the diesel generator problem, his supervisor informed him that management was considering taking disciplinary action against him for his role in the problem. Tr. p. 1147, l. 2. However, Goetcheus, who was the SQN Chemistry Manager in charge of the surveillance

instruction review for SQN and who missed finding the problem with the storage tanks, testified that no one from TVA discussed the problem with him until the day of his hearing testimony. Tr. p. 5112, l. 1. This indicates that it was not the missed identification of the diesel generator problem which concerned TVA management, but the involvement of its employees in the actual identification of and corrective action for that problem.

3.129. In addition to these statements by witnesses, TVA also introduced a TVA OIG interview statement by Patrick Lydon, a former TVA employee, which further supports a finding of a hostile work environment. TVA Exh. 122. In this statement, "Lydon advised that he resigned from TVA because he was disgusted with senior executive management. Lydon stated TVA was 'the most abusive place' he has ever worked. Lydon advised Bynum and Beecken would 'fire people for effect.'" TVA Exh. 122, p. 3. This statement indicates that even a former senior manager at TVA felt that the work environment was abusive.

3.130. Finally, the Board notes that over the course of seven years, from 1993 through 2000, no fewer than four employees who worked in the Corporate RadChem organization at some point during that time filed DOL complaints against TVA for retaliating against them for engaging in protected activities. *See* Staff Exhs. 34 and 37 (Fiser 1993 and 1993 DOL complaints); Staff Exh. 33 (Jocher complaint filed on June 29, 1993); Staff Exh. 174 (TVA OIG investigation of complaint by Sorrelle, formerly acting Corporate RadChem Manager); and TVA Exh. 99 (Grover DOL complaint). Under these circumstances, the Board credits the testimony of Fiser, Landers, and Harvey that TVA fostered an environment hostile to those who raise or document concerns or file complaints.

3.131. The Board finds that TVA fostered a work environment which was hostile towards individuals who engaged in protected activities. Under these circumstances, a discussion of a candidate's DOL activities immediately prior to his interview for a position is clearly inappropriate and could have a negative impact upon that candidate's review by the SRB members. The Board,

therefore, finds that a prophylactic rule preventing all improper references to an employee's protected activities, whether or not the employee has suffered damages or loss of employment activities as a result, is the proper rule to apply. Kent's statements clearly violated this rule and the Board concludes that Mr. Kent's statement about Fiser's DOL complaint prior to the interviews is a *per se* violation of 10 C.F.R. §50.7.

L. The Violation and Civil Penalty are Appropriate

3.132. Based on the findings of fact and conclusions of law set forth above, the Board finds that the Staff has demonstrated by a preponderance of the evidence that TVA committed a violation of 10 C.F.R. § 50.7 when it failed to select Fiser for a position during the 1996 reorganization.

3.133. In determining the appropriate Severity Level and Civil Penalty for a violation of the Commission's regulations, the Staff utilizes the Enforcement Policy, NUREG-1600. *See* Staff Exh. 170. The supplements to the Enforcement Policy provide guidance as to the determination of the appropriate Severity Level of a violation. Tr. p. 283, l. 15.

3.134. Supplement 7 of the Enforcement Policy explains how to determine the Severity Level of a violation of 10 C.F.R. § 50.7. Tr. p. 284, l. 14. The main consideration in determining the Severity Level of a violation is the management level of the discriminating official within the licensee's organization. Tr. p. 285, l. 13.

3.135. The Staff issued a Notice of Violation to TVA on February 7, 2000, classifying the violation as a Severity Level II violation. Jt. Exh. 47. Specifically, TVA was cited for eliminating Fiser's Chemistry and Environmental Protection Program Manager position and failing to select him for a new position within Operations Support, based in part upon retaliation for engaging in protected activities. Jt. Exh. 47, p. AB000026.

3.136. Supplement 7 of the Enforcement Policy cites the following as an example of a Severity Level II violation: "An action by plant management or mid-level management in violation

of 10 CFR 50.7. . . ." Staff Exh. 170. p. 61165. TVA stipulated that McGrath and McArthur were senior level management at TVA at the time of the discriminatory actions against Fiser. Tr. p. 301. l. 5. Therefore, the Board finds that the Staff properly classified this violation as a Severity Level II violation.

