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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

IN THE MATTER OF	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
	)	50-296-CivP
	)	
(Watts Bar Nuclear Plant, Unit 1;	)	
Sequoyah Nuclear Plant, Units 1 &	)	
2; Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2 & 3)	)	

TENNESSEE VALLEY AUTHORITY'S REPLY BRIEF

November 24, 2003

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TENNESSEE VALLEY AUTHORITY'S REPLY BRIEF

This reply brief is submitted in accordance with the Commission's August 28, 2003, memorandum and order (CLI-03-09 at 6). In reply to the Staff's November 3, 2003, brief, it is TVA's position (1) that the factual findings of the Board majority (majority) and the finding of discrimination are not supported by the evidence in the record; (2) that the majority's determination of what constitutes "protected activity" is incorrect as a matter of law; (3) that the appropriate legal standard is set forth in former Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988), as it existed prior to the 1992 amendment; and (4) that the Staff's theory has continued to evolve and, as a result, the NOV did not provide fair notice.

In this case, the Staff has the burden to prove by a preponderance of evidence that TVA—and more precisely McGrath and McArthur, because they are the managers charged in the NOV—took adverse action against Fiser ***because*** he engaged in protected activity. The Staff has variously redefined the standards throughout this proceeding, suggesting at times that its burden is met by an inference of discrimination, without regard to either a clear causal nexus to adverse action or the preponderance threshold, and then at others, suggesting that the burden is shifted to TVA to show that it did not select Fiser ***solely*** for nonprohibited reasons. This case underscores the need for clear Commission guidance on the approach and standard that must be applied in Section 50.7 cases. Indeed, the Staff's and the majority's articulations of the analytical approach

and legal standard are grossly inadequate to protect the balance inherent in 10 C.F.R. § 50.7(d) (2003) or to guide Staff investigations and enforcement actions in the future. Moreover, articulating a standard that reflects an appropriate balance is central to the generic significance of the case.

The Staff's case is built on a potpourri of facts, suppositions, and "inferences" drawn from perceived deficiencies and deviations in the reorganization and selection process that led to Fiser's nonselection in 1996. The majority accepted that theory, based on less than clear and less than rigorous logic. The fact is, however, reorganizations, hiring processes, and personnel performance reviews almost always involve differing perceptions and the exercise of management judgment as to which reasonable minds may differ. But these personnel decisions nonetheless must be made routinely based upon a manager's best judgment, based on direct observation and participation in the appropriate processes, and subject to normal human resources checks and balances. However, under the majority's approach, the slightest of inferences supports the ultimate finding. The Commission should not find discrimination merely because it is possible to draw inferences of improper motive from little more than "temporal proximity," knowledge of protected activity, or the degree of judgment inherent in the process. Managers should not be second-guessed lightly in these important organizational and personnel decisions. A hair-trigger evidentiary standard for finding discrimination would frustrate any reasonable manager's willingness to make difficult choices to manage for change and performance improve-ment. This case is sufficiently significant that the Commission must step in, articulate the standard, apply that standard, and thereby provide an appropriate check on an enforcement process that has gone on for too many years without Commission guidance or oversight.

I. The Majority's Factual Findings Are Not Supported by the Record.

A. The majority's factual findings are subject to *de novo* review. The Staff asserts (Br. at 2) that pursuant to 10 C.F.R. § 2.786(b)(4)(i) (2003), the majority's findings of fact are subject to the "clearly erroneous" standard of review. This is incorrect. Section 2.786(b)(4) provides that the Commission may grant a licensee's petition for review of an initial decision predicated upon "[a] finding of material fact [that] is clearly erroneous." Here, the Commission has already granted TVA's petition for review (see CLI-03-09). Nor does *Private Fuel Storage,*

L.L.C., CLI-03-08, 58 NRC ___ (Aug. 15, 2003), support that proposition. In that case, the Commission denied the licensee's petition for review because it failed to meet any of the criteria set out in 10 C.F.R. § 2.786(b)(4). Nothing in *Private Fuel Storage* even suggests that the "clearly erroneous" standard applies once the petition for review has been granted. To the contrary, the Commission stated that had the petition for review been granted, the licensee's arguments would have "warrant[ed] further briefing and ***plenary review*** under section 2.786(b)(4)." LEXIS slip op. at 2. *See also Duke Power Co.*, ALAB-355, 4 NRC 397, 403-04 (1976). Indeed, *de novo* review is mandated by the Administrative Procedures Act (APA), 5 U.S.C. §§ 556-557 (2000). *See Attorney General's Manual on the Administrative Procedures Act* 83 (1947) ("[The Commission] is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself."); *Duke Power Co.*, 4 NRC at 403; *Kester v. Carolina Power & Light Co.*, 2000-ERA-31 at 2 (ARB Sept. 30, 2003).

Even if the Commission was required to ordinarily apply the clearly erroneous standard to review licensing board findings of fact, the majority's factual findings here are subject to *de novo* review as a matter of law for a separate and independent reason. The majority failed to apply the proper legal standards in making its combined legal-factual determination that TVA discriminated against Fiser. Even the Staff acknowledges that the *McDonnell-Douglas-Burdine* paradigm applies in cases arising under Section 50.7, requiring the Staff to prove by a preponderance of the evidence a prima facie case of discrimination ***and*** pretext (Br. at 16-17). The majority, however, undertook no such analysis (ID *passim*).[1] The law is well settled that the clearly erroneous standard does not apply to a finding made under the misapplication of law. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 526 (6th Cir. 1976) ("However, we are not so bound [by the clearly erroneous standard] where the contention is that the district court applied erroneous legal principles."); *Sims v. Sheet Metal Workers Int'l Ass'n*, 489 F.2d 1023, 1026 (6th Cir. 1973).

