Benowitz, Howard

From: Baxter, Brad
Sent: Monday, July 18, 2016 1:52 PM
To: St. Amour, Norman; Benowitz, Howard
Subject: FW: NEI Arbitration List

Importance: High

Norm/Howard,

(b)(5)

Brad

From: Baxter, Brad
Sent: Friday, July 15, 2016 8:57 AM
To: Khanna, Meena <Meena.Khanna@nrc.gov>; Jordan, Natreon <Natreon.Jordan@nrc.gov>; Sanders, Aaron <Aaron.Sanders@nrc.gov>
Cc: Resner, Mark <Mark.Resner@nrc.gov>
Subject: NEI Arbitration List
Importance: High

All,

As mentioned yesterday..

(b)(5)

1. Exelon—Dresden (2) cases-falsifications, (both recently decided)
2. Exelon—1 case settled in 2013 prior to arbitration—Theft/Lying during a company investigation
3. Exelon reports possible up-coming challenges to the "Abstinence Letters" required by the SAEs
4. NextEra—Point Beach for DUI, (recently decided in favor of individual)
5. Dominion—Millstone FFD test denial, (recently decided favor of individual)
6. PSEG Nuclear—Salem-Hope Creek (decided in licensee favor and upheld by Fed circuit court 2001 court case)
7. STP Nuclear Operating Co.—South Texas Project—Decided on behalf of the worker that was denied 8 years ago (criminal omission).
8. Entergy—Pilgrim 3 Arbitrations
    a. 1 settled prior to arbitration
    b. 1 decided for company
    c. 1 on-going at this time
9. American Electric Power—1 Arbitration decided for company

10. Xcel Energy-- Prairie Island (3) cases-Falsification, (1 recently decided, 1 arbitrated decision pending, 1 arbitration pending early 2015).

(b)(5)

1. Beaver Valley-Chattanooga TN shooter – Killing of 4 Marines (Youssef Abdulazeez)- Never got access due to failed FFD test April 2015
2. VC Summer-Arsonist (I believe he worked in maintenance) 2012
3. Turkey Point- Tampering of security force weapons (AR-15s) and vandalizing response team vest and gas mask (4 security personnel involved) 2005

(b)(5)

1. TMI, Salem-Hope Creek, Calvert, Peach Bottom, Limerick- (Sharif Mobley) laborer for refueling outages (2002-2008).
2. Dresden-Senior control room operators (Armed armor car hi-jacking, theft)

(b)(5)

1. DC Cook – Murder suicide (husband and wife) (I&C tech)-April 2016
2. Bryon- Murder suicide (husband and wife) (warehouse worker) June 2012
3. Davis-Besse-Murder suicide (5 killed-husband, wife, 3 kids) (employed in maintenance dept) April 2011

Hope this helps...

Brad Baxter
U.S. Nuclear Regulatory Commission
Access Authorization Program Manager
Office of Nuclear Security and Incident Response
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M/S-3WFN-08C64

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27 Fed.Appx. 127, 2002 WL 125586 (C.A.3 (N.J.)), 171 L.R.R.M. (BNA) 3214
(Not Selected for publication in the Federal Reporter)
(Cite as: 27 Fed.Appx. 127, 2002 WL 125586 (C.A.3 (N.J.)))

United States Court of Appeals,
Third Circuit.
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
v.
LOCAL 94 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Appellant.

No. 01-2147.
Submitted Under Third Circuit LAR 34.1(a) Jan. 14, 2002.
Opinion Filed Jan. 31, 2002.

On Appeal from the United States District Court for the District of New Jersey, (District Court No. 99-CV-3634) Magistrate Judge: John J. Hughes.

Before ALITO and ROTH, Circuit Judges, and SCHWARZER, Senior District Judge.

MEMORANDUM OPINION OF THE COURT
**1 PER CURIAM.

The facts and procedural background of this case are familiar to the parties. Pursuant to its statutory authority under 42 U.S.C. § 2201(i), the Nuclear Regulatory Commission has adopted regulations to ensure that individuals with unescorted access*128 to protected areas of a nuclear power plant are sufficiently trustworthy and do not pose an unreasonable risk to public health and safety, including "the potential to commit radiological sabotage." 10 C.F.R. § 73.56 (2000). To screen individuals, nuclear power plant licensees must have in place an access authorization program as part of the facility's physical security plan, and this plan must be approved by the Commission. See *id.*

We hold that the District Court below properly granted Appellee's motion for summary judgment and properly denied Appellant's cross-motions for summary judgment. In his 39 page Opinion accompanying the Order, dated April 6, 2001, the Magistrate Judge correctly held that issues of site access for employees are not subject to arbitration under the grievance and arbitration provisions of the current collective bargaining agreement between the employer, PSE & G, and the union, Local 94. We have considered all of Appellant's arguments and find no ground to reverse.

The Order of the District Court is AFFIRMED.

C.A.3 (N.J.),2002.
Public Service Elec. & Gas Co. v. Local 94 Intern. Broth. of Elec. Workers
27 Fed.Appx. 127, 2002 WL 125586 (C.A.3 (N.J.)), 171 L.R.R.M. (BNA) 3214

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--- F.Supp.2d ----, 2013 WL 5881245 (D.Mass.), 197 L.R.R.M. (BNA) 2428
(Cite as: 2013 WL 5881245 (D.Mass.))

C

United States District Court,
D. Massachusetts.
MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Plaintiff,
v.
RESEARCH, DEVELOPMENT AND TECHNICAL EMPLOYEES UNION, Defendant.

Civil Action No. 12–11315–WGY.
Nov. 4, 2013.

Background: Privately endowed research university brought action against labor organization representing research, development and technical employees, seeking declaratory judgment that revocation of unrestricted access to nuclear research facility was not arbitrable grievance under collective bargaining agreement (CBA) between parties and asking court to enjoin union from arbitrating unrestricted access revocation issue. University moved for judgment on the pleadings.

Holdings: The District Court, Young J., held that:
(1) university had presented court with "actual controversy" as required under Declaratory Judgment Act;
(2) issue of arbitrability was question to be decided by court;
(3) university's decision to deny unescorted access privileges was subject to arbitration under agreement, as presumption of arbitrability governed and was not inapplicable due to public policy; and
(4) as university was not entitled to declaratory judgment, claim for injunction was moot.

Motion and requests denied.

West Headnotes

[1] Federal Civil Procedure 170A ⚿1041

170A Federal Civil Procedure
170AVII Pleadings
170AVII(L) Judgment on the Pleadings
170AVII(L)1 In General
170Ak1041 k. In general. Most Cited Cases

Since motion for judgment on the pleadings ultimately fulfils the same function as motion to dismiss for failure to state a claim, standards for decision are very much alike. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

[2] Declaratory Judgment 118A ⚿326

118A Declaratory Judgment
118AIII Proceedings
118AIII(D) Pleading
118Ak326 k. Motions in general. Most Cited Cases

To succeed with its motion for judgment on the pleadings and attain declaratory judgment on the pleadings, plaintiff must include in its complaint enough factual allegations to raise a right to relief above the speculative level, assuming all factual allegations are true; in that sense, unlike motion to dismiss for failure to state a claim, motion for judgment on the pleadings implicates pleadings as whole rather than solely drawing from complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

[3] Statutes 361 ⚿1343

361 Statutes
361III Construction
361III(L) Determination of Construction
361k1343 k. Questions of law or fact. Most Cited Cases

Questions of statutory interpretation are questions of law ripe for resolution at pleadings stage.

[4] Declaratory Judgment 118A ⚿61

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak61 k. Necessity. Most Cited Cases

Declaratory Judgment 118A ⚿62

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak62 k. Nature and elements in general. Most Cited Cases

Court ought grant declaratory judgment only if controversy ripe for judicial resolution exists; to make this determination, court ought to consider both fitness for review and hardship, the former involving questions of finality, definiteness, and need for further factual development, and the latter being concerned with whether challenged action created direct and immediate dilemma for the parties. 28 U.S.C.A. § 2201(a).

[5] **Declaratory Judgment 118A ⚿147**

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(G) Written Instruments and Contracts
118AII(G)1 In General
118Ak143 Particular Contracts
118Ak147 k. Labor agreements. Most Cited Cases

Privately endowed research university seeking declaratory judgment that revocation of unrestricted access to nuclear research facility was not arbitrable grievance under collective bargaining agreement (CBA) had presented court with "actual controversy," as required under Declaratory Judgment Act; considering history of case, issue of whether unescorted access denials were arbitrable was likely to arise again and court's decision in case would hopefully aid judicial economy, clarify that particular issue, and thus help obviate similar disputes in future. 28 U.S.C.A. § 2201(a).

[6] **Alternative Dispute Resolution 25T ⚿200**

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 k. Arbitrability of dispute. Most Cited Cases

Issue of arbitrability, namely whether particular grievance was excluded from arbitration, is matter for court to decide.

[7] **Labor and Employment 231H ⚿1549(1)**

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(1) k. In general. Most Cited Cases

Because interpreting arbitration clause contained in collective bargaining agreement (CBA) ultimately is matter of contract law, parties will only be required to arbitrate issue if they agreed to submit such dispute to arbitration.

[8] **Labor and Employment 231H ⚿1549(2)**

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(2) k. Arbitration favored; presumption of arbitrability. Most Cited Cases

Under "presumption of arbitrability," where labor agreement contains arbitration clause, intent to arbitrate particular grievance is presumed and hence order to arbitrate particular grievance should not be denied unless it may be said with positive assurance that arbitration clause is not susceptible of interpretation that covers asserted dispute.

|9| Labor and Employment 231H ⇐1549(18)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(18) k. Discipline. Most Cited Cases

Decision by privately endowed research university to deny unescorted access privileges to nuclear facility to employee who allegedly removed mail from other employees' mailboxes without authorization was to be submitted to arbitration; collective bargaining agreement (CBA) between university and labor organization representing that employee contained broad arbitration clause, and court was persuaded by arbitrator's opinion that based on facts of case, denial of access could well have constituted a disciplinary measure.

|10| Alternative Dispute Resolution 25T ⇐120

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk118 Matters Which May Be Subject to Arbitration Under Law
25Tk120 k. Matters of public interest. Most Cited Cases

While it is arguably in the public interest for publicly accountable judiciary to review site access disputes for nuclear facilities, it is not in fact Nuclear Regulatory Commission's (NRC's) or Congress's policy or intent to exclude access revocation disputes from private, and largely secret, arbitration. Atomic Energy Act of 1954, § 1 et seq., 42 U.S.C.A. § 2011 et seq.; Energy Reorganization Act of 1974, § 201 et seq., 42 U.S.C.A. § 5841 et seq.

|11| Labor and Employment 231H ⇐2085

231H Labor and Employment
231HXII Labor Relations
231HXII(L) Injunction
231HXII(L)6 Proceedings
231Hk2085 k. In general. Most Cited Cases

Privately endowed research university's claim for injunction preventing union representing employees at nuclear research facility from "pursuing any claim in the arbitration relating to decisions to grant or deny authorization for unescorted access" by grievant was moot, as university was not entitled to declaratory judgment that unescorted access denial grievance was not arbitrable.

Scott A. Roberts, Hirsch Roberts Weinstein LLP, Boston, MA, for Plaintiff.

Mark A. Hickernell, McDonald, Lamond & Canzoneri, Southborough, MA, for Defendant.

MEMORANDUM AND ORDER

YOUNG, District Judge.

I. INTRODUCTION

*1 The plaintiff, the Massachusetts Institute of Technology ("MIT"), brings this action against the Research, Development and Technical Employees Union (the "Union"), seeking declaratory judgment that the revocation of unrestricted access to a nuclear research facility is not an arbitrable grievance under the collective bargaining agreement MIT has with the Union, and asking the Court to enjoin the Union from arbitrating the unrestricted access revocation issue.

A. Procedural Posture

MIT commenced this action against the Union on July 19, 2012. Compl. Declaratory Injunctive Relief ("Compl."), ECF No. 1. The Union filed its answer along with an assented-to motion for leave to file the answer late on September 14, 2012. Answer, ECF No. 8; Assented–To Mot. Leave File Answer, ECF No. 7. The Court granted the motion to file by order on September 17, 2012. Elec. Order, Sept. 17, 2012, ECF No. 9. On November 21, 2012,

MIT filed a motion for judgment on the pleadings accompanied by a supporting memorandum. Pl.'s Mot. J. Pleadings, ECF No. 20; Pl.'s Mem. Law Supp. Mot. J. Pleadings ("Mem. Supp."), ECF No. 21. Along with the motion for judgment on the pleadings, MIT also filed a supporting affidavit of Scott A. Roberts, its counsel, accompanied by a series of attachments. Aff. Scott A. Roberts Supp. Pl.'s Mot. J. Pleadings ("Roberts Aff."), ECF No. On December 12, 2012, the Union filed an opposition to the motion for judgment on the pleadings. Def.'s Opp'n Mot. J. Pleadings ("Opp'n"), ECF No. 26.

On January 10, 2013, this Court heard argument on MIT's motion for judgment on the pleadings and issued an oral order to "stay its hand and remand the matter to the Arbitrator for arbitration," including a determination of the arbitrability issue, but permitted either side to move to re-open the administratively closed case upon completion of the arbitration. Elec. Clerk's Notes, Jan. 10, 2013, ECF No. 28. The parties briefed the issue of arbitrability of unescorted access for the Arbitrator and the Arbitrator issued his award finding arbitrability of the issue on April 4, 2013. *See* Pl.'s Status Report ("Status Report"), Ex. 1, Award Arbitrator ("Award") 30, ECF No. 30–1. On May 3, 2013, MIT requested a case management conference and filed an accompanying status report apprising the Court of the developments in the case. Pl.'s Request Case Mgmt. Conference, ECF No. 31; Status Report. A status conference was held on May 14, 2013, and the Court decided to hear argument at its motion session on June 3, 2013 and took the matter under advisement thereafter. *See* Elec. Clerk's Notes, May 14, 2013, ECF No. 33; Elec. Clerk's Notes, June 3, 2013, ECF No. 35.