3.137. Once the Severity Level of a violation has been determined, Tables 1A and 1B of the Enforcement Policy explain the appropriate determination of the Civil Penalty to be imposed upon the licensee. Tr. p. 286, l. 12; p. 287, l. 3. Table 1A sets forth the base civil penalty based upon the type of licensee, its size and ability to pay. *Id.* The base civil penalty for TVA under Table 1A is $110,000 because TVA is a nuclear power reactor licensee. Tr. p. 302, l. 25. Table 1B is then used to adjust the amount of the Civil Penalty based upon the Severity Level of the violation. Tr. p. 287, l. 3. *See also* Staff Exh. 170, p. 61150. Under Table 1B, the adjustment for a Severity Level II violation is 80 percent of the base civil penalty, or $88,000. Tr. p. 303, l. 6.

3.138. In order to determine the final amount of the Civil Penalty, the Civil Penalty Assessment flow chart contained in the Enforcement Policy is used. Tr. p. 287, l. 18. Staff Exh. 170, p. 61151. In this flow chart, the major considerations are: whether this is the first non-willful Severity Level III violation within the last two years or two inspections; and whether or not the licensee identified the violation; and whether or not the licensee took appropriate corrective action to remedy the violation. Tr. p. 288, l. 1. Staff Exh 170, p. 61151.

3.139. Credit for identification of the violation is warranted if the licensee identified the problem and either properly reported it or placed it in the corrective action system. Tr. p. 289, l. 18. The licensee does not get credit for identification where the licensee denies that a violation has occurred. Tr. p. 290, l. 1. Credit for corrective action is warranted if the licensee takes actions with remedy the specific violation and which will help prevent future similar violations. The licensee must take both types of corrective action in order to receive credit. Tr. p. 291, l. 24.

3.140. At the time of this violation, the statutory maximum Civil Penalty for a violation was $110,000 per day per violation. If the Civil Penalty based on the flow chart is more than $110,000, the Civil Penalty is capped at $110,000. Tr. p. 292, l. 5.

3.141. The first step under the flow chart is whether this is the first non-willful Severity Level III violation within the last two years or two inspections. The answer to that question is no, because this is a willful Severity Level II violation of 10 C.F.R. § 50.7. Tr. p. 303, l. 22. Therefore, under the flow chart, the Board will then look to whether TVA should get credit for identification of the violation and for taking appropriate corrective action.

3.142. The Board agrees with the Staff's determination that TVA should not get credit for identification of the violation because TVA denies that a violation of the Commission's regulations has occurred. Tr. p. 304, l. 5. The Board also agrees with the Staff's determination that TVA should not get credit for corrective actions because TVA's attempts at corrective action were insufficient. Tr. p. 304, l. 17. TVA's individual corrective action was insufficient because they continue to deny that a violation has occurred, although they did settle with the wronged party. Tr. p. 305, l. 1. Additionally, TVA stipulated that it did not take any specific corrective action for this violation. Tr. p. 2376, l. 19. TVA's broad corrective action was insufficient because the only action taken was it issue an advisory to the plant. TVA had issued such advisories in past discrimination cases and these advisories proved completely ineffective in preventing future occurrences of discrimination. Tr. p. 305, l. 1.

3.143. The Board concludes that TVA should not be given credit for either identification or corrective action. Therefore, under the Civil Penalty flow chart, the Staff could have imposed a Civil Penalty of two times the base Civil Penalty. Tr. p. 305, l. 21. Because two times the base Civil Penalty would have been over the $110,000 statutory maximum, the Board agrees that the appropriate penalty is $110,000. Tr. p. 306, l. 1.

IV. CONCLUSION

4.1. The Board finds that Fiser engaged in a number of protected activities under 10 C.F.R. § 50.7, including working on corrective action documents regarding the emergency diesel generator fuel oil storage tanks, refusing to cause a potential procedural violation by implementing a written requirement for trend plots, sending a letter to Senator Sasser, and filing two DOL complaints.