The Staff argues that the majority should be accorded "great" "deference" because "the [majority] bases its findings of fact in significant part on the credibility of the witnesses" (Br.

1 Of more troubling concern, as explained in TVA's Initial Brief (19-24) and in NEI's *amicus* brief (6-10), the majority did not articulate, much less identify, the legal standard it used to determine causation between Fiser's nonselection and his purported protected activities. The majority's finding of causation under an unidentified and unknown standard further counsels in favor of *de novo* review.

at 3; internal quotes omitted). However, the law holds that both the findings "[o]n issues of fact *and* credibility" are subject to *de novo* review since the majority applied the wrong legal standard in this case. *Senter*, 532 F.2d at 526. The majority may not shield its findings from review simply by labeling them credibility determinations. *Anderson v. Bessemer*, 470 U.S. 564, 575 (1985) (trial judge may not "insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness"). Guided by the applicable substantive law, findings must be supported by a preponderance of the "relevant, material, and reliable evidence" in the record. 10 C.F.R. § 2.743(c) (2003).

B. The majority made numerous factual findings which are clearly erroneous. TVA's initial brief showed (at 29-38) that the majority's finding of discrimination based on the nine so-called "plethora of career-damaging situations" and the "pattern of discrimination" "orchestrated by [unnamed] persons in authority" (ID 63-64) was clearly erroneous and not supported by "relevant, material, and reliable evidence" in the record (10 C.F.R.§ 2.743)(c). The Staff has adopted the nonsensical response that those findings are not clearly erroneous and not subject to Commission review simply because the majority rejected TVA's arguments "in reaching its findings" (Br. at 3). TVA petitioned the Commission for review because, in its view, the findings are in error and not supported by the record. We address the errors in the same sequence as the majority's "plethora of career-damaging situations" (ID 63).

1. Fiser was not subject to disparate treatment. Fiser, McArthur, and the hundreds of other employees whose position descriptions were rewritten were subject to the same procedure. Their existing PDs of record were compared to new PDs ***by HR*** to determine interchangeability. To avoid complaints of manipulation in the face of a probable RIF and consistent with TVA's view that OPM regulations require reliance on PDs of record, rather than the duties actually being performed on a day-to-day basis, TVA does not update any PDs in anticipation of a reorganization or RIF (TVA FoF ¶ 8.9). If HR determines that the new PD is not interchangeable with the existing PD of record, TVA's procedures require that the new position be advertised for competition.[2]

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2 The Staff now claims (Br. at 4) that the "position in which [McArthur] was placed was not interchangeable with" the position he occupied or the position for which he had an existing PD.

In this proceeding, the Staff and the majority have refused to acknowledge that TVA's actions must be measured against how TVA applies its procedures. Instead, both have argued that the procedures should have been applied in accordance with a different interpretation or even that different procedures altogether should have been used. Based on their constructed procedure, they conclude that Fiser was subject to disparate treatment.

It is undisputed that in comparing PDs, TVA's HR looks at the most recent PD of record. Further, it is TVA's practice to compare the written PDs without regard to the actual day-to-day assignments or duties of the incumbents. Nevertheless, the Staff argues that the new PD for the position filled by McArthur should have been compared to "the position [McArthur] occupied at the time of the reorganization" rather than his PD of record (Br. at 4). The Staff also argues that if, instead of using Fiser's existing PD, TVA had rewritten and updated his PD "Fiser would have retained his position" (Br. at 8). The majority would also rewrite TVA's procedures. Rather than review HR's comparison of PD's, the majority performed its own comparison, measuring the new PD against its perception of the actual duties performed by the incumbents instead of comparing it to the PD as TVA does (ID 51, n.29). In addition they infer a discriminatory motive based on TVA's noncompliance with the Staff's and the majority's preferred method of doing business. Obviously, if TVA's procedures are rewritten as did the Staff and the majority so that instead of comparing only apples, the comparison is between apples and oranges, a different result obtains.[3]

(. . . continued) That assertion is a new position taken by the Staff. During discovery in this proceeding, the Staff provided responses and supplemental responses to TVA interrogatories. See TVAX113. The Staff initially objected to informing TVA whether it contended "that the position which was filled by McArthur should have been posted" (TVAX113 at 13). Although it later provided a response (*id.* at 46), the Staff never took the position that the two PDs were not interchangeable under TVA's procedures. This new theory is but a further example of the Staff's attempt to make the facts fit any theory to support a violation.

3 The Staff's assertion that there is no evidence that upholding the majority's decision would "somehow lead to managers being unable to take appropriate actions" (Br. at 28) is simply wrong. For example, as to selections, the majority would require managers of licensees to slant interview questions in favor of those employees who have engaged in protected activities and to select advocates for such protected employees to sit on their SRBs. Such favoritism is a blatant violation of the law. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583-84 (6th Cir. 1992). Such a process would inevitably lead to selection of less than the best qualified candidates for key positions at nuclear plants. This case is the prime example. Indeed, the majority would have TVA select Fiser who, by his own admission, was not as qualified as Harvey for the PWR Program Manager

Both the Staff and the majority also ignored the key fact that, whether right or wrong in its application of procedures, ***HR made the determination***, not McGrath or McArthur—with respect to both McArthur's and Fiser's jobs. The question in this case is not whether TVA could have adopted some procedure to ensure that Fiser would not have been subject to an adverse personnel action. Rather, the issue is whether Fiser's adverse personnel action was the result of discrimination or whether it was caused by a legitimate nondiscriminatory reason (*i.e.*, the application of existing personnel procedures). At bottom, Fiser, McArthur, and other employees were subject to the same procedures as applied by HR.