B. Factual Background

1. Facts As Alleged

MIT is a co-educational, privately endowed research university with a location in Cambridge, Massachusetts. Compl. ¶ 1. The Union is a labor organization representing a number of MIT's employees in collective bargaining. *Id.* ¶ 2. As part of its research facilities, MIT maintains an interdepartmental Nuclear Reactor Laboratory (the "Laboratory"), which operates a six-megawatt nuclear research reactor (the "Reactor") under a license granted by the United States Nuclear Regulatory Commission (the "Commission"). *Id.* ¶¶ 8, 9. The Reactor and its surrounding containment building constitute a restricted area ("Restricted Area"), to which access rights, in particular unescorted access, are limited to specially authorized employees. *Id.* ¶¶ 6, 8.

*2 MIT is subject to an order (the "Order") issued by the Commission in April 2007, which imposes fingerprinting and criminal history record check requirements for unescorted access on its licensees. *Id.* ¶¶ 12, 15; Compl., Ex. 1, Order Imposing Fingerprinting & Criminal History Records Check Requirements Unescorted Access All Research Test Reactor Licensees Identified Attach. 1 (Effective Immediately) ("Order"), ECF No. 1–2. The Order places the duty of determining whether an individual may have, or may continue to have, unescorted access on a licensee's reviewing official. Order 5–6. Furthermore, the Order stipulates that in making this determination, the reviewing official must "determine whether the individual demonstrates a pattern of trustworthy and reliable behavior...." *Id.* at 2.

Ms. Rice ("Rice") is employed by MIT's Environment, Health and Safety Office as a Project Technician. Compl. ¶¶ 6, 17. She was formerly assigned to perform certain duties at the Laboratory, and for that purpose was given unescorted access to the Restricted Area. *Id.* ¶¶ 6, 18. In September 2009, one of Rice's colleagues lodged a complaint with the Laboratory alleging that Rice removed mail from his mailbox three times without the authority to do so. *Id.* ¶ 19.

Thereupon, MIT's Human Resources Department conducted an investigation during which time Rice's authorization for unescorted access to the Restricted Area was temporarily revoked. *Id.* ¶¶ 19,

20. On or about November 19, 2009, MIT completed the investigation into the colleague's complaint and concluded that Rice had twice removed mail without authorization from another employee's mailbox. *Id.* ¶ 23. The next week, Rice received an oral warning. *Id.* ¶ 24. Also, the subcommittee responsible for reactor security found Rice not "sufficiently trustworthy" to have unescorted access to the Restricted Area and voted unanimously not to restore her access authorization. *Id.* ¶¶ 6, 27, 29. Rice continues to work at MIT as a Project Technician, performing duties commensurate to her job classification, but has since been assigned to areas other than the Laboratory. *Id.* ¶ 31.

During the relevant time period, MIT and the Union were parties to a collective bargaining agreement (the "Agreement"),[FN1] and Rice is a member of the bargaining unit at MIT that is represented by the Union, and thus is an employee covered by the Agreement. *Id.* ¶¶ 33, 34. The Agreement sets forth a four-step grievance and arbitration procedure which applies "[i]n the event of any grievance between the employees and MIT concerning the interpretation or application of [the] Agreement...." *Id.* ¶ 35; Agreement 4–6. The Union initiated a grievance on behalf of Rice, the grievance procedure was exhausted, and the Union—unsatisfied with the results-submitted the matter to arbitration. Compl. ¶¶ 37–43. MIT concedes the arbitrability of the issues of whether there was just cause for the oral warning given to Rice and whether Rice was "transferred" within the meaning of the Agreement and, if so, whether it was for proper cause. *Id.* ¶¶ 44, 45. MIT contends, however, that the temporary revocation of unescorted access to the Restricted Area and the decision to decline reinstatement of Rice's authorization are not arbitrable under the Agreement. *Id.* ¶ 46.

2. The Arbitrator's Award

*3 The Arbitrator scrutinized the Agreement, specifically Article IV, containing the arbitration clause, Article XVIII, regulating, *inter alia*, transfers, and Article XX, relating to discipline, and opined that the Agreement contained no language regarding the denial of authorization of unescorted access to the Restricted Area. *See* Award 25–27. The Arbitrator concluded that while the language of the arbitration clause only permits arbitration of grievances "regarding the interpretation or application of [the] Agreement," and the fact that the Agreement is silent on the unescorted access issue seems to counsel against arbitrability of this issue in view of the arbitration clause's language, *see id.* at 25, the revocation of unescorted access under the circumstances of *this* case amounted to discipline and thus implicated Article XX of the Agreement, *see id.* 25–27. As additional ground for his reasoning, the Arbitrator considered the Order's language and opined that the denial of unescorted access "must be for specific and valid and reliable reason(s)," and the determination of whether Rice showed a "pattern of trustworthy and reliable behavior" necessarily relied on "an investigation of the events leading up to her removal of access ... which [could] only take place if this portion of the grievance" was arbitrable. *Id.* at 28. Lastly, the Arbitrator reasoned that doubts as to questions of arbitrability should be resolved in favor of arbitration and as the Agreement "contains no provision which prohibits the grievance regarding the denial of access to proceed to arbitration," the issue must be substantively arbitrable. *Id.* at 28–29.

C. Federal Jurisdiction

The Court has federal question jurisdiction over this declaratory judgment action pursuant to 28 U.S.C. section 1331, 28 U.S.C. section 2201, and section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

II. ANALYSIS

A. Legal Standard

MIT has moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) ("Rule 12(c)"), a motion that can be filed at any time "[a]fter the pleadings are closed—but early enough not to delay trial...." Fed.R.Civ.P. 12(c).

[1] Since a motion for judgment on the pleadings under Rule 12(c) ultimately fulfils the same function as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), the standards for decision are very much alike. *See Curran v. Cousins*, 509 F.3d 36, 43–44 (1st Cir.2007) (explaining that a motion for judgment on the pleadings is treated much like a Rule 12(b)(6) motion to dismiss). The Court thus is charged with assessing the merits of the case by viewing all facts in the light most favorable to the non-moving party, here the Union, and drawing all reasonable inferences therefrom. *R.G. Fin. Corp. v. Vergara–Nuñez*, 446 F.3d 178, 182 (1st Cir.2006) (citing *Rivera–Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir.1988)).

**4 [2] To succeed with its motion and attain a declaratory judgment on the pleadings, MIT must include in its complaint enough factual allegations to "raise a right to relief above the speculative level", assuming all factual allegations are true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see Pérez–Acevedo v. Rivero–Cubano*, 520 F.3d 26, 29 (1st Cir.2008). In that sense, unlike a motion under Rule 12(b)(6), a motion under Rule 12(c) "implicates the pleadings as a whole" rather than solely drawing from the complaint. *Curran v. Cousins*, 482 F.Supp.2d 36, 41 (D.Mass.2007) (Lindsay, J.), *aff'd*, 509 F.3d 36 (1st Cir.2007) (internal quotation marks omitted) (citations omitted).

[3] "[Q]uestions of statutory interpretation are questions of law ripe for resolution at the pleadings stage." *Simmons v. Galvin*, 575 F.3d 24, 30 (1st Cir.2009) (citing *General Motors Corp. v. Darling's*, 444 F.3d 98, 107 (1st Cir.2006)). The Court may consider "documents the authenticity of which are not disputed by the parties; ... documents central to plaintiffs' claim; [and] documents sufficiently referred to in the complaint." *Curran*, 509 F.3d at 44 (quoting *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir.1993)) (alterations original); *see also Beddall v. State Street Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir.1998) ("When ... a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it....").

B. MIT Has Presented the Court With an Actual Controversy

The Union contends that no actual controversy exists as necessary under the Declaratory Judgment Act, 28 U.S.C. § 2201. Opp'n 1.

[4] Indeed, the Court ought grant declaratory judgment only if a "controversy 'ripe' for judicial resolution" exists. *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322*, 651 F.3d 176, 188 (1st Cir.2011) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). According to First Circuit law, to determine whether an actual controversy exists, a court ought "consider both fitness for review and hardship," the former involving "questions of finality, definiteness, and the need for further factual development," and the latter being concerned with "whether the challenged action create[d] a direct and immediate dilemma for the parties." *Id.* at 188 (quoting *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 535 (1st Cir.1995)) (internal quotation marks omitted). In *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.1994), the First Circuit held that courts ought consider whether granting declaratory judgment would serve a "useful purpose." *Id.* at 693. Furthermore, as conceded by the Union, Opp'n 5, the First Circuit has concluded in *Tejidos de Coamo, Inc. v. Int'l Ladies' Garment Workers' Union*, 22 F.3d 8 (1st Cir.1994), that the Norris–LaGuardia Act, 29 U.S.C. § 101 *et seq.*, does not prohibit pre-arbitration declarations of arbitrability. *Tejidos de Coamo*, 22 F.3d at 15.

**5 [5] Considering the history of this case, the Court is mindful of the fact that the issue of whether unescorted access denials are arbitrable is likely to arise again and this Court's decision in this case

will hopefully aid judicial economy, clarify this particular issue, and thus help obviate similar disputes in the future. Thus, an actual controversy exists.

C. The Issue of Arbitrability is a Question to be Decided by the Court.

[6] It is well settled that the issue of arbitrability, namely whether a particular grievance was excluded from arbitration, is a matter for a court to decide. *AT & T Techs., Inc. v. Comme'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). In *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1 (1st Cir.2005), the First Circuit reviewed then recent Supreme Court decisions reiterating that there were "at least two sorts of questions ... presumptively for the *court* to decide: (1) whether the parties [were] bound by a given arbitration clause, and (2) whether a concededly binding arbitration clause applied to a particular type of controversy." *Id.* at 9–10 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)) (emphasis in original) (internal quotation marks omitted). In making this decision, however, the Court ought not decide the merits of the underlying claim. *AT & T Techs.*, 475 U.S. at 649, 106 S.Ct. 1415.

D. MIT's Decision to Deny Unescorted Access Privileges is Subject to Arbitration Under the Agreement.

1. The Presumption of Arbitrability Governs

[7] Although it is an issue of first impression under this collective bargaining agreement whether this particular grievance—the denial of unescorted access to a nuclear facility—ought be subjected to arbitration, there is well established case law as to the common principles that guide the determination of whether an issue is arbitrable or not. *See AT & T Techs.*, 475 U.S. at 650, 106 S.Ct. 1415. Because interpreting an arbitration clause contained in a collective bargaining agreement ultimately is a matter of contract law, the parties will only be required to arbitrate the issue if they agreed to submit such dispute to arbitration. *Id.* at 648–49, 106 S.Ct. 1415 ("The first principle ... is that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (citations omitted) (internal quotation marks omitted).

[8] Having said that, there is a—possibly competing—principle that where an agreement contains an arbitration clause, the intent to arbitrate a particular grievance is presumed and hence "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582–83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). This so-called presumption of arbitrability is dictated by a clear government policy favoring the resolution of such labor disputes by means of arbitration and also demands that if in doubt the Court ought interpret the agreement to have covered the issue. *Id.*; *see AT & T Techs.*, 475 U.S. at 650, 106 S.Ct. 1415 (holding that the presumption is "particularly applicable" in the case of a broad arbitration clause, such as one submitting to arbitration "any differences arising with respect to the interpretation of th[e] contract or the performance of any obligation [t]hereunder ....") (internal quotation marks omitted); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 130 S.Ct. 2847, 2858–59, 177 L.Ed.2d 567 (2010) (discussing application of the presumption of arbitrability). The Supreme Court has likewise held that unless a particular grievance is excluded from a general arbitration clause by express provision, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf Nav. Co.*, 363 U.S. at 584–85, 80 S.Ct. 1347.

*6 [9] Applying these common principles to

the case at hand, the Agreement contains what the Court considers a "broad" arbitration clause. The arbitration clause in place covers "any grievance ... concerning the interpretation or application of [the] Agreement." Agreement 4. MIT hotly disputes that the access denial grievance concerns the interpretation or application of the Agreement, arguing instead that it falls outside the scope of the Agreement. *See* Mem. Supp. 17–18.

It is not apparent why the question of whether the denial of Rice's site-access authorization does not concern the interpretation of the Agreement, namely the definition of "transfer" or "discipline" under the Agreement's Articles XVIII and XX respectively. In this regard, the Arbitrator's opinion that based on the facts of this particular case, the denial of access could well have constituted a disciplinary measure, Award 26–27, while not binding, persuades the Court. *See McCabe Hamilton & Renny Co., Ltd. v. Int'l Longshore & Warehouse Union, Local 142, AFL–CIO*, 624 F.Supp.2d 1236, 1245–46 (D.Haw.2008) (granting the union's motion to confirm the arbitration award and noting that the arbitrator acknowledged the employer's discretion to transfer the aggrieved but found that based on the facts of that case it was apparent that the employer used its discretion "as a means of disciplining [the aggrieved] without meeting the [collective bargaining agreement's] substantive and procedural requirements for discipline").

The absence of a specific provision does not necessarily equate to an intentional exclusion of a particular grievance or issue from arbitration. The failure specifically to regulate site access in the Agreement may be due to any number of reasons, yet faced with the strong presumption of arbitrability and having failed to allege a reason to have intentionally abstained from regulating the issue, let alone "forceful evidence of the purpose to exclude," MIT cannot make its case. *See Warrior & Gulf Nav. Co.*, 363 U.S. at 585, 80 S.Ct. 1347.

2. The Presumption of Arbitrability Is Not Inapplicable Here Due to Public Policy

Having established that according to the general principles of arbitration and labor contract interpretation the issue of unescorted access to a nuclear facility is one to be submitted to arbitration, the Court must consider MIT's argument that site access denials fall outside the scope of the Agreement for public policy reasons involving the safety and security of nuclear facilities. Mem. Supp. 17–19. MIT points to two decisions, one from the United States District Court for the District of New Jersey, upheld by the Third Circuit Court of Appeals, and one in which a labor arbitrator, acknowledging the New Jersey court's reasoning, came to the same conclusion, namely that the issue of revocation of access authorization was not arbitrable under the applicable collective bargaining agreement. *Public Serv. Elec. & Gas Co. v. Int'l Bhd. of Elec. Workers Local 94*, 140 F.Supp. 2d 384, 401–02, 406 (D.N.J. 2001) *aff'd*, 27 Fed.Appx. 127 (3d Cir.2002); *In re WE Energies & Int'l Bhd. of Elec. Workers, Local 2150*, 122 Lab. Arb. (BNA) 1122, 2006 WL 2641749, at *8 (2006) (Suntrup, Arb.).