4.2. The Board finds that TVA officials had knowledge of each of these areas of protected activity in 1996.

4.3. The Board concludes that TVA took two adverse actions against Fiser in 1996. First, TVA made an erroneous competitive level determination which affected Fiser's rights to a position in the new organization, and second, TVA failed to select Fiser for a position in the new organization.

4.4. The Board finds that there is a causal nexus between the adverse actions taken against Fiser and the protected activities in which he engaged. There is evidence in the record which demonstrates the disparate treatment of Fiser as compared to McArthur. The Board also finds that there was temporal proximity between Fiser's protected activity and the adverse action. Prior to 1996, neither McArthur nor McGrath had the opportunity to take an adverse action against Fiser. Upon gaining that opportunity, McArthur and McGrath engineered Fiser's nonselection within six weeks.

4.5. The Board rejects TVA's proffered legitimate nondiscriminatory basis for the adverse actions as unbelievable. TVA witnesses have provided a number of changing, and sometimes contradictory, stories regarding the reasons behind the decisions made in the 1996 reorganization in Operations Support.

4.6. The Board concludes that the evidence demonstrates that Harvey was preselected for the PWR Chemistry Program Manager position. McGrath's statement that he would not permit a transfer of Harvey to SQN because he wanted his expertise in Corporate Chemistry, combined with Harvey's statement to Voeller regarding his pending selection as the PWR Chemistry Manager support this inference. Harvey's preselection is evidence that TVA's legitimate reason is a pretext for retaliation.

4.7. Throughout the reorganization for Operations Support, TVA failed to follow its own internal procedures. At every turn, this failure to follow procedures worked to Fiser's detriment and to McArthur's benefit. The Board therefore finds that TVA's failure to follow procedures is evidence of pretext.

4.8. The Board finds that Kent's statement prior to the SRB interviews regarding Fiser's DOL activities, regardless of its intent, is a *per se* violation of 10 C.F.R. §50.7. In light of the hostile work environment toward individuals at TVA who make complaints, such a statement could only cause harm to the complainant prior to an interview.

4.9. The Board concludes that the Staff has met its burden of proving by a preponderance of the evidence that TVA discriminated against Fiser in violation of 10 C.F.R. § 50.7. The Board further finds that the Staff imposed the correct severity level and civil penalty for this violation. Therefore, the Board upholds the NOV and orders TVA to pay the Civil Penalty.

The above findings are respectively submitted by the Staff.

Dennis C. Dambly
Counsel for NRC Staff

Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
This 20th day of December, 2002

ATTACHMENT ONE

*1998 U.S. App. LEXIS 26600, *; 1998 Colo. J. C.A.R. 5450*

CAROLE RICHMOND, Plaintiff-Appellant, v. OKLAHOMA UNIVERSITY BOARD OF REGENTS; OKLAHOMA UNIVERSITY, d/b/a Oklahoma University Health Sciences Center, Defendants-Appellees.

No. 97-5181

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1998 U.S. App. LEXIS 26600; 1998 Colo. J. C.A.R. 5450

October 20, 1998, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 1998 U.S. App. LEXIS 34677.

PRIOR HISTORY: (N.D. Okla.). (D.C. No. 96-CV-340-K).

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee brought suit against defendant employer in the United States District Court for the Northern District of Oklahoma, alleging that the employer retaliated against her in violation of Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C.S. § 2000e-3(a). The district court granted the employer's motion for summary judgment, and the employee appealed.

OVERVIEW: The court held that the employee was required to demonstrate a prima facie case. She had failed to prove a causal connection between her filing a discrimination complaint and the employer's adverse actions. The time delay of four to six months between the complaint and the adverse actions, although not immediate, did not disprove causation. However, even if the delay were not taken into account, the employee still failed to establish the causal connection. As to the employee's claim that the employer failed to assist her in finding another position when one came open a year after she was suspended, the court held that a time lapse of one year was too great to draw a causal connection. Further, this was a gratuitous promise, and therefore did not form part of the employee's "terms and conditions of employment" as required for a retaliation claim. The employer's failure to provide benefits occurred soon after the employee's reinstatement; however, the employer provided a legitimate reason for this failure: the employee did not apply for benefits.

