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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
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 REPLY TO BRIEFS OF TENNESSEE VALLEY AUTHORITY AND THE NUCLEAR ENERGY INSTITUTE ON THE ISSUE OF CIVIL PENALTY MITIGATION

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INTRODUCTION

Pursuant to the "Memorandum and Order" dated August 28, 2003, CLI-03-09, ("Order"), the NRC Staff ("Staff") now replies to the briefs filed in this appeal by Tennessee Valley Authority ("TVA") and the Nuclear Energy Institute ("NEI") on the issue of civil penalty mitigation.[1]

DISCUSSION

I. The Board May Mitigate A Civil Penalty But May Not Do So Where the Staff Has Properly Followed The Enforcement Policy

The Staff agrees that, under 10 C.F.R. § 2.205(f), the Board has the authority to mitigate a civil penalty. However, in this case, the Board exercised that authority inappropriately. While § 2.205(f) gives the Board the authority to review civil penalties, the Commission's Enforcement Policy,[2] in Section III, states that ". . . the ***NRC Staff*** may depart, where warranted in the public's

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[1] *See* Tennessee Valley Authority's Brief of the Issue of Mitigation dated November 4, 2003 ("TVA Mitigation Brief"); Brief *Amicus Curiae* of the Nuclear Energy Institute on the Issue of Civil Penalty Mitigation dated November 5, 2003 ("NEI Mitigation Brief").

[2] NUREG-1600, 64 Fed. Reg. 61,142 (November 9, 1999).

interest, from this policy as provided in Section VII" (emphasis added). This implies that the Commission intended for the Board to have the authority to review the Staff's exercise of discretion, but not the authority to substitute its own discretion for that exercised under the policy.[3] Contrary to the assertions of NEI and TVA, this does not leave the Staff's implementation of the policy without oversight or fundamentally alter the scope of the hearing opportunity. The Staff's discretion is constrained by the Enforcement Policy, and certainly, the Board has the authority review the evidence *de novo* to determine whether the Staff properly followed that policy. However, where the Board finds that the Staff properly followed the Enforcement Policy, as it did in this case (I.D. at 67), the Board may not substitute its judgment for that of the Staff.[4]

II. The Board's Mitigation Is Not Consistent With The Dictates Of The Enforcement Policy

Even assuming the Board has the authority to exercise discretion to mitigate a civil penalty, the Staff believes that discretion is limited by the Enforcement Policy. In this case, the Board's mitigation of the civil penalty is not consistent with that policy. Section VII.B.5 of the Enforcement Policy discusses mitigation of a civil penalty for violations involving discrimination. This section states that discretion "would normally not be exercised in cases in which the licensee does not appropriately address the overall work environment . . . or in cases that involve . . . allegations of

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[3]Such a result would negate the very consistency and predictability that the Enforcement Policy seeks to ensure. *See* 63 FR 26,630 (May 13, 1998); 60 Fed. Reg. 34,381 (June 30, 1995).

[4]Prior to adoption of the first Enforcement Policy in 1980, the Board had the authority to substitute its judgment for that of the Staff. *See* TVA Mitigation Brief at 3-4; NEI Mitigation Brief at 3; Staff Mitigation Brief at 8, *citing Atlantic Research Corp*., 11 NRC 841 (1980) and *Radiation Tech., Inc.*, ALAB-567, 10 NRC 533 (1979). However, the Staff maintains that the Commission's adoption of the Enforcement Policy supercedes *Atlantic Research* and *Radiation Tech.* TVA and NEI cite *Consol. X-Ray Serv. Corp.* to support their argument to the contrary. ALJ-83-2, 17 NRC 693 (1983). However, that is a decision by an ALJ that was never reviewed by the Commission or an Appeal Board. Thus, it is not binding precedent, and because it is inconsistent with the intent of the Enforcement Policy, the Commission should not follow it. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI 98-25, 48 NRC 325, 343, n.3.

discrimination caused by a manager above the first-line supervisor." In this case, the Board found that TVA fosters a work environment hostile to whistle blowers. I.D. at 33-35. It does not appear that the Board took this or the involvement of higher level managers into account when deciding to mitigate TVA's penalty. Instead, the Board relied on Section VII.B.6 of the Enforcement Policy, which says that a penalty may be reduced based on, among other things, the significance of the violation or the clarity of the requirement. However, "this discretion is expected to be exercised only where application of the normal guidance in the policy is unwarranted."

III. The Board's Mitigation Based On The Minor Role Of The Discrimination Was Inappropriate

The Board found that Mr. Fiser's protected activities played a minor role in his failure to be retained. I.D. at 67. However, it appears that this finding is based on a determination that his failure to be retained was "premised at least to some degree on TVA's view of Mr. Fiser's work history." *Id.* As discussed in the Staff's Mitigation Brief, at 3-5, this finding is contrary to the evidence. In fact, TVA, in its Mitigation Brief, at 8-9, reiterates that Fiser's past performance did not play a role in his non-selection.[5] TVA argues that the "performance-oriented reason" was the reorganization, not Fiser's past performance. TVA Mitigation Brief at 8. However, the Board did not discuss the reorganization in its analysis of the civil penalty, I.D. at 65-68, and a reorganization is not a performance-oriented reason. In addition, the Board found that if standard RIF procedures had been used, Mr. Fiser would have been retained, I.D. at 67, and did not find that TVA had a legitimate reason for not following RIF procedures. Thus, it is irrelevant that TVA had a legitimate