*7 The court in *Public Service* noted that the collective bargaining agreement in question did not contain any provisions "**specific or otherwise, related to site access authorization determinations**," 140 F.Supp. 2d at 398, and interwove this argument with a holding that due to the "**unique and critical issue of the safety of the public at large**" it was "necessary and appropriate" for the parties "**to expressly agree to submit site access issues to arbitration and that this be specifically provided in the [collective bargaining agreement]**," *id.* at 400. The *Public Service* court explained that it read the applicable Commission regulations to "**permit arbitration to be the appeal process for revocation or denial of site access decisions**," but "due to public policy reasons," required a "**separate, clear, and specific provision in the collective bargaining agreement if arbitration is to be the review process.**" *Id.* at 403–04. The court concluded that it would not uphold an agreement that lacked such provisions, as enforcement would be contrary to public policy. *See id.* at 404.

Other courts examining the question of whether public policy justified an exception to arbitration on site access issues have come out a different way. To make an argument that the Agreement was against public policy one has to determine the public policy behind the regulations, especially the regulatory history and the Commission's intent. The Seventh Circuit and district courts therein have been concerned with the nuclear power plant site access revocation issue after the terrorist attacks of September 11, 2001, and the resulting amendments of the Commission regulations to tighten security. *Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, No. 10 C 4846, 2011 WL 2149624, at *1 (N.D.Ill. May 25, 2011) (Gettleman, J.), *rev'd and remanded*, 676 F.3d 566, (7th Cir.2012), *reh'g en banc denied*, 682 F.3d 620 (7th Cir.2012); *see also Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, No. 06 CV 6961, 2008 WL 4442608, at *1 (N.D.Ill. Sept. 29, 2008) (Lefkow, J.). In each of these cases, the court took great care to analyze the regulatory history in search of a prohibition or conflict with arbitration as a means of resolution of site access disputes and held that the Commission had indeed intended to permit arbitration procedures to exist alongside any review mechanisms established pursuant to the regulations. *See Exelon Generation Co., LLC*, 676 F.3d at 574 (quoting Access Authorization Program for Nuclear Power Plants, 56 Fed.Reg. 18997-01, 19002 (Apr. 25, 1991) (codified at 10 C.F.R. Part 73)) (citing from the regulatory guide the Commission's comment that "the Commission never intended that any review procedure that already exists in a bargaining agreement be abandoned."); *see also id.* at 575 (holding that this interpretation remained in force, even after the regulation was subsequently amended, as "[n]othing in the text of the amended regulation or the rulemaking history suggests the Commission came to a different conclusion in 2009.").

*8 Likewise, Judge Posner, in a concurrence to the denial of en banc rehearing, noted that "[t]he Commission could amend its regulations to forbid collective bargaining agreements to empower arbitrators to resolve disputes over security clearances.... As could Congress." *Exelon Generation Co.*, 682 F.3d at 622 (Posner, J., concurring). Judge Posner added that while it was "time that the Commission, or failing that Congress, instituted administrative review of decisions by private arbitrators granting or denying security clearances to employees of nuclear facilities," it was "beyond judicial authority to command" such review procedures. *Id.* at 622–23.

[10] This Court is persuaded by the Seventh Circuit's approach. While it is arguably in the public interest for a publicly accountable judiciary to review site access disputes for our nuclear facilities, it is not in fact the Commission's or Congress's policy or intent to exclude access revocation disputes from private (and largely secret) arbitration. Thus, MIT's policy argument must fail.

In addition, the Court takes note of the fact that the Agreement in the version made available to the Court was in effect from 2008 to 2011 and therefore was (re-)negotiated after MIT received the Commission's (April 2007) Order which it argues acts as a bar to arbitration of the site access issue. Suffice it to say one would assume MIT, put on notice by the Order of its duties as a licensee to monitor site access and convinced that site access was not (or at least was no longer) a grievance arbitrable under the Agreement, would have asserted its rights by negotiating an explicit provision to that effect to the Agreement.

In conclusion, the presumption of arbitrability stands and can neither be overcome by MIT's public policy arguments nor by the facts alleged to be sufficient to create "forceful evidence" that the site access revocation grievance was intentionally unregulated by the Agreement.

E. A Permanent Injunction Is Not Warranted

[11] MIT also seeks injunctive relief, asking the Court to enjoin the Union from "pursuing any claim in the arbitration relating to decisions to grant

or deny authorization for unescorted access ...." Compl. ¶ 56. As MIT is not entitled to a declaratory judgment that the unescorted access denial grievance is not arbitrable, the claim for such an injunction is moot.

III. CONCLUSION

For the foregoing reasons, the Court

(1) DENIES MIT's Motion for Judgment on the Pleadings and request for declaratory judgment, ECF No. 20,

(2) DENIES MIT's request for a permanent injunction, ECF No. 1; and

(3) ORDERS the case administratively closed. It may be reopened upon motion of any party once the arbitration has concluded.

SO ORDERED.

FN1. The Agreement in the version submitted to the Court was effective for the years 2008 to 2011. Compl., Ex. 4, 2008–2011 Agreement Mass. Institute of Tech. & Research, Development, & Technical Employees' Union ("Agreement"), ECF No. 1–5.

D.Mass.,2013.
Massachusetts Institute of Technology v. Research, Development and Technical Employees Union
--- F.Supp.2d ----, 2013 WL 5881245 (D.Mass.), 197 L.R.R.M. (BNA) 2428

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11442
Non-Argument Calendar

D.C. Docket No. 9:13-cv-80080-KLR

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS SYSTEM COUNCIL U-4,

Plaintiff-Appellee,

versus

FLORIDA POWER & LIGHT CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 30, 2015)

Before JORDAN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

PER CURIAM:

The plaintiff, a union operating on behalf of certain employees at a nuclear energy facility, filed suit against the operator of the facility to compel arbitration after the operator revoked a union employee's privileges to access the nuclear facility unescorted. As a result of having his access privileges revoked, the employee could not continue working at the nuclear facility. The operator opposed arbitration on the ground that the dispute was not within the scope of the arbitration agreement. The district court compelled arbitration, and we affirm.

I.

Defendant-Appellant Florida Power & Light ("FPL") operates the Turkey Point nuclear power plant. To operate a nuclear generator, FPL must comply with certain Nuclear Regulatory Commission ("NRC") regulations, which state that an individual must be "trustworthy and reliable" to be granted "unescorted access" to the nuclear facility. *See* 10 C.F.R. § 73.56. FPL has enacted policies to comply with NRC regulations.

Michael Kohl is a long-time FPL employee who worked as a nuclear watch engineer at Turkey Point. In August 2012, Kohl was arrested for "grand theft." Following his arrest, FPL revoked Kohl's "unescorted access" to the Turkey Point nuclear facility. Without unescorted-access privileges, Kohl could not continue working as a nuclear watch engineer at Turkey Point. Kohl appealed the revocation of his access privileges to FPL management, who upheld the revocation

in November 2012. *See* 10 C.F.R. § 73.56(l) ("The procedure must provide for an impartial and independent internal management review."). Ultimately, the grand-theft charges against Kohl were dismissed.

Kohl is a member of Plaintiff-Appellee International Brotherhood of Electrical Workers System Council U-4 ("IBEW"). Kohl was covered by a collective bargaining agreement between IBEW and FPL. The agreement contains a grievance and arbitration procedure. Grievances advance through a series of steps in an attempt to settle the dispute. If a grievance remains unresolved, either party may demand arbitration. Doc. 1–3, Art. IV, ¶ 27(a).

In September 2012, Kohl and IBEW filed a grievance with FPL, stating, "I Mike Kohl, request that my Nuclear Access be reinstated and I be returned to work and made whole." Doc. 1–5. After his access privileges were revoked, Kohl continued to work for FPL at a different power plant as a maintenance worker, but he earned substantially less than he did as a nuclear watch engineer.

In November 2012, FPL informed IBEW that it would "not accept a grievance because it involves a matter that is not disciplinary in nature and is not subject to grievance and arbitration procedures." Doc. 1–8. According to FPL, decisions about nuclear access are governed by NRC regulations, and FPL, "as licensee, has the sole responsibility to grant or deny unescorted access to its nuclear facilities." *Id.*

B.

In January 2013, IBEW filed a petition in the United States District Court for the Southern District of Florida to compel arbitration of the dispute about Kohl's access rights. *See* 29 U.S.C. § 185(a). FPL answered, denying that the dispute was subject to arbitration under the collective bargaining agreement. In November 2013, FPL moved to dismiss the petition for lack of subject-matter jurisdiction. FPL asserted that the case was moot because Kohl's site-access revocation had been lifted and he was "now eligible to apply for access authorization to Turkey Point."[1] The district court granted FPL's motion and dismissed the case as moot.

On appeal, this Court vacated and remanded. *Int'l Bhd. of Elec. Workers Sys. Council U-4 v. Fla. Power & Light Co.*, 580 F. App'x 868 (11th Cir. 2014) (hereinafter "*IBEW*"). We held that the district court erred in dismissing the case as moot because, "even if the issue of nuclear access is moot, IBEW's request that Kohl be returned to his previous job and receive back pay is not." *Id.* at 869. We remanded the action to the district court with instructions to determine only "whether FPL's determination of 'access rights' falls within the arbitration provisions of IBEW and FPL's collective bargaining agreement," such that the

[1] According to FPL, because Kohl's access had been "unfavorably terminated," NRC regulations required Kohl to again apply for and complete the unescorted access authorization process mandated by the NRC.

agreement "provides the arbitrator with authority to adjudicate this dispute." *Id.* We instructed the court not to consider "issues that go to the merits, such as whether the NRC regulations render FPL's actions unreviewable." *Id.* (citing *Int'l Bhd. Of Elec. Workers Local 2150 v. NextEra Energy Point Beach, LLC*, 762 F.3d 592, 596 (7th Cir. 2014) (hereinafter "*NextEra Energy*")).

On remand, the district court granted IBEW's petition to compel arbitration. According to the court, a "grievance" under the collective bargaining agreement "encompasses any conduct by FPL that takes a job benefit away from an employee, including nuclear access." Doc. 33 at 3. Finding that "FPL took away Kohl's worksite, job title, job duties and reduced his salary[,]" the court concluded that Kohl's challenge to these actions through his loss of access to Turkey Point constituted a valid and arbitrable grievance. *Id.* at 4. FPL appeals.

II.

"We review *de novo* a district court order granting a motion to compel arbitration." *Johnson v. Keybank Nat'l Assoc. (In re Checking Account Overdraft Litigation)*, 754 F.3d 1290, 1293 (11th Cir. 2014).

III.

We begin by summarizing the principles governing our review of an arbitration provision in a collective bargaining agreement, derived from the Supreme Court's *Steelworkers* Trilogy over fifty years ago. *See Steelworkers v.*

Enter. Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347 (1960); *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343 (1960).

First, because arbitration is simply a matter of contract and consent, *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418 (1986), "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*," *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297, 130 S. Ct. 2847, 2856 (2010) (emphasis in original).

Second, questions of whether an arbitration agreement covers a particular dispute are generally for the courts unless the agreement expressly provides otherwise. *AT&T Techs., Inc.*, 475 U.S. at 649, 106 S. Ct. at 1418. Thus, if an arbitration provision's applicability to the dispute is in issue, as it is here, "the court must resolve the disagreement." *Granite Rock Co.*, 561 U.S. at 299-300, 130 S. Ct. at 2858 (internal quotation marks omitted).

Third, in deciding questions of arbitrability, "a court is not to rule on the potential merits of the underlying claims." *AT&T Techs., Inc.*, 475 U.S. at 649, 106 S. Ct. at 1419. In this case, the previous panel identified "whether the NRC regulations render FPL's actions unreviewable" as such a merits issue. *IBEW*, 580 F. App'x at 869; *see also NextEra Energy*, 762 F.3d at 596 ("[W]e do *not* hold that

the arbitrator may, in fact, review and overturn NextEra's revocation of Hofstra's unescorted access privileges. . . . But the potential weakness of the Union's claim on the merits is no defense to the arbitrability of this dispute, as a threshold question.").

Fourth, and finally, "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc.*, 475 U.S. at 650, 106 S. Ct. at 1419 (brackets and internal quotation marks omitted; alterations adopted). In short, doubts should be resolved in favor of arbitration. *Id.* The presumption of arbitrability is "particularly applicable" where an arbitration clause is broadly worded. *Id.*; *see Nextera Energy*, 762 F.3d at 594 ("Where the arbitration clause is broad, we presume arbitrability of disputes.").

The presumption of arbitrability "applies when an 'arbitration agreement is ambiguous about whether it covers the dispute at hand.'" *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1115 (11th Cir.), *cert. denied*, 135 S. Ct. 144 (2014) (quoting *Granite Rock Co.*, 561 U.S. at 301, 130 S. Ct. at 2858). Put differently, the "federal policy favoring arbitration" does not "override[] the principle that a court may submit to arbitration only those disputes that the parties have agreed to

submit." *Granite Rock Co.*, 561 U.S. at 302, 130 S. Ct. at 2859 (ellipsis and internal quotation marks omitted); *Inetianbor v. Cashcall, Inc.*, 768 F.3d 1346, 1352-53 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015).

IV.

The question before us is "whether FPL's determination of 'access rights' falls within the arbitration provisions of IBEW and FPL's collective bargaining agreement." *IBEW*, 580 F. App'x at 869. That question, in turn, depends on the definition of "grievance" in the collective bargaining agreement, because only grievances may be advanced to arbitration. Doc. 1–3, Art. IV, ¶ 27(a). The agreement defines a "grievance" "as a violation of the terms of this Agreement or any type of supervisory conduct which unjustly denies to any employee the employee's job or any benefit arising out of the employee's job." *Id.*, ¶ 26.

FPL contends that the district court's order compelling arbitration should be reversed because the court applied the presumption of arbitrability without first determining whether the grievance and arbitrations provisions were ambiguous. And the provisions are not ambiguous, according to FPL, because the revocation of Kohl's access privileges does not fall within the plain and objective meaning of "supervisory conduct," given that David Bonthron, the FPL employee who

revoked Kohl's unescorted access, was not Kohl's supervisor.[2] FPL also argues that the "robust, unequivocal public policy to safeguard the Nation's nuclear facilities" is consistent with the purportedly clear conclusion that the parties did not include this particular dispute within the grievance and arbitration provisions.