2. The makeup of the SRB was not discriminatory. The Staff fails to address the fact that the SRB was constructed in accordance with TVA's procedures. It also fails to address the fact that Cox's absence from the SRB was not influenced by either McArthur or McGrath. Further, the Staff fails to address the fact that TVA's procedure is to use an ***impartial*** SRB. While it is uncontested that two of the three SRB members knew of Fiser's protected activity, neither the majority nor the Staff has ever pointed to any evidence of retaliatory motive on the part of any SRB member or any evidence that Fiser's low SRB scores were causally related to protected activity. Given that the theory of the majority and the Staff is that Fiser was discriminated against by McGrath and McArthur, it is essential to a finding of discrimination that there be evidence linking the alleged discriminating officials—McGrath and McArthur—to the SRB's decision which caused Fiser's nonselection. Absent such evidence, it cannot merely be assumed that the three SRB members acted in concert with McGrath and McArthur and with discriminatory animus towards Fiser. Moreover, some perceived "unfairness" in the make-up of the SRB, not linked in any way to protected activity, is not discrimination.

3. The questions asked by the SRB were not discriminatory. The Staff does not dispute that the questions were fair, based on TVA's needs and the problems it was having with secondary chemistry. The Staff and majority simply found them unfair to Fiser. However, the Staff and the majority are merely second-guessing the SRB's determination of the relative importance of the candidates' qualifications. Since the Staff's and the majority's theory is that

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(. . . continued) position (Tr. 4260-64 (Fiser)). The majority decision is the blueprint for the subordination of safety, efficiency, and performance in favor of preferential treatment of those who have engaged in protected activities.

McGrath and McArthur were the discriminating officials and the majority did not find that any of the SRB members acted in concert or at the behest of McGrath and McArthur, there can be no finding that the questions were selected by the SRB with a discriminatory animus.[4]

4. While admitting that the telephone conversations between Harvey and Voeller do not establish that Harvey was preselected, the Staff argues that the make-up of the SRB and the questions asked "amounted to a virtual preselection of Harvey" (Br. at 5).[5] This is simply speculation and unsupported by the record. It raises obvious questions: preselection by whom? for what reason? how does the theory fit together? The fact that Fiser was not selected by the SRB is not a basis to conclude that Harvey was preselected as part of a plot against Fiser. The purpose of the selection process is to select the best qualified candidate. It is inconceivable that the majority could find preselection simply because Harvey was better qualified to answer the SRB's questions. The law is clear that discrimination cannot be inferred from the nonselection of a complainant absent evidence that the complainant was overwhelmingly a better choice. *See Deines v. Texas Dep't of Prot. & Regulatory Svs.*, 164 F.3d 277, 280-81 (5th Cir. 1999) ("The phrase 'jump off the page and slap [you] in the face' is simply a colloquial expression that we have utilized to bring some degree of understanding of the level of disparity in qualifications required to create an inference of intentional discrimination. In its essence, the phrase should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."). Since the majority did not find that Fiser was better qualified, but indeed admitted that "Harvey had significant technical qualifications, particularly with respect to secondary chemistry" (ID 59), there is no basis to conclude that Harvey was preselected in order to discriminate against Fiser.[6]

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4 The Staff concedes that McArthur did not select any of the questions, but points out that he "wrote all but one of the questions" (Br. at 4). That is irrelevant. The SRB selected from a number of questions and was free to write their own questions (which they did).

5 This is a new position and contrary to the Staff's NOV. In response to TVA's interrogatories, the Staff said that the factual basis for the NOV's assertion of preselection was the telephone interchange (TVAX113 at 7-8) which the Staff now admits is "non-conclusive" (Br. at 5).

6 The Staff argues that "Fiser was the better qualifieds for the position" (Br. at 6). This is another new Staff position—it has never contended that Fiser should have been selected by the SRB. In fact, the SRB scored Fiser dramatically lower than the other two candidates. Asked

5. Kent's caution to the SRB "to *avoid* taking any negative action against Mr. Fiser based on [his] protected activity" (ID 79; emphasis in original) was not discriminatory. The Staff does not dispute that Kent's comment was intended as a precaution and not to discriminate (Br. at 24). The Staff, in an overabundance of zeal, again suggests that "the Commission should determine that the statement . . . *alone* would support a violation" (Br. at 24; emphasis added). Kent's comment was not only innocent of discriminatory motive, but was not a basis for the NOV (JX47 at 7). The result the Staff seeks would be absurd.

6. The lack of temporal proximity negates a finding of discrimination. The Staff ignores the fact that the only protected activity temporally proximate to Fiser's nonselection was his 1996 DOL complaint. That was not a protected activity cited by the Staff in the NOV (JX47). The Staff admits that "some decisions may have been made before Fiser filed his complaint" (Br. at 5), like the decision to reorganize to eliminate positions, the rewriting of PDs, and whether to post vacancies. It is thus impossible to infer that those decisions were caused by Fiser's 1996 DOL complaint. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). Moreover, the Staff cannot explain how the distance in time between Fiser's earlier purported protected activities and his 1996 nonselection does not dispel any suggestion of a discriminatory motive.

7. Fiser's 1993 RIF does not give rise to an inference of discrimination in 1996. Neither the majority nor the Staff have ever explained how a decision by Bynum and Keuter to RIF Fiser in 1993 is any evidence that McGrath or McArthur acted with discriminatory animus in the 1996 reorganization. While the Staff asserts that McArthur was Fiser's supervisor

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(. . . continued) whether the SRB rankings "should be disregarded," the Staff stated that it "made no contention regarding the SRB's ranking of applicants" (TVAX113 at 14). By TVA's procedure, performance appraisals were not considered by the SRB and it is inappropriate for the Staff to suggest that they should have been. The Staff also refers to Harvey's "conduct related problems" (Br. at 6) to support its new position that Fiser was better qualified. However, Harvey had received coaching on interpersonal issues, and under TVA's procedure these matters could not be considered by the SRB. Moreover, the "problems" include an incident with a woman who testified that she felt Fiser and Grover had tried to manipulate her into filing a false sexual harassment complaint against Harvey in order to affect the upcoming selection process (Tr. 2064-2072 (Landers)).

in 1993, the Staff fails to address that McArthur attempted to save Fiser's job.[7] Further, both the Staff and the majority have never come to grips with the fact that Fiser's 1993 DOL complaint named managers other than McGrath and McArthur as responsible for his RIF.