OUTCOME: The court affirmed the judgment of the lower court in favor of the employer.

CORE TERMS: retaliation, adverse action, termination, prima facie case, summary judgment, causal connection, grievance, reinstatement, terminated, conditions of employment, legitimate reason, pretextual, causation, protected activity, cancer, genuine issue of material fact, unlawful employment practice, moving party, gratuitous, retaliate, gap, grievance committee, disability benefits, failure to follow, oral argument, social work, reply brief, recommended, retaliatory, disability

LexisNexis(TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Labor & Employment Law > Discrimination > Retaliation

HN1 Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000e-2000h, makes it an unlawful employment practice for an employer to discriminate against any of his employees because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C.S. § 2000e-3(a). In order to show retaliation, a plaintiff must first establish a prima facie case of retaliation. If a prima facie case is established, then the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff. To make out a prima facie case of retaliation, a plaintiff must prove: (1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action.

Civil Procedure > Summary Judgment > Summary Judgment Standard

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The appellate court reviews a grant of summary judgment de novo, applying the same standard as the district court. The court will examine the record to determine whether any genuine issue of material fact was in dispute; if not, it will determine whether the substantive law was applied correctly, and in doing so it will examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion. However, where the non- moving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment.

Labor & Employment Law > Discrimination > Retaliation

HN3 When there may be valid reasons why an adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation in a retaliation case.

Labor & Employment Law > Discrimination > Retaliation

HN4 An employer retaliates against an employee when he takes adverse action which affects the employee's terms and conditions of employment. Gratuitous promises do not form part of the terms and conditions of employment.

COUNSEL: For CAROLE RICHMOND, Plaintiff - Appellant: Patterson Bond, Tulsa, OK.

For OKLAHOMA UNIVERSITY BOARD OF REGENTS, Defendant - Appellee: Fred A. Gipson, Lisa Millington, Joseph Harroz, Jr., University of Oklahoma, Norman, OK.

For OKLAHOMA UNIVERSITY HEALTH SCIENCES CENTER, Defendant - Appellee: Lisa Millington, Joseph Harroz, Jr., University of Oklahoma, Norman, OK.

JUDGES: Before BALDOCK, EBEL, and MURPHY, Circuit Judges.

OPINIONBY: DAVID M. EBEL

OPINION: ORDER AND JUDGMENT *

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*2]**

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-Appellant Carole Richmond appeals from the district court's order granting summary judgment for the defendants-appellees on her retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). We affirm the judgment of the district court.

Beginning in 1987, the University of Oklahoma (University) employed Richmond as a licensed clinical social worker at the Women's Clinic of the Health Sciences Center at its College of Medicine at Tulsa. On or about November 1, 1993, Richmond presented a petition to Dean Harold Brooks requesting replacement of a door lock at the Women's Clinic. On November 16, 1993, the University placed Richmond on administrative leave pending an investigation of the petition. Two days later, the University terminated her employment. n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 In a memorandum dated November 18, 1993, Drew Accardi of Clinic Administration notified Richmond that her employment was terminated based on her "(1) failure to follow the appropriate lines of reporting; (2) [false representation of] the facts regarding the issues addressed; (3) [misrepresentation of] the Clinic staff's support; and (4) [undermining of] the ability of the Clinic Administration to address operational issues within the Clinics in an appropriate manner." Appellant's App. at 94.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*3]**

Richmond asserts that on or before November 16, 1993, she notified the University of her intention to file a complaint with the Health Sciences Center's affirmative action office, and that she did in fact file such a complaint on November 16. This complaint does not appear in the record.

On December 1, 1993, Richmond filed a grievance with the University concerning her discharge. Pending resolution of her grievance, the University changed her status from "terminated" to "administrative leave without pay." On January 31, 1994, before the grievance procedure was complete, Richmond filed a gender discrimination complaint with the Oklahoma Human Rights Commission.