[5]TVA also misinterprets the Staff's discussion of 10 C.F.R. 50.9. *See* TVA Mitigation Brief at 10. The Staff, in its Mitigation Brief (at 4), pointed out that there was no evidence to support the Board's finding that TVA's decision was based on Fiser's work history. The Staff did not request review of TVA's compliance with section 50.9, nor did it threaten TVA with a section 50.9 violation. In fact, the Staff specifically agreed with TVA's assertion that it had not considered Fiser's prior work history and noted that TVA had consistently maintained this position. The Staff raised the issue of section 50.9 only to illustrate the problems raised when the Board found, contrary to all evidence, that TVA was motivated in part by Fiser's past job performance.

reason for the reorganization, because that legitimate purpose would have been accomplished without Fiser losing his job if TVA had not employed its RIF procedures in a discriminatory manner.

IV. The Board's Mitigation Based On Lack Of Notice Of The Standards Was Inappropriate

The Staff has consistently argued that the appropriate standard to apply in this case is the standard applied by DOL to cases arising under section 211 of the ERA. Specifically, a violation of section 50.7 occurs if protected activity is a contributing factor in a decision to take an adverse action. While the Staff maintains that DOL interpretations are not binding on the NRC, the Staff has consistently advocated using DOL decisions under section 211 to guide NRC discrimination determinations. This is precisely the standard that TVA and NEI have urged the Board to adopt.[6] In its Mitigation Brief, however, TVA has apparently found a standard that it likes better than the section 211 standard advanced in all its previous filings. TVA Mitigation Brief at 13, n.13. TVA now argues that, rather than applying the standards of section 211 (which TVA acknowledges would not include section 211(b)(3)(D) because it applies only to remedies), the appropriate standard is to analyze section 50.7 in accordance with section 210 as it existed prior to 1992 (*i.e.*, when the standard for determining remedies and violations was the same). TVA claims that when the Commission adopted section 50.7, its silence on the standards for finding discrimination indicated an intent to adopt the standards of section 210.[7] TVA then concludes that, when the Commission amended section 50.7 to reflect amendments to section 210, a similar silence on the standards for finding discrimination indicated the Commission's intent not to adopt the standards of the new

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[6]*See* Tennessee Valley Authority's Reply to a Notice of Violation dated January 22, 2001 at E1-6; First Prehearing Conference, July 19, 2001, Tr. 9-15; Tennessee Valley Authority's Prehearing Brief dated March 4, 2002 at 42-45; Brief *Amicus Curiae* of the Nuclear Energy Institute dated March 1, 2002 at 4-6.

[7]In adopting this regulation, the Commission said that it was "intended . . . to implement section 210" but did not discuss the standard for finding discrimination. Protection of Employees Who Provide Information, Final Rule, 47 Fed. Reg. 30,452 (July 14, 1982).

section 211.[8] Such a contradictory interpretation simply is not logical. While TVA may not agree with the manner in which the standard was applied, it cannot expect the Commission to believe that it did not have notice of the very standard (that of section 211) that it has advocated.

In addition, as noted in Staff's Mitigation Brief, at 7, TVA should have been aware that it is a per se violation of section 211 to announce that an employee has filed DOL complaints.[9] TVA correctly points out that the Board did not reach this issue in its Initial Decision. The Board may have felt it was unnecessary to the decision. However, since this issue was raised during the proceeding, it is not inappropriate for the Commission to consider it if it is necessary to a decision.

CONCLUSION

For the foregoing reasons, the Staff respectfully submits that the Board applied inappropriate standards in its decision to mitigate the civil penalty in this case and that its decision to do so should be reversed.

Respectfully submitted,

/RA/
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/RA/
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Dated at Rockville, Maryland
this 21st day of November, 2003

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[8]The Commission noted that this amendment reflected the changes in section 210/211, but again did not address the standard for finding discrimination. Whistleblower Protection for Employees of NRC-Licensed Activities, Final Rule, 58 Fed. Reg 52,406 (October 8, 1993).

[9]TVA argues that DOL case law requires discriminatory purpose or retaliatory motive. TVA Mitigation Brief at 15, n. 15, *citing Earwood v. Dart Container Corp.,* 93-STA-16 (Sec'y Dec. 7, 1994). The Staff disagrees and notes that *Earwood* prohibits any improper references to an employee's protected activity. The Staff also notes that such a statement may itself constitute direct evidence of discriminatory purpose. *See Garballa v. The Atlantic Group, Inc.*, 94-ERA-9, (Secy Jan. 18, 1996) (noting that a "supervisor's negative comment about contacts with NRC is direct evidence of discrimination" and that "comments by a manger or others involved in [an] employment decision may constitute direct evidence of discrimination." (citations omitted)).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO BRIEFS OF THE TENNESSEE VALLEY AUTHORITY AND THE NUCLEAR ENERGY INSTITUTE ON THE ISSUE OF CIVIL PENALTY MITIGATION" 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 21st day of November, 2003.

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