8. There is no evidence that McGrath's decision that PDs should be rewritten as part of the 1996 reorganization was based on a discriminatory animus toward Fiser. In assuming that this decision was motivated by discrimination, the majority and the Staff ignore the fact that the overwhelming majority of PDs in NOS were rewritten and that throughout TVAN literally hundreds of jobs were eliminated and new PDs were written. No satisfactory explanation has ever been offered why TVA should have treated Fiser differently. The Staff's argument (Br. at 7) that McGrath could have cut fewer positions, particularly in Chemistry, misses the point. Management is responsible for making tough decisions on how best to structure the organization and what staffing levels are needed to achieve the best results. Simply because employees are adversely affected or because there are other alternatives is not a basis to infer discrimination. *See Dabrowski v. Warner-Lambert Co.*, 815 F.2d 1076, 1079 (6th Cir. 1987) ("'[E]vidence that a competent older employee was terminated, and a younger employee was retained, is insufficient standing alone to establish a prima facie case when the employer reduces his workforce because of economic necessity.'").

9. McArthur's 1993 warning to Fiser about filing a DOL complaint is not evidence of a discriminatory intent in 1996. The Staff does not deny that the comment was not in the context of the 1996 reorganization. Nor does the Staff contradict evidence that it was not a threat, but a warning about how employers outside of TVA, where Fiser was looking for employment, might react.

II. TVA Followed Its RIF Procedures.

The Staff contends that TVA failed to follow the mandatory RIF regulations (*see* 5 C.F.R. pt. 351 (2003)) promulgated by the OPM, resulting in the unfair treatment of Fiser (Br.

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7 The Staff asserts (Br. at 4) that the "record is clear" that the Chemistry Superintendent position at SQN "was never eliminated." This is simply wrong. SQN Chemistry was combined with RadCon in about February 1993 and the Chemistry Superintendent position was eliminated (Tr. 3005-3006, 3009 (Kent); JX58). It was many months later that a Chemistry Manager job was created, a job with a different reporting relation, at a different pay grade, and with different responsibilities.

at 6-9). The Staff's simplistic view ignores the undisputed evidence. In the planning for the 1996 reorganization, Oliver Kingsley, TVA's CNO, requested a review of TVAN's corporate organization to determine how it could best support five operating units, to decide what functions it should perform, and to eliminate duplication of effort (Tr. 431-33, 752-53 (McGrath)). When McGrath assumed the position of Acting General Manager of NOS, Kingsley informed McGrath that he was dissatisfied with the corporate review that had been done and asked him to relook at it (*id.* at 754). Kingsley's primary directive to McGrath was to reorganize NOS to best support five operating reactors and to do so as soon as possible (*id.* at 822-24). The budget for NOS was also to be reduced by 40 percent over the next five years (*id.*).

In line with Kingsley's directive and future budgetary reduction, McGrath determined to reduce the number of positions in NOS just like other organizations were doing throughout TVAN (Tr. 769-70 (McGrath), 4009-12 (Boyles); TVAX62 at BI00066). The two new specialized BWR and PWR Chemistry Program Manager positions would enable Corporate Chemistry to provide in-depth expertise to the plants (Tr. 1476-77 (McArthur)), satisfying Kingsley's primary directive. In hind sight, the Staff argues that McGrath did not have to reduce NOS by "the entire 40 percent" during "the first year of the five year reorganization plan" (Br. at 7). While this is true, McGrath's philosophy was that it was better for management to be up front with employees about what was going to happen and to then proceed, instead of stretching out reductions over several years (Tr. 439-40 (McGrath)). Second guessing the wisdom or soundness of McGrath's business decision does not establish that the decision was made because Fiser had engaged in protected activity. There is simply no evidence that these decisions had any causal relation to Fiser's purported protected activities and the law is clear that it may not be assumed. *See Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266 (6th Cir. 1986) ("The fact finder may not, however, focus on the soundness of an employer's business judgment."). Indeed, TVA presented undisputed evidence that McGrath was not even aware of Fiser's 1993 DOL complaint or the Sasser letter at the time, and the 1996 DOL complaint had not yet been filed (SX133 (McGrath) at 41, 47, 93; Tr. 415-16 (McGrath)). It was the Staff's burden to prove by a preponderance of the evidence that McGrath, as the alleged retaliating official, had actual knowledge of Fiser's protected activity and that the decisions were motivated by that protected

activity. *Hayes v. Potter*, 310 F.3d 979, 982-83 (7th Cir. 2002); TVA Reply FoF at 100-02. Absent such proof, the Staff failed to prove retaliation as a matter of law.

The next step in the process was the writing of PDs for the BWR and PWR Chemistry Program Manager positions, a task that McGrath delegated to his subordinates, including Fiser (Tr. 471-72 (McGrath)). In fact, Fiser helped draft the PD for the new PWR Chemistry Program Manager position (Tr. 2332, 2767 (Fiser)). Once the new PDs were written, HR, *not* McGrath or McArthur, evaluated and compared them to the existing Chemistry and Environmental Protection Program Manager PDs (not the actual duties), and determined that the new and existing PDs were not interchangeable (SX135 (Boyles) at 32-33, 34, 35-38). The process and criteria, as set out in JX65, for evaluating new position descriptions was the same as that used for all other positions in NOS and the rest of TVAN which was impacted by the reorganization (*id.* at 32-33; Tr. 5414-15 (Fogleman)). HR's determination meant that under OPM regulations, as applied by TVA, the incumbents of the existing positions did not have retention standing for the new positions. Thus, under TVA practice (JX65), the new positions would be advertised to allow employees to apply and compete for the jobs. In short, when HR determined that the PDs were not interchangeable, there was not a RIF situation and the OPM RIF regulations were inapplicable (SX135 (Boyles) at 34).