On April 1, 1994, while Richmond's grievance was still pending, Dean Brooks submitted a proposal for a reduction-in-force (RIF) at the Health Sciences Center to Jay Stein, Senior Vice President and Provost. The RIF plan called for the elimination of all social work positions at the Women's Clinic, including Richmond's position.

On April 4, 1994, the University's grievance committee issued its recommendation to Provost Stein. The committee found that Richmond's termination had not been justified, and recommended that she **[*4]** be reinstated to her former position with lost pay and benefits. The committee further recommended that the University make "every effort to assist Ms. Richmond in relocating within the University." Appellant's App. at 206.

On April 14, 1994, the University sent Richmond a letter indicating that her position had been eliminated, and that her last working day would be May 16, 1994. The next day, April 15, 1994, Provost Stein issued a memorandum formally approving the RIF. On April 27, 1994, Provost Stein adopted the grievance committee finding and ordered Richmond's reinstatement. Richmond was thereafter placed on medical leave due to cancer surgery.

The University terminated Richmond's employment on May 16, 1994, pursuant to the RIF. Believing the University had retaliated against her for complaining of discrimination, she filed this suit.

HN1 Title VII makes it an unlawful employment practice "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under **[*5]** this subchapter." 42 U.S.C. § 2000e-3(a). In order to show retaliation,

> [a] plaintiff must first establish a prima facie case of retaliation. If a prima facie case is established, then the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff.

Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (quotation omitted). To make out a prima facie case of retaliation, a plaintiff must prove: "(1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action." Id.

The district court found that Richmond failed to satisfy the third element of her prima facie case. Richmond asserted three adverse actions subsequent to her complaint of discrimination: (1) the University's refusal **[*6]** to give effect, after May 16,1994, to the Provost's order directing that she be given all possible assistance in relocating within the University; (2) the University's decision in May 1994 to treat Richmond as an ex-employee rather than giving her short-term disability support after she developed cancer; and (3) the University's failure to allow her to file an untimely grievance regarding its decision to lay her off as part of the RIF. n2 Each of these adverse actions took place in May 1994 or later, nearly six months after Richmond's initial discrimination complaint to the University and nearly four months after she filed her charge with the Oklahoma Human Rights Commission.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 The district court found a fourth possible adverse action: Richmond's termination pursuant to the RIF. Richmond does not assert that the RIF itself was retaliatory, however. See Appellant's App. at 190.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The district court found that this span of time, standing alone, indicated insufficient causal connection to support a prima facie **[*7]** case. See Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (stating, in FLSA retaliation case, that a four month time lag between the plaintiff's participation in protected activity and his termination was not, by itself, sufficient to support an inference of causation). It further found that Richmond failed to present any other evidence of a causal connection between her protected activity and the adverse employment actions. Alternatively, the district court found that the University had advanced a legitimate reason for its actions, and that Richmond had failed to show that this reason was pretextual.

We review the district court's order of summary judgment as follows:

> *HN2*
> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. We review a grant of summary judgment de novo, applying the same standard as the district court. We examine the record to determine whether any genuine issue of material fact was in **[*8]** dispute; if not, we determine whether the substantive law was applied correctly, and in doing so we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion. However, where the non moving party will bear the burden of proof at trial on a dispositive issue that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment.

McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998) (quotations and citations omitted).

Richmond acknowledges that there was a four- to six-month delay between the time she filed her discrimination complaints and the alleged adverse actions. She argues, however, that until she was reinstated to employment by Provost Stein's directive of April 27, 1994, the University had no opportunity to retaliate against her. *HN3*"When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation." Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997); **[*9]** see also Bowers v. Bethany Med. Ctr., 959 F. Supp. 1385, 1392 (D. Kan. 1997) (finding causation element of prima facie case satisfied despite gap of between one and one-half and two years between protected action and termination, where plaintiff had been absent from work on disability leave during entire period of gap).