A.

We first address whether the grievance and arbitration provisions are ambiguous, so as to trigger the presumption of arbitrability. *See Dasher*, 745 F.3d at 1115. We must interpret an arbitration agreement by construing the contract to effectuate the intent of the parties, "as determined by the objective meaning of the words used." *Inetianbor*, 768 F.3d at 1353 (citation and internal quotation marks omitted). "A contract term is ambiguous if reasonably susceptible to more than one interpretation." *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1360 (11th Cir. 1988).

Initially, we note that FPL makes no claim that the revocation of access privileges does not or could not "unjustly den[y] to any employee the employee's job or any benefit arising out of the employee's job." *See* Doc. 1–3, Art. IV., ¶ 26. And, because access privileges are necessary for an employee to work at a nuclear facility, we find that their revocation arguably denies the employee his job and his

[2] According to FPL, Bonthron was employed by FPL as the Access Authorization/Fitness for Duty Program Manager. He was responsible for ensuring FPL's compliance with the NRC's regulations regarding unescorted access privileges and related matters for all FPL executives and employees.

job benefits. For example, in this case, Kohl lost his job as a nuclear watch engineer and suffered a loss of job duties and salary because of FPL's revocation of his access rights.

Rather, FPL's challenge is limited to whether determinations of access privileges are encompassed by the phrase "any type of supervisory conduct." The collective bargaining agreement does not define the term "supervisory conduct," or, for that matter, "supervisor." FPL interprets "supervisory conduct" to exclude actions from those who, like Bonthron, exercise authority over employees in the interest of management but do not supervise employees' job duties or performance.[3] This may, in fact, be a reasonable interpretation. We do not need to decide whether it is, however, because we conclude that the grievance and arbitration provisions are reasonably susceptible to an interpretation that covers FPL's determination of access rights.[4]

In interpreting a contract, we must read the words of the contract in the context of the contract as a whole. *Inetianbor*, 768 F.3d at 1353. In this case, the

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[3] We infer this interpretation, we think fairly, from FPL's briefing. FPL asserts that Bonthron was not Kohl's supervisor, but it never defines what it means by the term "supervisor" or attempts to provide a more comprehensive interpretation of the provision.

[4] We may affirm the district court's order on any ground supported by the record, even if that ground was not relied upon by the district court. *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252-53 (11th Cir. 2013). Thus, even if the district court failed to determine whether the agreement was ambiguous, as FPL contends, we nonetheless can reach and decide this question of law in the first instance. *See Peterson v. Lexington Ins. Co.*, 753 F.2d 1016, 1018 (11th Cir. 1985) (contractual ambiguity is a question of law).

context is that of a collective bargaining agreement governing relations between labor and management. "A collective bargaining agreement is an effort to erect a system of industrial self-government[,]" and "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *Warrior & Gulf Navigation Co.*, 363 U.S. at 580-81, 80 S. Ct. at 1351-52. In essence, "[c]ollective bargaining agreements regulate or restrict the exercise of management functions." *Warrior & Gulf Navigation Co.*, 363 U.S. at 583, 80 S. Ct. at 1353.

Viewed against this backdrop, we think it is reasonable to construe the phrase "supervisory conduct" broadly as referring to conduct under management's authority and in its interest that takes away an employee's job or job benefit, or, as the district court succinctly put it, "any conduct by FPL that takes a job benefit away from an employee" *See* 29 U.S.C. § 152(11) (defining a "supervisor" under the National Labor Relations Act as an individual who has authority "in the interest of the employer" to take or recommend certain actions with respect to employees); *cf. Beasley v. Food Fair of N. Carolina, Inc.*, 416 U.S. 653, 658-60, 94 S. Ct. 2023, 2026-27 (1974) (explaining that "supervisors" were excluded from collective bargaining because they were considered part of "management obliged to be loyal to their employer's interests"). The collective bargaining agreement's use of broad

language to define a grievance—"*any type* of supervisory conduct"—likewise may suggest that the provision was not intended to be construed narrowly.

Whether or not Bonthron supervised Kohl's work, it is undisputed that Bonthron had authority, in the interest of FPL, to make nuclear-access determinations for FPL employees, including Kohl. *See Black's Law Dictionary* 1667 (10th ed. 2014) (defining a "supervisor" as "[o]ne having authority over others; a manager or overseer")[5]; FPL's Initial Br. at 30 (stating that Bonthron's duties were "to assist in managing" Turkey Point by making access determinations); *see also IBEW*, 580 F. App'x at 869 (characterizing the issue in this appeal as "***FPL's*** determination of 'access rights'" (emphasis added)). In making these determinations, FPL "monitor[ed]," "evaluat[ed]," "investigat[ed]," and "observ[ed]" employees—all terms consistent with oversight and supervision—to determine whether they are and continue to be "trustworthy and reliable" so as to comply with NRC regulations. FPL's Initial Br. at 14.

As explained above, FPL's access decisions can have significant employment consequences for employees. Thus, despite the fact that Bonthron may not have been Kohl's supervisor in a traditional sense or that access decisions do not arise out of that type of relationship, we think the phrase "any type of

[5] "To ascertain ordinary meaning, courts often turn to dictionary definitions for guidance." *United States v. Lopez*, 590 F.3d 1238, 1248 (11th Cir. 2009).

supervisory conduct" is reasonably susceptible of an interpretation that encompasses FPL's nuclear-access determinations.

In sum, the grievance and arbitration provisions are ambiguous because they are reasonably susceptible of an interpretation that covers FPL's determinations of access rights. *See Orkin Exterminating Co., Inc.*, 849 F.2d at 1360. Therefore, even assuming that FPL's interpretation of the grievance and arbitration provisions is also reasonable, we apply the presumption of arbitrability. *See Granite Rock Co.*, 561 U.S. at 302, 130 S. Ct. at 2858 (stating that the presumption applies where there is "a validly formed and enforceable arbitration agreement [that] is ambiguous about whether it covers the dispute at hand").

B.

We adhere to the presumption of arbitrability and resolve any doubts in favor of ordering arbitration unless the presumption is rebutted. *Id.*, 130 S. Ct. at 2858-59. To rebut the presumption in the face of a broadly worded arbitration provision, the party opposing arbitration generally must show either an "express provision excluding a particular grievance from arbitration" or, in its absence, "only the most forceful evidence of a purpose to exclude the claim from arbitration." *AT&T*, 475 U.S. at 650, 106 S. Ct. at 1419 (quoting *Warrior & Gulf*, 363 U.S. at 584-85, 80 S. Ct. at 1354).

Here, FPL points to no express exclusion in the collective bargaining agreement. The agreement does not expressly commit unescorted-access decisions either to arbitration or to management's sole discretion. FPL suggests that we can infer a purpose to exclude access decisions based on the "strong public policy to safeguard nuclear facilities," and it also cites a general provision in the collective bargaining agreement vesting management of the properties of the company exclusively in FPL. However, the exclusion clause is vague, not express, and inferring a purpose to exclude based on public-policy grounds goes beyond our threshold inquiry of arbitrability and improperly encroaches on the merits of the dispute. *See Warrior & Gulf Navigation Co.*, 363 U.S. at 584-85, 80 S. Ct. at 1354; *see also NextEra Energy*, 762 F.3d at 596; *IBEW*, 580 F. App'x at 869. FPL puts forth no other "forceful evidence" or legal argument in satisfaction of its burden.

In short, FPL has provided no "positive assurance" that the arbitration clause does not cover this dispute. *See AT&T Techs, Inc.*, 475 U.S. at 650, 106 S. Ct. at 1419. Applying the presumption of arbitrability, we resolve any doubts about the scope of the grievance and arbitration provisions in favor of coverage, and find, therefore, that the dispute is arbitrable as a threshold matter. To be clear, we do not hold that the arbitrator may, in fact, review FPL's revocation of Kohl's unescorted-access privileges, and, as we indicated in our previous opinion, that

question may now be moot. *IBEW*, 580 F. App'x at 869. We express no opinion on these matters. *See NextEra Energy*, 762 F.3d at 596. But, as we also indicated in our previous opinion, IBEW's request for Kohl to be reinstated to his previous position and to receive backpay is not moot. *Id.*

V.

In sum, the grievance and arbitration provisions in the parties' collective bargaining agreement are reasonably susceptible of an interpretation that covers FPL's determination of access rights. Thus, the agreement is ambiguous, and the presumption of arbitrability applies. Because FPL has not rebutted the presumption, any doubts are resolved in favor of coverage. Consequently, we affirm the district court's order compelling arbitration.

AFFIRMED.

140 F.Supp.2d 384, 169 L.R.R.M. (BNA) 2364, 143 Lab.Cas. P 10,986
(Cite as: 140 F.Supp.2d 384)

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United States District Court,
D. New Jersey.
PUBLIC SERVICE ELECTRIC & GAS COMPANY, Plaintiff,
v.
LOCAL 94 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Defendant.

No. CIV. A. 99–3634 (GEB).
April 6, 2001.

Union brought grievance against employer operating nuclear energy facility, challenging employer's suspension of employee's site access privileges following his third arrest for driving under influence, and his termination following conviction. When grievance proceeded to arbitration, employer sought court order that site access issue was not subject to arbitration. The District Court, Hughes, United States Magistrate Judge, held that: (1) arbitration was acceptable means of complying with appeal process mandated when employee is denied site access to nuclear energy facility; (2) dispute regarding denial of site access was not subject to arbitration; (3) public policy favoring nuclear safety required that site access questions not be submitted to arbitration, in absence of collective bargaining provision calling for submission; (4) employer's procedure for appealing site access withdrawal comported with Nuclear Regulatory Commission (NRC) regulations; and (5) there was no private right of action under Atomic Energy Act through which union could challenge withdrawal of access.

Order accordingly.

West Headnotes

[1] Labor and Employment 231H ⚖1549(7)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(7) k. Particular disputes in general. Most Cited Cases
(Formerly 232Ak435.1 Labor Relations)

Arbitration pursuant to collective bargaining agreement is an acceptable means of complying with appeal process mandated when employee is denied site access to atomic energy facility. Atomic Energy Act of 1954, § 1 et seq., as amended, 42 U.S.C.A. § 2011 et seq.; Energy Reorganization Act of 1974, §201 et seq., 42 U.S.C.A. § 5841 et seq.; 10 C.F.R. § 73.56.

[2] Labor and Employment 231H ⚖1549(1)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(1) k. In general. Most Cited Cases
(Formerly 232Ak434.1 Labor Relations)

In determining whether a dispute is subject to arbitration, pursuant to the arbitration clause of a collective bargaining agreement, a court is to consider (1) whether the present dispute comes within the scope of the arbitration clause, (2) whether any other provision of the agreement expressly excludes from arbitration kind of dispute involved in present case, and (3) whether there is any other forceful evidence indicating that the parties intended an exclusion.

[3] Labor and Employment 231H ⚖1549(1)

231H Labor and Employment

231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(1) k. In general. Most Cited Cases
(Formerly 232Ak435.1 Labor Relations)

Arbitration clause in collective bargaining agreement, covering "any dispute or difference ... as to the interpretation, application, or operation of any provision of this Agreement," allowed for arbitration of any grievance that fell within zone of interests receiving union protection under agreement.

[4] Labor and Employment 231H ⚿1549(7)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(7) k. Particular disputes in general. Most Cited Cases
(Formerly 232Ak435.1 Labor Relations)

Disputes regarding employer's withdrawal of access to restricted area in nuclear energy facility was not subject to arbitration under collective bargaining agreement, as dispute was not within zone of interests protected by union under agreement; there was no mention of site access in agreement, and an insufficient showing of past practices of arbitrating site access questions.

[5] Labor and Employment 231H ⚿1549(7)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(7) k. Particular disputes in general. Most Cited Cases
(Formerly 232Ak435.1 Labor Relations)

In order to harmonize public policy concerns regarding nuclear safety, and public policy favoring resolution of labor disputes through arbitration, arbitration of an employer's denial of employee's access to nuclear energy facility may be appealed through arbitration, but only if there is provision in collective bargaining agreement specifically calling for arbitration of question.

[6] Electricity 145 ⚿8.7(2)

145 Electricity
145k8.7 Nuclear Power
145k8.7(2) k. Environmental and safety considerations. Most Cited Cases
(Formerly 145k8.5(2))

Employer complied with Nuclear Regulatory Commission's (NRC's) regulations governing appeals from decisions denying site access to nuclear energy facilities, when employee's access was suspended after his third arrest for driving under influence and he was terminated following conviction; employee was afforded opportunity to appeal access revocation to official supervising access, and to provide information. Atomic Energy Act of 1954, § 1 et seq., as amended, 42 U.S.C.A. § 2011 et seq.; Energy Reorganization Act of 1974, § 201 et seq., 42 U.S.C.A. § 5841 et seq.; 10 C.F.R. § 73.56.

[7] Action 13 ⚿3

13 Action
131 Grounds and Conditions Precedent
13k3 k. Statutory rights of action. Most Cited Cases

Labor and Employment 231H ⚿1995

231H Labor and Employment
231HXII Labor Relations
231HXII(K) Civil Liabilities
231Hk1994 Actions Against Employers or Employers' Organizations in General
231Hk1995 k. In general. Most Cited Cases
(Formerly 232Ak759 Labor Relations)

There was no private cause of action, under Atomic Energy Act, through which union could challenge employer's withdrawal of employee's access to nuclear energy facility, on grounds that there was pattern of abuse of withdrawal power; only recourse was appeal to Nuclear Regulatory Commission (NRC). Atomic Energy Act of 1954, § 221(c), as amended, 42 U.S.C.A. § 2271(c); 10 C.F.R. § 2.206.

***385** Patrick Westerkamp, Newark, NJ, for Plaintiff.

***386** Brian Curtis, Paul Montalbano, Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, P.C., Kenilworth, NJ, for Defendant.

MEMORANDUM OPINION

HUGHES, United States Magistrate Judge.