The Staff (Br. at 8) is critical of HR's determination because the PDs for the existing Chemistry and Environmental Protection Program Managers purportedly did not accurately reflect their job duties. Such criticism in no way establishes discriminatory animus for several reasons. First, the evidence is undisputed that under TVA's policy (JX65) HR compares new PDs to the official PD of record to make interchangeability determinations (SX135 (Boyles) at 32-33; Tr. 5414-15 (Fogleman)) and does not look at the various duties being performed by the incumbents. As pointed out above, HR does not update PDs in anticipation of a RIF. The evidence is undisputed that this is the same way HR has always applied the policy (JX65), including during the 1994 reorganization when HR also determined that the Chemistry and Environmental Protection Program Manager position was not interchangeable with the Chemistry Program Manager and Environmental Protection Program Manager positions, necessitating Fiser and the other incumbents of those positions to compete (SX135 (Boyles) at 32-33, 34-35, 36-38).

Fiser was treated the same as all other employees and this decision cannot give rise to an inference of discrimination as a matter of law. *See Mitchell*, 964 F.2d at 583-84; Initial Br. at 31. Second, HR's comparison of new PDs with the official PD of record to make its determination of interchangeability under the policy has been specifically upheld by the MSPB, the agency with responsibility for reviewing the correct application of OPM's RIF regulations. *See Trahan v. TVA*, 31 M.S.P.R. 391 (1986). Third, the Staff did not charge that the HR employees who made the interchangeability determination discriminated against Fiser (JX47, JX48, JX49). Such decisions therefore cannot reflect discriminatory animus as a matter of law on the part of McGrath and McArthur. *See Mitchell v. Iowa Prot. & Advocacy Servs., Inc.*, 325 F.3d 1011, 1014-15 (8th Cir. 2003); Initial Br. at 30-31.

III. The Majority's View of Protected Activity Is Contrary to Law.

A. TVA's interpretation of "Protected Activities" is consistent with Section 50.7 and Section 211. The Staff argues (Br. at 9-11) that the Commission should reject TVA's, NEI's, and the dissenting Board member's position that Fiser's "participation" in the resolution of already-identified safety issues does not constitute protected activity under Section 50.7. In particular, the Staff characterizes (at 9) this position as "extremely narrow," "restricted," and "at odds with the language and purpose of" Section 50.7 and Section 211 "and with appropriate precedent." The Staff's reading and interpretation of "protected activities" under Section 50.7 to include participation in the resolution of already-identified safety issues is erroneous.[8] *See Union Elec. Co.*, ALAB-527, 9 NRC 126, 135 (1979) ("We keep in mind, however, that the party who urges a reading not apparent on the face of a statute [or regulation] bears the burden of showing a basis for the departure.").

The Staff chides the dissent for purportedly adopting an "I know it when I see it" interpretation of "protected activities" (Br. at 9; internal quotes omitted). It is the Staff's position, not the dissent's, however, that is shallow and lacking in legal soundness. The dissent simply pointed out that it would not be reasonable to include participation in the resolution of already-identified issues as protected activity since that is not the type of activity likely to be undertaken

8 In another change of position, the Staff did not so broadly interpret "protected activities" until after the majority's decision.

against the wishes of the employer (ID 72-73). This observation is consistent with the rationale and purpose for the enactment of whistleblower protection provisions: to foster an environment in the workplace in which employees feel free to provide information free from the fear of retaliation. The Staff does not dispute that the dissent's observation is specifically supported by the Commission's own comments regarding its 1982 amendment to Section 50.7 and statements of Commissioners made in connection with their consideration of SECY-02-0166 (Mar. 26, 2003) (see TVA's Initial Br. at 27). Most important, Fiser's participation in the resolution of already-identified safety issues was not, nor could it be perceived as, activity or conduct against the wishes of TVA to address safety concerns that would otherwise go unaddressed (ID 72-73). Indeed, the evidence here is undisputed that TVA management instructed Fiser to help correct safety concerns, ***after*** they had been identified and reported by others (*id.*). Regarding Fiser's participation in the resolution of already-identified safety issues as protected activity is contrary to the letter and spirit of Section 50.7.

Despite the obvious gap in the Staff's analysis, they nevertheless argue (Br. at 9) that Fiser's participation in the resolution of already-identified safety issues should be considered protected activity because "Section 50.7(a)(1)(iv) [*sic*] specifically covers 'assisting' others who engage in protected activity as well as any 'participation' in protected activities." This contention, however, is contrary to the plain language of 10 C.F.R. § 50.7(a)(1)(v) (2003). The language of this provision is unequivocal that an employee's "assisting" others or "participating" in any of the protected activities or conduct listed enumerated in 10 C.F.R. §§ 50.7(a)(1)(i)-(iv) (2003)—is itself protected activity under Section 50.7. But there is no evidence, and the majority did not find, that Fiser's participation in the resolution of already-identified safety issues consisted of "assisting or participating" in "[p]roviding the Commission or [TVA] information about alleged violations of" the AEA or Section 211; "[r]efusing to engage in any practice made unlawful under either" the AEA or Section 211; "[r]equesting the Commission to institute action against" TVA; or "[t]estifying in any" proceeding before the Commission, Congress, or any federal or state agency "regarding any provision" of the AEA or Section 211. *See* Section 50.7(a)(1)(i)-(iv). The evidence here is simple, straightforward, and undisputed that TVA management instructed Fiser to help correct safety concerns that had been previously identified and reported by others (ID 72-73).