Even if we ignore the time period between Richmond's assertion of her rights and her reinstatement, however, she must still establish a causal connection between her protected conduct and an adverse action by the University. We consider first the University's alleged failure to assist her in finding other employment. She states that the University was obligated to notify her of available jobs which she could fill and to help her to obtain those positions. The earliest such position which she specifically identifies is a social work opening at the Oklahoma City campus. n3 This job did not come open until approximately April 1995, nearly one year after Richmond's reinstatement. A time lapse of one year is too great to draw a causal connection between her protected action and the University's failure to act. See Conner, 121 F.3d at 1395. **[*10]** Richmond's retaliation claim concerning the University's failure to help her find a job fails n4 because she has not demonstrated a causal connection between her assertion of rights and an adverse action. n5

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 Connie Gould, the University's director of personnel services, estimated that during the year after Richmond was RIF'd, somewhere between twenty and one hundred positions came open at the University's health sciences center. Richmond contends that the University had a duty to help her find one of these jobs. She presented no evidence, however, concerning what any of the jobs were or whether she was qualified to perform them.

n4 Richmond has also failed to establish the second element of her prima facie case. The University's failure to assist her in finding employment does not fit the definition of retaliation for purposes of Title VII. *HN4*An employer retaliates against an employee when he takes adverse action which

affects the employee's "terms and conditions of employment." Conner, 121 F.3d at 1395 n.4. Gratuitous promises do not form part of the terms and conditions of employment. Cf. Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1482-84 (4th Cir. 1996) (holding employer's discontinuation of health care benefits furnished gratuitously after termination of plaintiff's employment did not violate ERISA's anti-retaliation provision). The promise to "make every effort" to help Richmond find another job after her termination was vague and gratuitous and did not affect her terms and conditions of employment. We therefore decline to hold that failure to follow through on it after Richmond's departure constituted retaliatory adverse action against her. **[*11]**

n5 Richmond also argues that the district court ignored her initial termination from employment on November 18, 1993, only two days after she filed her discrimination complaint with the University. We agree with the University, however, that Richmond has waived this argument. In her summary judgment brief, Richmond enumerated the acts of retaliation upon which she relied to support her claim. See Appellant's App. at 190-93. She did not mention her initial termination from employment among these acts. We do not consider arguments made for the first time on appeal. See Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Richmond also asserts that the University retaliated against her by failing to provide her with short-term disability benefits after she fell ill with cancer. Although the University's failure to provide benefits occurred soon after her reinstatement, the University provided a legitimate reason for not granting Richmond disability benefits: she never applied for them. Richmond has failed to create a genuine issue of material fact concerning **[*12]** whether this reason was pretextual. Accordingly, we conclude that summary judgment was proper on this assertion of retaliation.

Richmond claims that the University refused her additional time to pursue a grievance against the RIF decision. The University explained that it simply followed its policies, which did not allow it to provide extra time for filing a grievance. Richmond also failed to show that this reason was pretextual. Summary judgment is proper on this assertion of retaliation.

Finally, Richmond complains that the district court denied her motion to strike the University's summary judgment reply brief. She asserts that the University should not have been allowed to submit new evidence with its reply brief. We have reviewed the summary judgment record, and determine that failure to exclude the additional materials was harmless. See Fed. R. Civ. P. 61. The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

Entered for the Court

David M. Ebel

Circuit Judge

ATTACHMENT TWO

During the June 20, 2002 session of this hearing, Judge Young cited to *Benzies v. Illinois Department of Mental Health*, 810 F.2d 146 (7th Cir. 1987). Judge Young requested that the parties address the issue of whether, if the trier of fact disbelieves the employer's stated explanation for the adverse action, it would be compelled to make a finding of discrimination. Although the Staff has addressed this point in its Findings of Fact and Conclusions of Law, it has provided a more detailed explanation of this issue here.