This matter comes before the Court on motion by Plaintiff Public Service Electric & Gas Company ("PSE & G") for summary judgment requesting the Court to declare that site access issues are not subject to arbitration under the grievance/arbitration provision of the Collective Bargaining Agreement ("CBA") between PSE & G and Local 94, International Brotherhood of Electrical Workers ("Local 94"). Defendant Local 94 opposes the motion and has submitted a cross-motion for summary judgment requesting the Court to order PSE & G to submit to arbitration the issue of the revocation of site access for Vincent Forte and all other Local 94 represented employees whose employment may be adversely affected. The parties have consented to the exercise of jurisdiction by the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and FED. R. CIV. P. 73, for all purposes. Oral Argument was conducted on December 18, 2000 and the matter was taken under advisement. For the following reasons, Plaintiff's motion for summary judgment is granted and Defendant's cross-motion for summary judgment is denied in part, and denied without prejudice in part.

I. *BACKGROUND & PROCEDURAL HISTORY*

This action arises from a dispute between Plaintiff PSE & G and Defendant Local 94 concerning the arbitrability of a site access issue in the context of a grievance challenging the discharge of Union Member Vincent Forte. Plaintiff PSE & G is a public utility incorporated under the laws of the State of New Jersey to provide safe and dependable electric and gas energy within its service territory. Statement of Undisputed Material Facts ¶ 1. Defendant Local 94 is an unincorporated labor organization commonly known as a union as the term is defined in Section 2(d) of the Labor–Management Relations Act. *Id.* ¶ 2. Since 1943, Local 94 and its predecessors have bargained collectively with PSE & G on behalf of employees engaged in the generation and distribution of electricity. *Id.* ¶ 9. Local 94 is recognized by PSE & G as the exclusive representative for bargaining unit members including those assigned to the Artificial Island nuclear stations. Pl.'s Compl. at ¶ 10. Vincent Forte is a Local 94 bargaining unit member.

Among the facilities operated by PSE & G are Salem I & II, and Hope Creek nuclear generating stations on Artificial Island in Salem County, New Jersey. Statement of Undisputed Material Facts ¶ 4. There is a fence which surrounds these stations and the land and the buildings inside the fence are know as the "unescorted access" or "protected" areas. *Id.* ¶ 6. Out of about 2000 employees who work on Artificial Island, Local 94 represents approximately 800. *Id.* ¶¶ 7 and 8. Approximately 99% of the union represented employees work in the unescorted access area. *Id.* ¶ 9. Employees of independent contractors also work at the nuclear stations and unions, other than Local 94, represent some of these workers. *Id.* ¶¶ 12 and 13.

The operation of the Island's generating stations is licensed and regulated by the Nuclear Regulatory Commission ("NRC") pursuant to the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011–2394. As an NRC licensee, PSE & G must comply with applicable rules promulgated by the NRC, which are contained in 10 C.F.R. Part 0–199. *Id.* ¶ 17. One of these rules *387 requires a licensee to design and implement a procedure "to limit unescorted access to vital areas during nonemergency conditions to individuals who require access in order to perform their duties." *Id.* ¶ 18 (quoting 10 C.F.R. § 73.55(7)(i)). Licensees including PSE & G are responsible for granting, denying, or revoking unescorted access to their own employees, contractors, and vendors. *Id.* ¶ 22 (referring to 10 C.F.R. § 73.56(a)(4)).

PSE & G and Local 94 entered into their current Collective Bargaining Agreement effective May 1, 1996. *Id.* ¶ 25. Article IX of the CBA provides for a grievance/arbitration procedure agreed upon by PSE & G and Local 94. *Id.* ¶ 33. This grievance/arbitration procedure was invoked by Local 94 after the termination of Mr. Forte, who until March 9, 1998, worked for PSE & G at the Hope Creek Nuclear Station. *Id.* ¶ 36. Mr. Forte had held the position of Nuclear Technician/Mechanical Welder and had unescorted access under the Personal Access Program ("PAP") established by PSE & G pursuant to 10 C.F.R. § 73.56. *Id.* ¶ 39. In August 1997, Forte's site access privilege was suspended following his third arrest for driving under the influence ("DUT"). *Id.* ¶ 40. PSE & G found temporary work for Forte that did not require site access. *Id.* ¶ 41. In November 1997, Forte was convicted of the DUI charge and forfeited his driver's license to the State of New Jersey. *Id.* ¶ 42. In January of 1998, PSE & G indefinitely continued the suspension of Forte's site access privilege. *Id.* ¶ 43. PSE & G discharged Forte on March 9, 1998. *Id.* ¶ 44.

PSE & G and Local 94 were unable to settle the grievance as to whether Forte had been discharged for just cause and the matter was submitted for arbitration with the American Arbitration Association (hereinafter "AAA"). *Id.* ¶ 71. The AAA appointed as arbitrator Shyam Das, Esquire. *Id.* ¶ 72. Arbitrator Das opened the hearings on April 7, 1999. *Id.* ¶ 76. The parties then stipulated that the issues for resolution were "[w]hether the discharge of Vinni Forte was for just cause" and "[i]f not, what shall the remedy be?" *Id.* ¶ 78. Immediately thereafter, PSE & G submitted a motion in limine to the arbitrator requesting the arbitrator to "bar Local 94 from presenting evidence touching on the January 1998 decision to revoke the grievant's unrestricted access to the Company's nuclear facilities." Pl.'s Compl. ¶ 25.

Plaintiff PSE & G filed the present action in Federal District Court, District of New Jersey, requesting a declaratory judgment that the site access issue is not subject to the arbitration provisions of the CBA, or any other agreement between PSE & G and Local 94, and seeking an Order staying Defendant Local 94 from proceeding with the arbitration on the site access question. *See* Pl.'s Compl. Defendant Local 94 filed an Answer and cross-motion requesting a declaratory judgment that site access is subject to arbitration and for an Order from the Court requiring PSE & G to submit to arbitration the issue of revocation of site access for Vincent Forte. Def.'s Answer and Countercl. The arbitration hearing has been stayed pending resolution of the arbitrability issue by the United States District Court for the District of New Jersey. Statement of Undisputed Material Facts ¶ 80.[FN1]

> FN1. Defendant Local 94 disputes Plaintiff's Statement of Undisputed Facts ¶ 80 by objecting to "the implication that Arbitrator Das rendered a decision or ruled otherwise that he did not have the authority to determine whether the revocation of site access resulting in discharge was a term and condition of employment protected under the [CBA] to which the parties agree to be bound." Def.'s Statement of Disputed

Facts.

***388** The first issue to be addressed by the Court is whether there is anything in the NRC regulations which prevent site access issues from being arbitrated pursuant to a grievance/arbitration provision in a collective bargaining agreement. If not, then the next issue to be addressed is whether the arbitration provision in the operative collective bargaining agreement covers revocation or denial of site access authorization.

II. *STANDARD FOR SUMMARY JUDGMENT*

A court may enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. Once the moving party has met its initial burden, the non-moving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the differences at trial. *Id.* at 324, 106 S.Ct. 2548. In deciding whether there is a genuine issue of material fact, the Court must view the evidence in the light most favorable to the non-moving party, and the non-moving party receives the benefit of all reasonable inferences that may be drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Baker v. Monroe Township*, 50 F.3d 1186, 1190 (3d Cir.1995).

III. *DISCUSSION*

A. *DO THE NRC REGULATIONS PREVENT SITE ACCESS ISSUES FROM BEING ARBITRATED?*

1. *NRC REGULATIONS*

[1] By enacting the Atomic Energy Act of 1954, 42 U.S.C. § 2011 and the Energy Reorganization Act of 1974, 42 U.S.C. § 5841, which established the NRC and transferred to it the licensing jurisdiction over private nuclear power plants which were formerly exercised by the Atomic Energy Commission, Congress intended that the "federal government maintain complete control of the safety and 'nuclear' aspects of energy generation," by regulating safety aspects involved in the construction and operation of nuclear power plants. *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). The NRC's "prime area of concern in the licensing context ... is national security, public health, and safety." *Id.* at 207, 103 S.Ct. 1713 (citation omitted). The NRC is authorized to prescribe regulations, including standards and restrictions governing the design, location and operation of nuclear facilities in order to protect health and to minimize danger to life and property. *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 235–36 (3d Cir.1980) (*citing* 42 U.S.C. § 2201(i)(3) (1976 & Supp. I)).

Pursuant to NRC regulations, nuclear power plant licensees must have an approved Physical Security Plan that provides protection against sabotage and unreasonable risk to the public health and safety. *See* 10 C.F.R. § 73.55 (2000). In May 1991, the NRC implemented a rule, 10 C.F.R. § 73.56, mandating that licensees establish an "access authorization program" and that the program be "incorporated***389** into the site Physical Security Plan as provided for by 10 C.F.R. § 50.54(p)(2) and implemented." *See* 10 C.F.R. § 73.56 (2000). According to § 50.54(p)(2), changes may be made to the Physical Security Plan without prior Commission approval as long as the changes do not decrease the effectiveness of the safeguards in the Plan. *See* 10 C.F.R. § 50.54(p)(2) (2000). However, the licensee is required to maintain records of the changes for three years from the date of the change and must submit a report describing each change within two months after the changes have been made. *See id.*

The NRC's objective in requiring licensees to establish a program for granting unescorted access to protected areas of a nuclear power plant "is to provide high assurance that individuals granted unescorted access are trustworthy and reliable and do not constitute an unreasonable risk to public health and safety, including the potential to commit radiological sabotage." 10 C.F.R. § 73.56(b)(1); *see also* NRC Regulatory Guide 5.66, Access Authorization Program for Nuclear Power Plants, June 1, 1991. The access authorization program must include a background investigation, psychological assessment and behavioral observation of individuals to be granted unescorted access. *See* 10 C.F.R. § 73.56(b)(2). Furthermore, pursuant to 10 C.F.R. § 73.56(a)(4), a "licensee may accept part of an access authorization program used by its contractors, vendors, or other affected organizations and substitute, supplement, or duplicate any portion of the program as necessary to meet the requirements of this section." 10 C.F.R. § 73.56(a)(4).

The rule also requires the implementation of a review procedure of denials or revocations of unescorted access authorization and sets forth minimum standards for such a procedure. 10 C.F.R. § 73.56(e). Section 73.56(e) of Title 10 of the Code of Federal Regulations provides:

> Each licensee implementing an unescorted access authorization program under the provisions of this section shall include a procedure for the review, at the request of the affected employee, of a denial or revocation by the licensee of unescorted access authorization of an employee of the licensee, contractor, or vendor, which adversely affects employment. The procedure must provide that the employee is informed of the grounds for denial or revocation and allow the employee an opportunity to provide additional relevant information, and provide an opportunity for an objective review of the information on which the denial or revocation was based. The procedure *may* be an impartial and independent internal management review.

10 C.F.R. § 73.56(e) (emphasis added).

The regulatory guide which accompanies the rule provides an approach acceptable to the NRC by which a licensee can meet the requirements of an access authorization program. NRC Reg. Guide 5.66, June 1, 1991. This approach is set forth in "Industry Guidelines for Nuclear Power Plant Access Authorization Programs" (NUMARC 89–01) published in 1989 by the Nuclear Management Resources Council (hereinafter "NUMARC"). The NRC endorses the NUMARC Guidelines with two exceptions. One of these exceptions refers to the review procedure as addressed in the guidelines. Section 7.2 of the Guidelines provides:

> Each permanent employee of a utility whose employment is or will be terminated as a direct result of denial or revocation of unescorted access authorization will: (1) be informed of the basis of a denial or revocation ...; (2) have the opportunity to provide additional information; and (3) have the decision ... ***390** reviewed by another designated manager ... who is ... independent of the individual who made the initial decision.
>
> . . . . .
>
> An alternative review process which is independent and impartial is acceptable. Where applicable, grievance review procedures contained in a collective bargaining agreement covering the bargaining unit of which the permanent employee is a member will meet this requirement and may be used for this purpose. If an alternative review process is used, the utility will include a description of the review process to be used in the procedures that meet this guideline.

The NRC explanation for excepting this provision is as follows:

> The Guidelines specify a review procedure specifically for *permanent* employees of licensees. The rule requires that a review procedure be available to all employees of a licensee, contractor, or vendor, *temporary or permanent,* whose

employment is adversely affected when unescorted access is denied or revoked by the licensee.

NRC Reg. Guide 5.66, June 1, 1991 (emphasis added).

2. *NATIONAL LABOR RELATIONS ACT*

Congress, through the National Labor Relations Act, 29 U.S.C. § 151, has regulated labor-management relations as well and has set forth that it is "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151. Section 173 of the Act provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

29 U.S.C. § 173(d). It is well settled law that arbitration is the preferred method for resolving disputes between a union and an employer. *See E.M. Diagnostic Sys., Inc. v. Local 169*, 812 F.2d 91, 94 (3d Cir.1987); *see also AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (stating that certain principles applied in determining whether a grievance is subject to arbitration "have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of collective-bargaining agreement.").

The relevant provisions of the CBA agreed to by PSE & G and Local 94 are: Article II(A); Article V(A)(1); and Article IX(A). Article II(A) provides:

> The management of the Company and the direction of the working forces including the right to hire, suspend, *discharge for proper cause*, promote, demote ... for other proper and legitimate reasons are recognized to be in the Company, except as otherwise provided in this Agreement. (emphasis added).

Article V(A)(1) of the CBA provides:

> The safety rules and regulations established by the Company or governmental authority shall be strictly adhered to by both the employees and the Company, and the Company shall enforce these rules and regulations uniformly.... Representatives of the Company and the Union shall meet at the request of either to discuss the reasonableness of the safety rules and regulations. Proposed changes in safety rules and regulations ***391** shall be submitted to the Union for full discussion before becoming effective.

Article IX of the CBA provides:

> Should any dispute or difference arise between the Company and the Union or its members as to the *interpretation, application, or operation of any provision of this Agreement*, not specifically settled in said Agreement, both parties shall endeavor to settle these in the simplest and most direct manner. (emphasis added).

A five-step procedure to settle the dispute follows with the relevant fifth step providing: "If the dispute or difference is not settled in the fourth step above, either party may request that the matter be referred to arbitration." Art. IX(F), Pl.'s Ex. F.