The Staff attributes (Br. at 9) to TVA the argument that both Section 50.7 and Section 211 "require[] that an individual [must] be the first one to find, raise, report or document a safety issue" to engage in protected activity. TVA has taken no such position in this litigation. In discussing *Zinn v. Univ. of Missouri*, 1993-ERA-34 (Sec'y Jan. 18, 1996), TVA noted in its Initial Brief (at 25) that employees who pursue previously identified, raised, or reported safety concerns themselves engage in protected activity. But that is not the case here, where the Staff put on no evidence, nor does the record otherwise reflect, that Fiser pursued a previously identified, raised, or reported safety concern. Rather than pursuing safety concerns, Fiser was performing (or not performing as the case may be) tasks that were assigned to him by his supervisors (ID 74).

The Staff cites (Br. at 10) *DeFord v. Sec'y of Labor*, 700 F.2d 281 (6th Cir. 1983), and *McCafferty v. Centerior Energy*, 1996-ERA-6 (ARB Oct. 16, 1996), ostensibly as support that Fiser's participation in the resolution of already-identified safety issues is protected activity under Section 50.7. These cases are of no help to the Staff. *DeFord* simply stands for the proposition that an employee's participation in an NRC investigation (in this case, "discuss[ing] certain [previously reported] problems and concerns of the quality assurance staff with NRC personnel") is "participat[ion] in an NRC proceeding under either the Energy Reorganization Act of 1974 or the Atomic Energy Act of 1954" and is thus protected activity. 700 F.2d at 283, 286. The Staff does not contend here that Fiser's "participation" was tantamount to "participating in an NRC proceeding under either" the ERA or AEA. *Id.* And *McCafferty* simply stands for the proposition that an employee who files a lawsuit under the Price-Anderson Act, 42 U.S.C. § 2210 (2000), even if filed after the reporting of safety concerns, engages in protected activity because the filing of the Price-Andersen Act lawsuit is "on its face" "a 'proceeding . . . under the Atomic Energy Act.'" 1996-ERA-6, at 3. Fiser did not file a suit under the Price-Anderson Act.

B. Fiser did not engage in "Protected Activities" beyond his DOL complaints and the Sasser Letter. The Staff sets up a straw man, arguing that the filing of a DOL complaint is protected activity and that there is no requirement for "the protected activities to include a 'technical' issue" (Br. at 11). The Board so held and TVA agrees. However, the Staff misses the point raised by the majority, the dissent, and TVA regarding "technical" issues. The existence of "technical issues" and management's positive or negative reaction to them are central to a case of

discrimination (*i.e.*, whether an adverse action ***motivated*** by protected activity). The classic case of whistleblower discrimination is an attempt to cover up safety issues and the attempted cover-up is evidence of discriminatory animus. The polar opposite, the absence of a motive to retaliate, is where the employer promptly takes action to correct a problem, as pointed out in *McCafferty*, a case quoted at length by the Staff (Br. at 10).

The Staff asserts that "Fiser did in fact engage in finding and/or pursuing technical concerns" and claims that the diesel generator fuel oil issue is a "prime example" (Br. at 11). The Staff then goes on to assert that "Fiser and his team discovered" problems and "that Fiser and his staff were responsible for finding, documenting, and correcting" the problem (*id.* at 12). The Staff's claims of Fiser's involvement are just as misleading as Fiser's claims that ***he*** was involved in the "discovery, raising, reporting or documenting" of any safety matters (ID 75).[9] As pointed out by the dissent (ID 73-74), the issue was discovered by others and Fiser was directed to not only look into it, but to explain how SQN Chemistry had missed the problem earlier. The Staff's suggestion (Br. at 11-12) that Fiser bore no responsibility for missing the problem is also misleading. Fiser was in charge of SQN Chemistry when the incorrect procedure was revised (revisions 12 and 13) without discovering the problem (Tr. 4903-04, 4908-09 (Burzynski); TVAX128 at FI 82-83). Although Fiser was not disciplined, it is likely that any discussion of discipline was based on his failure to identify the issue (Tr. 4909-10 (Burzynski)).

The Staff continues to claim that Fiser's refusal to proceduralize data trending was protected activity asserting that "all that is required is a good faith belief on Fiser's part that a violation would occur" (Br. at 13). That is not what happened here. As pointed out in NEI's brief (at 18), a refusal to work based on a concern that the ***particular*** activity violates the AEA or NRC regulations is protected activity. Data trending and proceduralizing trending are not violations and Fiser never claimed that they were. His claim to have refused to do something legal—adopting a procedure to enhance plant efficiency and safety—out of a hypothetical concern that he would be unable to meet management expectations and might thereby cause a violation is simply not protected. *Skelly v. TVA*, 1987-ERA-8 at 10 (ALJ Feb. 22, 1989) (The employee's concerns

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9 Throughout his testimony and in his DOL complaints, Fiser attempted to unfairly take credit for discovery and documenting problems by asserting that "I," "we," and he and his "staff" discussed and documented problems (*e.g.*, TVA FoF ¶¶ 4.13, 4.19, 4.33-4.35)

about working to meet management expectations were "not at the expense of safety" and not protected by the ERA), *adopted* (Sec'y Mar. 21, 1994).