In *Benzies*, the Seventh Circuit concluded that proof that an employer's explanation is false is strong evidence of discriminatory intent, but does not compel a finding of discrimination. 810 F.2d at 148. The court found that the judge may conclude "that neither discriminatory intent nor the employer's explanation accounts for the decision." *Id.* The court reasoned that an employer may have another explanation for the action that it does not wish to proffer for business reasons. Judge Young inquired of the parties why, under this rationale, the Board could not find that the Staff disproved TVA's proffered explanation for the adverse actions against Fiser, but instead conclude that a reason not proffered by either party was the real reason for the actions.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Supreme Court addresses the issue of whether "the trier of fact's rejection of the employer's asserted reason for its actions mandates a finding for the plaintiff." 509 U.S. at 504. Over a strong dissent, the Court concluded that disbelief of the employer's proffered explanations, combined with the evidence supporting the prima facie case, suffice to demonstrate discrimination. *Id.* at 511. More specifically, the Court stated that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is *required*.'" *Id.* (emphasis in original). However, the Court went on to conclude that such a rejection does not compel a judgment for the plaintiff. *Id.*

The dissent in *Hicks* identified a major problem with the majority's interpretation of the law: it permitted the factfinder to base its decision upon a reason not articulated by the employer. *Id.* at 529-30, 534 (Souter, J., dissenting). The dissent's concern with this problem was twofold: it allows an employer whose proffered basis for the action was false to benefit from that falsehood, and it deprived the plaintiff of an opportunity to demonstrate that the unarticulated reasons relied upon by the factfinder are unworthy of credence. *Id.* at 534, 536-37 (Souter, J. dissenting). Specifically, the dissent stated that the plaintiff "will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reason to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record." *Id.* at 534-35 (Souter, J., dissenting). The dissent also noted that this interpretation would place an employer who was untruthful about its explanation for the adverse actions in a better position than an employer who was silent as to the reasons for the actions. The end result of such an interpretation of the law would be to provide a benefit to employers providing false information to the court.

The Supreme Court again addressed "whether a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140 (2000). In that case, the Court first reiterated its conclusion in *Hicks* that it is permissible for the court to infer discrimination from the falsity of the employer's explanation of the adverse action. *Id.* at 147. The Court then further explained why proof that an employer's proffered reason is false permits the trier of fact to make a finding of discrimination. The Court noted that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* at 147. The reasons for this are threefold. First, it is reasonable to infer from the falsity of the employer's explanation

that he is seeking to cover up a discriminatory intent. *Id.* Second, this inference is consistent with the evidentiary principle that a party's dishonesty may be considered "affirmative evidence of guilt." *Id.* (citations omitted). Finally, the Court stated that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Id.*

After *Reeves*, it is questionable whether an employer can prevail in a discrimination case in federal court where it proffers a false explanation for the adverse action. However, it is clear that this result is completely foreclosed in an NRC proceeding. NRC licensees are required to provide the Commission with complete and accurate information. 10 C.F.R. § 50.9. A licensee does not have the option of only putting forth those explanations for an adverse action which it deems acceptable; it must inform the NRC of each and every reason for the action or it violates the regulation. A finding by the Licensing Board that the real reason for an adverse action was a reason not articulated by the licensee is the equivalent of a finding that the licensee violated section 50.9 by not proffering that reason. Because TVA has stated that it provided to the Commission all the reasons for the adverse actions against Fiser, this eliminates the option for the Board to conclude that an unarticulated reason was the real reason for the actions. If the Board disbelieves TVA's stated nondiscriminatory basis, then the only option is for the Board to make a finding of intentional discrimination.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-390-CivP; 50-327-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-328-CivP; 50-259-CivP;
	)	50-260-CivP; 50-296-CivP
(Watts Bar Nuclear Plant, Unit 1;	)	
Sequoyah Nuclear Plant, Units 1 & 2	)	ASLBP No. 01-791-01-CivP
Browns Ferry Nuclear Plant, Units 1, 2, 3)	)	
	)	EA 99-234

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING THE TENNESSEE VALLEY AUTHORITY'S VIOLATION OF 10 CFR 50.7" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 20th day of December, 2002.

Administrative Judge **
Charles Bechhoefer, Chairman
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555

Administrative Judge **
Ann Marshall Young
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, D.C. 20555

Thomas F. Fine **
Brent R. Marquand **
John E. Slater **
Barbara S. Maxwell **
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37901-1401

Administrative Judge **
Richard F. Cole
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555

Office of the Secretary *
ATTN: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

David Repka
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005

Jennifer M. Euchner
Counsel for NRC Staff