3. *WHETHER 10 C.F.R. § 73.56 PERMITS ARBITRATION AS THE REVIEW APPEAL PROCESS*

Neither party has cited authority directly on point as to whether NRC regulations preclude the revocation or denial of site access authorization from being arbitrated pursuant to an arbitration provision in a collective bargaining agreement. However, both PSE & G and Local 94 refer to the historical record, specifically the NRC's evaluation and response to public comments to the proposed regulation 73.56 published in the Federal Register. The parties use the NRC's response to public comments to support their respective arguments as to

whether the NRC regulations allow or endorse the arbitration procedure included in a collective bargaining agreement as a review procedure for revocation and/or denials of site access authorization.

Before implementing the rule, the NRC published for public comment a proposed rule to require access authorization programs at nuclear power plants and the NUMARC Guidelines. *See* Access Authorization Program for Nuclear Power Plants, 56 Fed.Reg. 18,997 (April 25, 1991). Comments were received from industry groups such as the NUMARC, labor unions, and various government agencies. *See id.*

According to the published evaluation and response to the public comments, the NRC acknowledged that, as reflected by the comments that had been submitted, there was concern that the review procedure required by the original proposed NUMARC Guidelines did not sufficiently protect the worker's interest. *Id.* at 19,002. Labor unions expressed concern that the Guidelines were developed without input from the bargaining unit or any worker representatives. *See id.* at 19,005. "The unions believed that issues involved in granting access authorization were conditions of employment and as such should be subject to the collective bargaining process." *Id.* In its discussion of this issue, the NRC stated "[i]t should be noted that the Commission never intended that any review procedure that already exists in a bargaining agreement be abandoned." *Id.* at 19,002. The NRC responded further to these comments by stating, "[i]t is not the intent of the Commission to exclude from consideration or to require consideration of access authorization issues in the collective bargaining process as long as the resolution of these issues is within the limits set by this rulemaking." *Id.* at 19,006.

The NRC replied to comments from industry questioning the necessity of a separate review procedure by stating:

> In the Commission's view, it is not sufficient reason to dispense with the review procedures simply because there are other remedies that are available to the aggrieved person. Although in theory an aggrieved individual could commence an action in a State or Federal court, such litigation could be costly and time-***392** consuming for the average employee. In addition, the Commission has not seen evidence that union collective bargaining agreements (where they exist) would automatically include denial or revocation of access authorization as a grievable action. In any case, the latter would not be available in nonunion plants. Further, if procedures under collective bargaining agreements are readily available for this purpose in the absence of a required review procedure, ... there is no basis for objection to the review portion of the rule in unionized plants, *since the rule would allow the use of a grievance procedure for review of denials or revocations of access authorizations.*
>
> *Id.* at 19,002 (emphasis added).

Nevertheless, PSE & G asserts that the historical record is, at best, ambiguous as to whether the NRC regulations support arbitration of site access appeals. *See* Pl.'s Br. at 15–16. PSE & G claims that the fact that the NRC "embraced virtually every [current NUMARC] Guideline element with the exception of Section 7.2," is critical. *Id.* "Had it received the NRC's vote of confidence, Section 7.2 would have ratified the qualified support for arbitration which appeared in the Commission's April 1991 commentaries." *Id.* at 16. In sum, "[b]y ruling that Section 7.2 'does not apply' the Commission apparently withdrew its tacit consent to the use of existing grievance/arbitration procedures for access appeals." *Id.*

However, the NRC explanation for the exception specifies that the rule requires that a review procedure be available for all employees of the licensee, contractor or vendor, temporary or permanent whose employment is adversely affected when authorized access is denied or revoked. By comparison the Guidelines provide for such a procedure solely for permanent employees of licensees. *See*

Reg. Guide 5.66, Pl.'s Ex. I. Significantly, the NRC is silent as to the portion of Section 7.2 that allows for a grievance review procedure contained in a collective bargaining agreement as an acceptable alternative review process, which indicates that the NRC did not reject this position. *See id.*

Furthermore, upon review of the NRC's response and evaluation to public comment published in the Federal Register it is apparent that the NRC never intended to preclude a grievance/arbitration provision included in a collective bargaining agreement as a review procedure for site access denials or revocations. In fact, the Court finds the historical record persuasive that the NRC's intent was to permit an arbitration provision to be utilized as the appeal process for revocation or denial of site access authorization when appropriate, especially in consideration of the NRC's response that it was not its intent to "exclude from consideration or to require consideration of access authorization issues in the collective bargaining process." 56 Fed.Reg. at 19,006.

More importantly, the language of the regulation itself supports this argument. Section 73.56(a)(4) allows a licensee to "accept part of an access authorization program used by its contractors, vendors, or *other affected organizations* [to] *substitute, supplement, or duplicate* any portion of the program as necessary to meet the requirements of this section." 10 C.F.R. § 73.56(a)(4) (emphasis added). Furthermore, § 73.56(e) provides that a licensee shall implement a review procedure and sets forth the minimum requirements such a procedure should include, one of which is "an opportunity for an objective review of the information on which the denial or revocation was based." *Id.* "The procedure *may* be an impartial and independent *internal management review*," but the regulations do not require that it be as ***393** such. *Id.* (emphasis added). Not only has the NRC not expressly precluded arbitration to be the appeal procedure, but the language in the regulation contemplates it. Therefore, the Court concludes that arbitration pursuant to a collective bargaining agreement is an acceptable means of complying with the appeal process requirement as specified in NRC regulation 10 C.F.R. § 73.56.

PSE & G cites *Department of Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), in support of the proposition that decisions about security clearances rest solely with the granting agency and that because the NRC delegated this power to individual licensees, authority to make site access determinations rests solely with PSE & G and are not reviewable as part of examining whether just cause existed for an employee's discharge. *See* Pl.'s Br. at 23. In *Egan*, the Supreme Court held that the grant or denial of a security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate executive branch agency having the necessary expertise in protecting classified information. 484 U.S. at 529–30, 108 S.Ct. 818.

PSE & G also cites to cases that follow *Egan* when reviewing a denial of site access leading to a discharge of nuclear power plant employees. However, these cases are distinguishable. One case involved a disability discrimination action under the Rehabilitation Act of 1973. *See Mitchell v. Crowell*, 966 F.Supp. 1071 (N.D.Ala.1996). The other two cases concerned actions under the Americans with Disabilities Act ("ADA"). *See McDaniel v. AlliedSignal, Inc.*, 896 F.Supp. 1482 (W.D.Mo.1995); *McCoy v. Pennsylvania Power & Light Co.*, 933 F.Supp. 438 (M.D.Pa.1996). The issues in *McDaniel* and *McCoy* were very similar to each other and both actions were dismissed for failure to establish a *prima facie* case under the ADA. *Id.* Both courts held that a security clearance is a qualification for the job under the ADA; that it is an essential function of the job; and that the employers could not accommodate the essential function of maintaining a government security clearance. *See McDaniel*, 896 F.Supp. at 1491; *McCoy*, 933 F.Supp. at 443 ("[The company] could make no 'reasonable accommodation' that would have al-

lowed plaintiff to remain in his former position and retain his security clearance without compromising its obligation imposed by NRC."); *see also Mitchell*, 966 F.Supp. at 1079 (holding that an employee was not "otherwise qualified" for position of public safety officer and that "this court is without authority ... to require defendant to allow plaintiff to remain in the position without a security clearance.").

Nevertheless, NRC regulation 10 C.F.R. § 73.56 is distinct in that it allows for an arbitration procedure provided in a collective bargaining agreement to be implemented as the required appeal process for revocation or denial of site access authorization. Therefore, these cases and the holding in *Egan* do not apply to the particular circumstances in this matter. Having established that the NRC regulations do not preclude site access issues from being arbitrated and that § 73.56 permits arbitration as an appeal process for revocation and denial of site access authorization, the Court will review whether the arbitration provision in the operative collective bargaining agreement covers revocation of or denial of site access authorization.

B. *DOES THE ARBITRATION PROVISION IN THE OPERATIVE CBA COVER SITE ACCESS AUTHORIZATION?*

The Supreme Court has set forth certain principles which govern the arbitrability of labor disputes. *See AT & *394T Tech.*, 475 U.S. at 648, 106 S.Ct. 1415 (referring to a series of cases known as the Steelworkers Trilogy: United *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and United *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). The first principle is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* (quoting *Warrior & Gulf Navigation*, 363 U.S. at 583, 80 S.Ct. 1347). The second principle is that whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance is an issue for judicial determination. *See id.* at 649, 80 S.Ct. 1347 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). The third principle is that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *Id.* at 649, 80 S.Ct. 1347.

In addition, if the collective bargaining agreement contains an arbitration clause, there is a presumption of arbitrability. *See id.* Arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 650 (citations omitted). Where a particular arbitration provision is a broad one, "in the absence of any express provision excluding a particular grievance from arbitration," the Court has held that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.*

[2] The Third Circuit Court of Appeals in *E.M. Diagnostic* articulated a three-part analysis to determine whether a particular labor dispute is subject to arbitration. *E.M. Diagnostic Sys., Inc. v. Local 169, Int'l Bhd. of Teamsters*, 812 F.2d 91, 95 (3d Cir.1987). This analysis requires the court to inquire (1) whether the present dispute comes within the scope of the arbitration clause; (2) whether any other provision of the contract expressly excludes this kind of dispute from arbitration; and (3) whether there is any other "forceful evidence indicating that the parties intended such an exclusion." *Id.*

PSE & G asserts that the grievance/arbitration procedure under Article IX of the CBA "limits arbitrable issues to 'disputes or differences' about the 'provisions' of the CBA" and given this narrow arbitration clause "and the fact that no reference" to

"site access" or to "unescorted access" issues is mentioned in the CBA, "it is clear that the Forte access grievance is not arbitrable." Pl.'s Br. at 6, 16. Local 94 contends that the language in the arbitration clause "lends itself to a very broad interpretation" and that "[n]onetheless, even in cases involving narrow arbitration clauses, or grievance subjects not covered by any particular clause of an agreement, the proper inquiry is whether the grievance is related to an interest protected by the collective bargaining agreement or whether there are any provisions, specific or otherwise, in the agreement relative to the issue in dispute." Def.'s Br. at 14 (referring to *E.M. Diagnostic,* 812 F.2d 91). PSE & G concedes that "employees who are discharged can arbitrate the termination of their employment," and that "Local 94 is entitled to arbitrate whether proper cause existed under the collective bargaining agreement for the discharge of Vincent Forte," but not with respect to *site access* determinations. Pl.'s Reply Br. at 4, Answer to Countercl. ¶ 19 (emphasis in ***395** original). Local 94 counters that "adverse job actions resulting in discharge, such as the revocation of site access authorization," is a term and condition of employment protected under the CBA. Def.'s Br. at 13. Accordingly, Local 94 asserts that Mr. Forte had the option and/or the ability to challenge any adverse action that affected any term or condition of employment through the CBA grievance procedures. *See id.*

1. *Scope of the Arbitration Clause and Zone of Interests*

[3] In *E.M. Diagnostic,* the collective bargaining agreement provided for arbitration of "any dispute arising out of a claimed violation of this Agreement." 812 F.2d at 95 (quoting collective bargaining agreement). The Court held that "a claimed contract violation comes within the scope of an arbitration clause of this character when the subject matter of the grievance is one that is within the zone of interests that have received protection in the collective bargaining agreement." *Id.*

In *E.M. Diagnostic,* the Company sought to enjoin arbitration of a grievance concerning its use of an outside contractor to perform certain work. 812 F.2d at 92. The Company argued that the collective bargaining agreement bestowed upon the Company the right to subcontract and "that there is no language in the agreement from which the Union's claim can be said to arise out of." *Id.* at 95. However, the court noted that the contract also limited the right to subcontract by providing that this right was "subject to restrictions contained in agreement." *Id.* The court held that even if limits on the right to subcontract were not explicitly declared, "an absolute right to subcontract would include the right to subcontract all work of the bargaining unit and would be inconsistent with the agreement's recognition of the Union as the bargaining agent for Company's employees." *Id.* at 96. The court further reviewed other provisions in the agreement that recognized the interests of Union members in their right to perform work free from competition of non-union personnel. *See id.* Based on these provisions, the court concluded that the subject matter of the grievance came within the zone of its protected interests under the collective bargaining agreement, therefore, the dispute arose out of a claimed violation of the agreement. *Id.; see also General Elec. Co. v. Teamsters Local Union No. 676,* 718 F.Supp. 400, 404 (D.N.J.1989) (where the court reviewed several provisions in the bargaining agreement concerning the subject matter of a union's grievance and found that the disputed issue came within the zone of union's protected interests under the agreement.).

2. *Whether the Zone of Interests Analysis Applies*

PSE & G argues that the zone of interests analysis does not apply to the present matter because 1) in contrast to the provision in *E.M. Diagnostic* where the agreement provided for arbitration of "any dispute arising out of a claimed violation of the agreement," the arbitration provision at issue in the present case is significantly narrower; and 2) the CBA between PSE & G and Local 94 provides solely for "rights" arbitration and interest disputes are not arbitrable under a "rights" arbitration

clause. *See* Pl.'s Br. at 19–22.

PSE & G stresses that "any dispute arising out of a claimed violation of the agreement" is broader than the "narrower category of disputes, i.e. those about existing contract provisions," provided in the CBA between PSE & G and Local 94. Pl.'s Br. at 20. Therefore, according to PSE & G, a court's review of the CBA for any reference to the subject matter of the dispute and whether it is within the union's zone of interests that are protected in the ***396** CBA is inappropriate. Furthermore, PSE & G asserts that Local 94 has failed to identify a provision in the CBA of which PSE & G allegedly violated; therefore, there is no dispute pertaining to the interpretation, application, or operation of any provision in the Agreement. *Id.* at 29.

However, a similar argument as the one PSE & G asserts was asserted by General Electric Company in *General Elec.*, 718 F.Supp. at 403. The court in *General Electric* found this argument to be unpersuasive because there did not "appear to be a significant difference in the character of the *E.M. Diagnostic* clause which provided for arbitration for 'any dispute arising out of a claimed violation of this Agreement' and the language of the clause at issue which provided for arbitration 'with respect to the interpretation or application of any provision of this Agreement.' " *Id.* The Court held that:

> Both clauses direct attention to the agreement, the first toward disputes arising from violations of the agreement, the second toward disputes with respect to "interpretation or application" of provisions of the agreement. GE's clause involves *interpretation* of provisions and the word interpretation connotes as flexible a character as the *E.M. Diagnostic* language of 'arising out of.' Thus, the zone of interest test is applicable.