IV. The Majority Did Not Apply the Correct Causal Nexus Standard.

The majority did not articulate and apply the proper standard of causation. Section 50.7 requires the Staff to prove that adverse action was taken ***because*** of protected activity. Thus the regulation requires that the protected activity be proven to be the motivating factor in the alleged adverse action. The majority and the Staff both confuse the interpretation of Section 50.7 with the authority of the Commission to "take action against licensees who discriminate" (Br. at 14; see ID 11). TVA does not dispute that the Commission has authority independent of the ERA to adopt an anti-discrimination rule. The question is not whether the Commission could promulgate a standard different from Section 210/211, but having adopted Section 50.7, how it should be interpreted and applied.

When the Commission added Section 50.7, it was expressly patterned after Section 210 of the ERA. After Congress amended the ERA in 1992, the Commission amended Section 50.7 to conform the scope of protected activities. Although Congress also amended Section 210/211 to change the causation standard, to specify the legal paradigm, and to deal with dual-motive cases, the Commission did not incorporate any of those changes into Section 50.7. Thus, the causation standard, the legal paradigm, and the dual-motive analyses remain consistent with the Section 210 standards prior to the 1992 Congressional amendments.[10] The case cited by the Staff (Br. at 15 n.10), *Kester v. Carolina P&L Co.*, 2000-ERA-31 (ARB Sept. 30, 2003), holds that the pre-1992 ERA causation standard (and therefore the Section 50.7 standard) is the "'motivating factor'" standard (*Kester*, at 3 n.15).[11]

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10 The Staff argues that the Commission should look to "relevant case law under Title VII and other antidiscrimination statutes when analyzing a violation of Section 50.7" (Br. at 16). However, the Staff argues that it is "an untenable position" to look at "the state of the law under Title VII . . . as it existed prior to its amendment in 1991 and prior to the 1992 amendments to the ERA" (Br. at 14 n.9). We agree that the Commission should look to Title VII case law for guidance in analyzing Section 50.7, but it must be measured against the law prior to the 1991 Civil Rights Act and the 1992 ERA amendments since Section 50.7 has not been amended to reflect the changes to Title VII and the ERA with respect to causation, legal paradigm, and dual-motive.

11 The Staff sets up another straw man argument that TVA and NEI are urging the Commission to adopt Section 211(b)(3)(D). That is not the case. That provision was adopted by Congress in 1992 and, like other changes to Section 211, has not been incorporated into

The Staff argues (Br. at 16) about the paradigm to prove discrimination based on circumstantial evidence (*e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). TVA agrees that this case should have been analyzed against that standard, which the Board did not do. The Staff also discusses (Br. at 18-19) proof of discrimination without resorting to the shifting burdens in *McDonnell Douglas*, often referred to as a dual-motive analysis. The Staff once again misstates TVA's argument. TVA is not saying that type of case requires evidence of a direct statement of discrimination, but that the evidence must show "a specific link between an improper motive and the challenged employment decision." *Carroll v. DOL*, 78 F.3d 352, 357 (8th Cir. 1996). Although the majority proclaimed that this was a "dual-motive" case (ID 12), it never pointed to any conduct or statements that "actually relate to the question of discrimination ***in the particular employment decision***, not to the mere existence of other, potentially unrelated, forms of discrimination." *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1998); emphasis in original. While the Staff purports to rely on *Desert Palace Inc. v. Costa*, 123 S. Ct. 2148 (2003), there is no evidence in this case, as there was there, that an illegitimate consideration was a motivating factor. In *Desert Palace*, the Supreme Court itemized how the illegitimate factor of sex was involved in plaintiff's treatment, including sex-based slurs and " 'intense "stalking" ' by one of her supervisors" (123 S. Ct. at 2152). Here there is no link to show that Fiser's protected activities were considered in any of the employment decisions, the reorganization, the elimination of jobs, the rewriting of PDs, HR's determination of the interchangeability of PDs, the composition of the SRB, or the interview questions.

One final note, the Staff asserts that "the Board found that the reasons proffered by TVA were not credible," thus compelling a finding of discrimination (Br. at 20). Once again the Staff is guilty of mischaracterization. The majority in fact found that TVA had legitimate reasons for the reorganization and for Fiser's nonselection. The majority did not measure TVA's actions against TVA's procedures; instead, it substituted its judgment as to how TVA should conduct its HR business. While that was inappropriate on the majority's part, it was hardly a finding that TVA's reasons were not credible. While the majority may have thought TVA's

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(. . . continued) Section 50.7. Instead, dual-motive cases under Section 50.7 are subject to the analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the Supreme Court interpreted a "because of" standard directly comparable to the language of Section 50.7.

judgments were incorrect, that hardly compels a conclusion that an incorrect judgment was motivated by discrimination. Because it is management's responsibility to exercise its discretion to make judgment calls, the Commission should recognize that management has the latitude to make honest mistakes in judgment without being accused of harboring an illegitimate motive. TVA has fully cooperated to give its honest and good-faith explanations of its reasons for the 1996 reorganization and how it adversely affected Fiser. The Staff simply exercises too much zeal in its heavy-handed threat of a Section 50.9 violation.

V. TVA Was Not Provided Fair Notice.

The Staff does not dispute that the NOV charged that TVA retaliated against Fiser because of his "identification of chemistry related nuclear safety concerns in 1991-1993, and [his] subsequent filing of a DOL complaint in September 1993 based, in part, on these chemistry related nuclear safety concerns" (JX47 at AB26). Nor does the Staff dispute that the civil penalty was imposed against TVA on that basis alone. But the majority sustained the NOV not only on the basis set forth in the NOV but also purportedly because of Fiser's participation in the resolution of already-identified safety issues; filing the 1996 ERA complaint; and coauthoring the Sasser letter (ID 31-47).