Id. (emphasis in original). The language of the arbitration provision in *General Electric* is nearly identical to the language of the arbitration provision in the CBA between PSE & G and Local 94, which provides for arbitration of "any dispute or difference ... as to the interpretation, application, or operation of any provision of this Agreement." The Court agrees with the court's reasoning in *General Electric* and finds that there is no critical difference in the language contained in the CBA agreed to by PSE & G and Local 94 and the arbitration provision at issue in *E.M. Diagnostic.* Therefore, the Court concludes that the zone of interests test is applicable to the present matter.

PSE & G also cites to three Third Circuit cases to assert that in applying the zone of interest test, the Third Circuit has drawn a dichotomy between "rights" arbitration and "interest" arbitration, and that interest disputes are not arbitrable under a "rights" arbitration clause. Pl.'s Br. at 21–22 (citing *Pennsylvania Power Co. v. Local Union # 272*, 886 F.2d 46 (3d Cir.1989); *Jersey Nurses Econ. Sec. Org. v. Roxbury Med. Group*, 868 F.2d 88 (3d Cir.1989); *Lodge 802 Int'l Bhd. of Boilmakers v. Pennsylvania Shipbuilders Co.*, 835 F.2d 1045 (3d Cir.1987)). PSE & G contends that the CBA between PSE & G and Local 94 provides solely for "rights" arbitration. *See id.* However, PSE & G's reliance on these cases is misplaced.

The Third Circuit Court of Appeals in these cases did not note the distinction between "rights" arbitration and "interest" arbitration in applying the zone of interest test, nor is the zone of interest analysis discussed. Instead, these cases involve separate provisions in collective bargaining agreements that specifically limited an arbitrator's ability to set new terms to the agreement. For example, in *Pennsylvania Power*, in deciding whether a grievance regarding a wage rate for a newly created job classification was arbitrable, the court reviewed a separate provision of the collective bargaining agreement which provided that "the arbitrator shall have no power to change, add to, or subtract from any of the provisions of this Agreement." *Id.* at 48. Noting that it had been called upon to examine the legal effect of similar language in *Lodge, supra,* and *Jersey Nurses, supra,* the court found that "such clauses limit the scope of arbitrable issues to

those 'involving the interpretation or application of terms and conditions of employment*397 that the parties have themselves agreed to in their contract.' " *Id.* (citations omitted). The court explained "we have distinguished such 'rights' arbitration from 'interest' arbitration, where the parties have agreed to allow the arbitrator to set new terms and conditions of employment that are not contained in the collective bargaining agreement." *Id.* The court further discussed that "when parties agree to 'rights' rather than 'interest' arbitration, the arbitrator exceeds her authority if she deems arbitrable those issues whose resolution calls for the addition of new terms or conditions to the agreement." *Id.* The court concluded that because the collective bargaining agreement did not contain a wage rate for the [newly created] position, the union, in seeking an arbitrator's ruling as to the appropriate wage rate for that position, "sought 'to have the arbitrator create new terms for the parties' " and because of the separate provision limiting arbitrable issues to terms and condition already agreed upon, the arbitrator did not have that power. *Id.* at 49.

Similarly, in *Lodge 802,* the union had sought to have an arbitrator fix the wage rates for a particular job classification. 835 F.2d 1045. The relevant agreement limited arbitration "to the meaning, application or interpretation of any of the terms or conditions of this Agreement." *Id.* at 1046. The collective bargaining agreement also contained a separate provision which provided that "the arbitrator shall not have power to alter or modify the terms and conditions of this Agreement." *Id.* The court distinguished the case from *E.M. Diagnostic* by explaining that the present "grievance is not one of 'a claimed contract violation'; instead the Union seeks to have the arbitrator create new terms for the parties." *Id.* at 1047.

In contrast with the agreement involved in these cases, there is no separate provision in the CBA agreed to by PSE & G and Local 94 that specifically limits the arbitrator from changing, adding to, or subtracting any provision in the agreement or, in the alternative, one that specifically permits the arbitrator to set new terms and conditions of employment that are not contained in the agreement. The distinction between "rights" arbitration and "interests" arbitration does not apply without such a provision. Furthermore, unlike the aforementioned cases where the union asked the arbitrator to set wage rates or benefit categories (*see Jersey Nurses,* 868 F.2d at 89) which would create new terms in the collective bargaining agreement, Local 94 is not asking the arbitrator to create new terms for the parties. Instead, the Union is claiming that PSE & G is in violation of the CBA by revoking Mr. Forte's site access authorization and discharging him without proper cause. The arbitrator is not expected or requested to create new terms in the agreement, but rather, is to decide whether proper cause exists for discharging Mr. Forte. Whether the arbitrator is permitted to determine if proper cause existed for the revocation of site access is the issue before this Court, and whether site access determinations are within the zone of interests protected in the CBA is the appropriate inquiry in determining the issue. Finally, whether or not the zone of interests test applies to the instant matter is not determinative of the outcome of this case because the Court finds that the arbitration of site access decisions is not within Union's protected zone of interests under the CBA.

3. Site Access Determinations are not within the Zone of the Union's Protected Interests under the Operative CBA.

[4] As compared with *E.M. Diagnostic,* where the court found that the subject matter of the grievance was within the zone of interests, the Court does not find *398 that to be the situation in the present matter. Whereas in *E.M. Diagnostic,* the collective bargaining agreement provided that the right to subcontract was subject to restrictions and the court reviewed other provisions which recognized the rights of union members to perform work free from competition of non-union personnel, there is no mention of site access authorization issues in the CBA agreed to by PSE & G and Local 94.

There are no provisions, specific or otherwise, related to site access authorization determinations. In fact, during the deposition of John Gerrity, President of Local 94, Mr. Gerrity agreed that the "the body of the contract, says nothing about site access." Def.'s Ex. 10 at 39, App. 3, Gerrity Dep. Upon furthering questioning, Mr. Gerrity explained that site access questions should be both grieved and arbitrated because it has been established as past practice. *See id.* at 39–42.

Local 94 in its brief refers to certain letters attached to and incorporated into the CBA to demonstrate that PSE & G has agreed to be bound by terms and conditions of employment outside the actual wording of the contract, *i.e.* past practice. Asserting that past practice has been incorporated into the CBA, Local 94 specifically refers to the May 2, 1961 letter that states, "the intent of the existing provisions and the long-time interpretation and practice do not limit Company representation at second and third-step grievance meetings as a literal interpretation of the wording might indicate." Def.'s Ex. 4 at A4, App. 1. Local 94 contends that this demonstrates that PSEG acknowledged its acceptance of a long-time practice and interpretation of the wording in the contract concerning grievance procedures. However, this provision specifically refers to discussions concerning the revision to Sections C and D under Article IX of the CBA, which both parties agreed was not necessary based on the understanding that long-standing practices would continue. *See id.* Sections C and D of Article IX refer to the steps in the procedure for how disputes or differences should be settled. No revisions were discussed or long-standing practices accepted concerning Section A, which delineates the substantive issues (disputes and differences) to be resolved pursuant to the procedure set forth in Sections B through F. *See id.* The Court finds this letter unpersuasive because it is the subject matter for arbitration that is at issue in the present matter.

Local 94 refers to other letters incorporated into the CBA as well. *See* Def.'s Br. at 12. The May 1, 1977 and May 1, 1987 letters reflect the agreement between the parties to refer to the language in the source document if a question arises over the interpretation, application or operation of "certain Personnel Instructions and Letters to the System Council" incorporated into the CBA. Def.'s Ex. 4 at A10 and A26, App. 1. The Court finds these letters unconvincing in that they fail to support the Union's assertion that PSE & G agreed to be bound by past practice or any terms and conditions regarding site access authorization issues outside the wording of the contract.

Furthermore, a past practice must be clearly enunciated and consistent, endure over a reasonable length of time, and be an accepted practice by both parties. *See Posadas de Puerto Rico Assoc., Inc. v. NLRB*, 243 F.3d 87, 92 (1st Cir.2001) (stating that "[a]n item that is not addressed in a collective bargaining agreement can become a term and condition of employment ... if it has been 'satisfactorily established' by past practice or custom."); *but see Lukens Steel Co. v. United Steelworkers of Am.*, 989 F.2d 668, 673 (3d Cir.1993) (stating that "[i]f the agreement is explicit and unambiguous [regarding whether a grievance is arbitrable]; there is no need ***399** to look to extrinsic evidence."). Local 94 asserts that "the resolution of site access disputes by way of arbitration has been the established practice between the parties for nearly two decades." Def.'s Br. at 11. Local 94 offers the Affidavit of John Gerrity, President of Local 94, as providing a historical factual basis for the Union's conclusion that PSE & G has consented to the resolution of site access disputes through the grievance and arbitration provisions in the CBA. *See* Def.'s Ex. 11, App. 3, Gerrity Aff.

In his Affidavit, Mr. Gerrity refers to five disputes that were submitted to arbitration, four of which occurred in the 1980s, prior to the promulgation of the NRC regulation at issue, and one in 1993. The Court has reviewed Mr. Gerrity's Affidavit and the accompanying settlement agreements, arbitration awards, and arbitration hearing tran-

scripts, Def.'s Ex. 19–24, App. 4, and concludes that these matters do not demonstrate a past practice that is clearly enunciated, consistent, and accepted as a course of conduct by both parties with respect to site access. For example, in 1983, an employee who was accused of misrepresenting his criminal history on his employment application was suspended from "vital access" to restricted areas of the facility. Def.'s Ex. 20, App. 4, Opinion and Award of Arbitration Board. Several days thereafter, he was suspended from work pending the outcome of an investigation. *Id.* About one month later, the employee was discharged based on his falsification of the application. *Id.* The Union filed a grievance protesting the discharge; subsequently, the matter was submitted to arbitration. *Id.* Notably, the issue before the Board of Arbitration was whether the employee falsified information on his employment application, and if so, whether such conduct constituted proper cause for his termination. *Id.* The Board found that the discharge was for proper and just cause and not in violation of the CBA. *Id.* Importantly, the issue before the Board was not whether there was proper cause to revoke the employee's site access and there is no discussion of site access issues in the Board's Opinion.

In another matter, the issue submitted to arbitration was whether the discontinuance of employment of the grievant was for proper cause. Def.'s Ex. 20, App. 4, Arbitration Opinion and Award. There is no discussion of site access issues in the Board's opinion, nor would such a discussion have been relevant in the matter because the employee was not denied site access. *Id.* In addition, Mr. Gerrity refers to another dispute submitted to arbitration that was settled pursuant to an informal settlement agreement before an arbitration award was issued. Def.'s Ex 11, App. 3, Gerrity Aff. Interestingly, as Mr. Gerrity discusses in his Affidavit, PSE & G argued during the arbitration hearing that the proper issue before the Arbitration Board was whether the Company had a right to discontinue the employee once the determination was made that he was unsuited for site clearance. Def.'s Ex. 22, App. 4. The Union disagreed and argued that it was one of the issues to be resolved by the Board. *Id.* Far from evidence that PSE & G accepted arbitration of site access issues, this demonstrates that PSE & G actually disputed submission of site access issues to arbitration. In the fourth matter, once again, the issue submitted to arbitration was whether the employee was discharged for proper cause and once again, there is no discussion of site access issues in the Arbitration Board's opinion. Def.'s Ex. 23, App. 4.

In the fifth dispute Gerrity refers to in his Affidavit, which occurred after implementation of the relevant NRC regulation, PSE & G filed an action for a declaratory judgment barring the issue of denial and revocation of site access from arbitration. ***400** Def.'s Ex. 24, App. 4. The action was withdrawn without resolution by the court and the parties settled the dispute. *Id.* A clause in the Settlement Agreement reads that "[i]t is the position of Public Service that site access determination issues are not arbitrable, and it is the position of [the Union] that they are arbitrable under the parties agreement." Def.'s Ex. 24, App. 4, Settlement Agreement. Once again, this demonstrates that PSE & G had not accepted arbitration as a means of resolving site access disputes.

The Court concludes that the resolution of site access disputes by way of arbitration is not a past practice incorporated into the CBA, and thus, is not within the zone of interests protected in the operative CBA. The matters Local 94 has identified for supporting this assertion fail to demonstrate a clearly enunciated and consistent practice over a reasonable length of time that has been an accepted course of conduct by both parties. Because the Court has determined that site access disputes do not come within the scope of the arbitration clause it is not necessary to inquire whether there is any other provision excluding this kind of dispute from arbitration or whether there is other "forceful evidence" indicating that the parties intended such an exclusion under *E.M. Diagnostic.*

The Court recognizes the interests of union members in their right to arbitrate whether proper cause exists for decisions affecting the terms and conditions of their employment. As admitted by PSE & G, whether proper cause existed for Mr. Forte's termination is subject to arbitration pursuant to the CBA. However, revocation of Mr. Forte's access authorization is a separate determination that is made pursuant to NRC regulations that require licensees, here PSE & G, to implement an access authorization program and an appeal procedure for denial or revocation of site access authorization. *See* 10 C.F.R. § 73.56. Though the appeal procedure may be a grievance/arbitration process provided in a collective bargaining agreement, it is also important to note that in light of the first principle governing the arbitrability of labor disputes, arbitration is a matter of contract and PSE & G is only required to submit to arbitration those disputes it has agreed to submit. *See AT & T Tech.*, 475 U.S. at 648. 106 S.Ct. 1415. PSE & G has neither expressly or implicitly agreed to submit site access disputes to arbitration, nor has the Company assented that arbitration, as set forth in the CBA, is the appeal process for revocation of access authorization decisions pursuant to NRC regulation § 73.56.

Though there is a presumption of arbitrability when a CBA contains a broad arbitration clause, not every issue is subject to arbitration. *See E.M. Diagnostic*, 812 F.2d at 95. Not only does the Court conclude that site access issues are not within the zone of the Union's protected interests under the current and operative CBA, but in the instant matter which concerns the unique and critical issue of the safety of the public at large regarding nuclear power plants, the Court deems it necessary and appropriate that both PSE & G and Local 94 expressly agree to submit site access issues to arbitration and that this be specifically provided in the CBA.