The Staff contends that the majority's reliance on the three unstated bases was proper, "regardless of whether they were raised in the NOV," because TVA was provided adequate notice of these matters "sufficient to provide a real opportunity to be heard" (Br. at 26). Specifically, the Staff states that it "raised" and thus apprised TVA of its intention of relying on these activities "numerous times before and during the hearing" (*id.* at 27). This ignores the requirements of applicable regulation and Commission precedent. To be adequate, the required notice must be provided in the NOV.

The Commission's regulation requires that, "[b]efore instituting any proceeding to impose a civil penalty," the Director of Enforcement "shall serve a written notice of violation upon the person charged" in which the Director "shall specify the date or dates, facts, and the nature of the alleged act or omission with which the person is charged" and the "proposed penalty." 10 C.F.R. § 2.205(a) (2003). The person so charged then must be given an opportunity to submit a written answer why the proposed civil penalty should not be imposed. 10 C.F.R.

§§ 2.205(a), (b). If these procedural requirements are not followed, the imposition of a civil penalty is improper as a matter of law. The decision in *Metro. Edison Co.*, CLI-82-31, 16 NRC 1236 (1982), in which the licensee was not provided the required notice in the NOV nor afforded the opportunity to submit a written answer, is directly in point. Due to the lack of notice and opportunity to respond ***before*** the imposition of the civil penalty, the Commission vacated the civil penalty, holding:

> Finally, section 234 of the Atomic Energy Act, 42 U.S.C. 2282(b), and the Commission's regulations, 10 CFR 2.205, set forth procedural requirements ***which must be followed prior to imposition of a civil penalty***. A person subject to imposition of a fine ***must*** be given written notice of (1) the specific statutory, regulatory or license violations, (2) the date, facts and nature of the act or omission with which he is charged, and (3) the proposed penalty. The person subject to the fine ***must*** then be given an opportunity to show in writing why the penalty should not be imposed. None of those steps were followed here [*Metro. Edison Co.*, 16 NRC at 1238].

Accord, Radiation Tech., Inc., ALAB-567, 10 NRC 533, 537 (1979); Initial Br. at 39.

Here, the Director of Enforcement did ***not*** charge in a "written notice of [violation]" that TVA retaliated against Fiser because of his participation in the resolution of already-identified safety issues; filing the 1996 ERA complaint; or coauthoring the Sasser letter (JX47 at AB26). Moreover, prior to imposing the civil penalty, TVA was ***not*** "given an opportunity to show in writing why the penalty should not be imposed" as to those same matters. *Metro. Edison Co.*, 16 NRC at 1238. Since TVA was not issued an amended or superseding NOV that included the charge that TVA violated Section 50.7 when it purportedly retaliated against Fiser because of these previously unidentified protected activities and was not provided the opportunity to respond to these charges ***prior*** to the imposition of the civil penalty, the majority's reliance on these activities to sustain the NOV is a violation of TVA's procedural rights.

CONCLUSION

The ultimate question in this case is the one posed by the dissent: Has the Staff shown by a preponderance of the evidence that Fiser was not selected because he engaged in protected activity? As the dissent also concluded, it has not. The Staff's case simply lacks a coherent, sensible theory. Instead, its theory is infinitely mutable, such that every counter-argument is met with a new theory. McGrath and McArthur are not aware of the alleged

protected activity, so the claimed protected activity changes. Fiser did not identify, raise, or document the concerns he claimed, so a new class of protected activity is created to include participation, at the direction of management, in addressing the concerns. While the Staff charges McGrath and McArthur, the evidence does not reasonably support any reasonable motivation on their part to retaliate years after the fact. When it is shown that they did not make key decisions, the Staff and majority suggest an "unseen hand" requiring participation by individuals such as the SRB members and organizations such as HR and TVA's OGC. In the end, the Staff's theory is simply too cynical. It strains credulity. The facts can much more reasonably be read and interpreted as suggested by TVA and the dissent: that Fiser was accorded the same process as every other similarly situated employee and that he failed to win the job. He may have had some bad luck (when Cox removed himself from the SRB), but based on the totality of the record, the Staff has not met its burden to prove discrimination.

At bottom, TVA believes that McGrath and McArthur were not in any part or in any way motivated by Fiser's alleged protected activities. They were motivated to do their jobs—including carrying out the reorganization mandated by senior management—to the best of their abilities. They followed applicable processes and appropriately utilized other TVA organizations to assist with important and necessary decisions, such as posting decisions. TVA believes that there was no violation and that the individual managers deserve to be vindicated. TVA also believes that the Commission must set a precedent that will prevent Section 50.7 from being stretched to a degree where a violation can arbitrarily be based on nothing more than second guessing procedures and decisions and on variations that enter any human process. The ability of managers to manage based on nonprohibited considerations, as preserved in 10 C.F.R. § 50.7(d), must be protected.

Based on the foregoing reasons and authorities, the Commission should reverse the majority's decision and vacate the NOVs issued by the Staff to TVA, McArthur, and McGrath.

November 24, 2003

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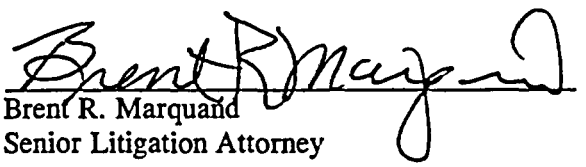

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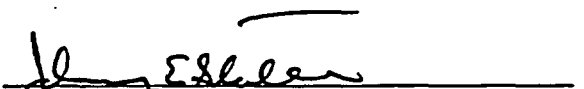

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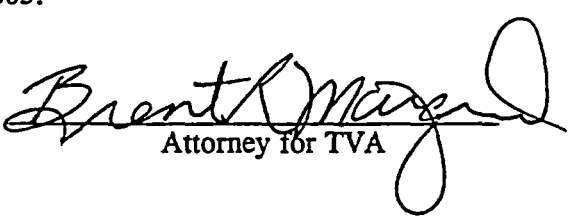

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