Furthermore, denying arbitration of Mr. Forte's revocation of site access authorization without a specific provision in the CBA does not infringe on the rights of the Union to grieve and arbitrate whether proper cause exists for his termination. As PSE & G asserts, if Local 94 prevails on behalf of Mr. Forte, and the arbitrator finds that proper cause does not exist for Forte's discharge, then the arbitrator could award, for example, reinstatement ***401** with full back pay for Forte. The only remedy not available would be granting site access. Finally, arbitration may be available for union members in the future, provided that labor and management negotiate this issue and specifically articulate in the CBA that arbitration is the appeal procedure for revocation or denial of site access authorization.

C. *DOES PUBLIC POLICY PERMIT ARBITRATION SPECIFICALLY PROVIDED FOR IN A CBA AS AN APPEAL PROCESS FOR SITE ACCESS DETERMINATIONS?*

[5] Other courts have recognized the significance of the regulatory scheme governing nuclear energy in ensuring public safety. The court in *International Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power* maintained that "[c]ongressional authorization for a specific agency, the Nuclear Regulatory Commission, to oversee and ensure nuclear safety, reflects the 'level of public concern over the safety of the nuclear power industry.' " 143 F.3d 704, 718 (2d Cir.1998) (citation omitted). The NRC regulations represent "a strict regulatory scheme devised by Congress for the protection of the public from the hazards of nuclear radiation" demonstrating "a dominant and well-defined policy requiring strict adherence to nuclear safety rules." *Id.* (citations omitted); *Tennessee Valley Auth. v. Tennessee Valley Trades and Labor Council*, 184 F.3d 510, 519 (6th Cir.1999). Courts have also acknowledged the licensee's required compliance with the extensive regulations promulgated by the NRC designed to ensure the safety of nuclear power plant workforces and the public at large. *Id.* at 707. In addition, "[a] court may not enforce a collective bargaining agreement that is contrary to public policy" and the "question of public policy is ultimately one for resolution by the courts." *Id.* at 715 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of*

United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983))

Several cases have involved claims that a labor arbitration award should not be enforced because it contravened public policy or that the arbitrator exceeded his or her authority to resolve issues that affected public safety and well being subject to government regulation, i.e. nuclear safety regulations. *See id.; Local 97, Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power,* 196 F.3d 117 (2d Cir.1999); *Tennessee Valley Auth.,* 184 F.3d 510 (6th Cir.1999). The issue in these cases was the public policy implications of reinstating employees to safety-sensitive positions. Basically, at bottom, this is the same issue that PSE & G is concerned about here. These cases also reflect that site access issues have been submitted to arbitration pursuant to collective bargaining agreements, however, there is no detailed discussion regarding the specific arbitration provisions.

The NRC regulation at issue in *International Bhd. of Elec. Workers, Local 97* required the licensee to maintain a Fitness for Duty program which entailed random drug testing.[FN2] 143 F.3d at 707. The case involved a chemistry technician, responsible for ensuring that the plant chemistry was maintained within the technical specifications required by the NRC, who adulterated his specimen with chlorine during the administration of a random drug test. *Id.* After a second test confirmed the presence of cocaine, a disciplinary hearing was ***402** held pursuant to a provision in the collective bargaining agreement which required that a fact-reviewing meeting be convened prior to the imposition of any discipline involving the loss of pay. *Id.* at 707–08. Subsequent to the hearing, the Company terminated the employee. *Id.* at 708. The union appealed the termination through the grievance procedure pursuant to the collective bargaining agreement and the matter was ultimately submitted to arbitration. *Id.* The issue submitted was whether the Company had "just cause" for the discharge. *Id.* The arbitration panel ordered that the employee be conditionally reinstated and the District Court vacated the award holding that reinstatement would contravene public policy favoring a safe work environment. *Id.* at 709.

> FN2. It should be noted that, initially, the Company unilaterally implemented the Fitness for Duty program. However, importantly, it was superceded when the Company and the Union reached an agreement and created a new program. *Id.* at 709.

The Second Circuit Court of Appeals reversed the District Court and held, in part, that the arbitration award of the employee's conditional reinstatement didn't violate public policy. *Id.* at 719. The court found that the NRC regulations did not proscribe reinstatement of employees found to have adulterated a drug test or who have tested positive for drugs or alcohol. *Id.* at 718. Specifically, the regulations did not discuss or specify any penalty for the adulterated drug test offense, and that the regulations only required a minimum two week denial of unescorted access and referral to an employee assistance program when employees tested positive. *Id.* at 718 (referring to 10 C.F.R. § 26.27). The court further found that the NRC regulation "clearly contemplates the notion of both rehabilitation and reinstatement." *Id.* Therefore, the court held that nothing in the NRC regulations prohibited re-employment of the employee provided that adequate assurance of the employees's rehabilitation is obtained. *Id.* at 719.

In dicta, the court sympathized that in a nuclear work environment, the protection of the public must take precedence for which there is little room for error, and dismissal from employment ought to be a viable alternative for the offenses. *Id.* at 727. However, the court recognized the problem as two-fold. The Company had agreed to a Fitness of Duty Program that did not provide it with sufficient authority to discharge an employee for that particular offense, and second, the NRC, "the policy maker here, [had] chosen not to confront the issue dir-

ectly." *Id.*

In *Tennessee Valley Auth.*, when a nuclear reactor unit operator tested positive during a random drug test administered pursuant to the Company's Fitness for Duty Program, his security clearance was suspended. 184 F.3d at 512. Thereafter, the employee unsuccessfully attempted to understand and comply with instructions concerning his responsibilities and rights in appealing the denial of his security clearance. *Id.* Eventually, the company terminated him for failure to maintain his security clearance. *Id.* at 513. Pursuant to the collective bargaining agreement entitled the General Agreement, the union filed a grievance alleging that the employee had been "treated unfairly" by the Company. *Id.*

The arbitrator awarded reinstatement surmising that the employee's termination was unjustified because he was not afforded due process to which he was entitled pursuant to the collective bargaining agreement and Company policy and procedure based on the appropriate laws and NRC regulations. *Id.* at 514. The District Court vacated the arbitrator's award holding in part that it was at variance with another contract between the parties (the Framework Agreement) and was contrary to public policy. *Id.* However, the Court of Appeals held that the "enforcement of the award did not violate any public policy." *Id.* at 521.

***403** The court reviewed the General Agreement which in express terms, provided a grievance procedure "to resolve an employee's complaints about having been 'treated unfairly' " and explicitly reserved the resolution of the issue to the arbitrator as well as disagreements with supervisors regarding the application of employment policy. *Id.* at 516. The court also considered the Framework Agreement which specifically provided that unless expressly modified or restricted by another provision, management, Tennessee Valley Authority ("TVA"), retains the right "to determine its internal security practices; to suspend, discharge employees... for cause." *Id.* (quoting Agreement). The Agreement also designated management responsibilities as being "matters governed by federal law, including regulations," but parenthetically qualified this clause by providing "to the extent that the law provides flexibility in its implementation, such matters are within the scope of bargaining unless otherwise excluded by this Agreement." *Id.* at 517. The Agreement further designated as management responsibilities, "the program for determining fitness for duty; [and] ... development of health and safety rules and requirements." *Id.*

The court concluded that based on this Framework Agreement, determinations of fitness of duty were not within the scope of bargaining, but that this did not "restrict any right that the [union] would otherwise have to challenge actions on matters which go beyond the requirements of federal law." *Id.* at 518 (quoting Agreement). Therefore, because the issue before the arbitrator was whether the Company had treated the employee unfairly, the arbitrator was allowed to consider pursuant to the General Agreement, whether the determination to remove his security clearances was conducted fairly. *Id.*

The court further held that the arbitrator's decision was not contrary to federal law or regulation nor was the reinstatement award violative of public policy. *Id.* at 518–20. However, the court qualified this holding by explaining that if the award were interpreted as requiring TVA to reinstate the employee's security clearance without any further proceedings, the question of whether it violated public policy would be more difficult. *Id.* In addition, the court explained that such an award would more likely "exceed the arbitrator's authority under the General Agreement, which does not authorize an arbitrator to dictate a substantive outcome of a fitness determination nor the manner in which the company weighs the various considerations relevant to that decision." *Id.* at 520.

In the present case, the question is whether arbitration of a labor-management dispute pursuant to a collective bargaining agreement is violative of

public policy, not whether the award itself is violative of public policy. The relevant NRC regulation requires a procedural appeal process when licensees deny or revoke security clearances and the issue is whether arbitration pursuant to this collective bargaining agreement may be the appeal process. PSE & G's concern appears to be the usurping of its authority to make site access decisions by the arbitrator if arbitration is designated as the site access appeal process. However, as the Court has already determined, the NRC regulations permit arbitration to be the appeal process for revocation or denial of site access decisions. Similar to the General Agreement in *Tennessee Valley Auth.*, the CBA agreed to by PSE & G and Local 94 does not authorize an arbitrator to rule on site access determinations. This having been established, the Court believes that as a matter of public policy, including the profound safety concerns regarding the nuclear energy industry, an appeal procedure***404** for site access determinations is worthy of a clear and specific reference in either the CBA or the PAP.

Therefore, the Court holds that due to public policy reasons, including the critical importance of security measures implemented by nuclear power plants in accordance with the law and NRC regulations to ensure public safety, and in acknowledgment of the public interest in resolving labor disputes in the least obstructive manner by encouraging arbitration and protecting the rights and interests of labor, site access appeals must be a specifically agreed upon procedure by both labor and management. The importance of site access determinations warrants a separate, clear and specific provision in the collective bargaining agreement if arbitration is to be the review process. In the present case, the Court has found that there is no specific provision in the operative CBA between PSE & G and Local 94 allowing for arbitration as an appeal procedure of site access determinations. Absent such a provision in the CBA, the current management review process in PSE & G's Personnel Access Program is the only available means for appealing decisions revoking or denying site access authorization.

In sum, public policy does not preclude arbitration from being implemented as the appeal procedure for site access determination, however, it does require a clearly enunciated provision in the CBA that designates arbitration as the appeal procedure for site access determinations.

D. *DOES THE PSE & G PERSONNEL ACCESS PROGRAM VIOLATE NRC REGULATIONS?*

Finally, Local 94 argues that the PSE & G Personnel Access Program violates NRC regulations. As previously mentioned, NRC regulation 10 C.F.R. § 73.56 sets forth certain required minimum standards to be included in the appeal procedure for site access decisions. The site access appeals program must provide that the employee is informed of the grounds for the denial or revocation of site access authorization; that he or she is allowed an opportunity to provide additional relevant information; and that he or she is provided an opportunity for an "objective review of the information on which the denial or revocation was based." 10 C.F.R. § 73.56(e). Furthermore, the regulation provides that "[t]he procedure may be an impartial and independent internal management review." *Id.*

After reviewing the appeal procedure set forth in PSE & G's Personal Access Program, the Court finds that the program complies with § 73.56(e). Pursuant to the PAP, when a background investigation discloses adverse information concerning an employee, the Access Authorization Supervisor is responsible for deciding whether to deny personnel access clearance using her own expertise referring to criteria for denying access listed in Appendix A of the PAP manual, "and any other available regulatory or industry guidance." Pl.'s Ex. K at 36–37, PSE & G Personnel Access Program Section 7.4. As part of the program, a Site Access Committee is established as well, "to provide guidance and aid in the decision-making process when multi-department issues are present." *Id.* The Committee members include the "Access Authorization Supervisor, Manager–Nuclear Security, Psychological

Services Administrator, Medical Review Officer, the subject's R/C Manager and/or Employee Relations management representative, as appropriate to the case." *Id.*

An employee may appeal a denial or revocation of site access decision "provided the person has a reasonable basis upon which to believe the decision was incorrect."***405** *Id.* at 8.0. "Disagreement with written company policy or requirements in federal or state regulations is not an acceptable reason for an appeal." *Id.* at 8.1. The employee must submit a written request for an appeal to the Access Authorization Supervisor, a copy of which is sent to the Employee Relations Manager, stating the reasons he or she believes the denial or revocation of access decision was incorrect. *See id.* The Access Authorization Supervisor reviews the appeal request and forwards it to the Appeals Officer "responsible for conducting the impartial review of Personnel Access Clearance denial decisions" and any additional information germane to the case. *See id.* The Appeals Officer then reviews the employee's "access processing files and may conduct or have conducted additional inquiries as necessary to achieve an independent evaluation of the available facts." *Id.* at 8.3. During this independent evaluation, the program requires the Appeals Officer to review 1) information provided by the employee at the time of the original adverse information interview or in the appeal request; 2) documentation received by the employee which provided notification of the access denial; 3) other relevant communications such as notes of oral discussions and interviews; and 4) the department's documented process used to affect the decision; *i.e.* departmental implementing procedures. *Id.* The Appeals Officer will either affirm the decision or recommend reversal. If reversal of the decision is recommended, the Access Authorization Supervisor has the opportunity to concur. *Id.* If the Supervisor does not concur, the recommendation of reversal is submitted to the Manager of Nuclear Security. *See id.* at 8.3, Actions by the Appeals Officer.

After his third arrest for DUI in August 1997, PSE & G suspended Mr. Forte's site access authorization. PSE & G found temporary work for Mr. Forte that did not require site access. However, in November 1997, after Mr. Forte's conviction of the DUI charge and the forfeiture of his drivers' license to the State of New Jersey, PSE & G indefinitely suspended Forte's site access privileges. In a letter dated April 9, 1998, Ronald Fisher, Site Access Screening Supervisor, informed Mr. Forte that the "Site Access Committee re-convened pursuant to a request by PSE & G management to reconsider the matter of [his] unescorted access." However, the Committee concluded that the decision to deny access authorization was appropriate. Pl.'s Ex. H. Mr. Fisher further advised Mr. Forte that he had the right to appeal the access decision within 10 days. *Id.* Mr. Forte failed to avail himself of the appeal process offered by PSE & G as part of their PAP in compliance with the NRC regulations.

[6] Local 94 does not contend that the procedure was not followed in Mr. Forte's case or that it was arbitrarily or unfairly imposed in his case. Instead, Local 94 alleges that the PSE & G Personnel Access Program violates NRC regulation 10 C.F.R. § 73.56 in that, in general, it is unfairly and arbitrarily implemented against PSE & G employees. *See* Def.'s Br. at 21. The Union alleges that too much power is vested in individual management personnel who decide the fate of employees without adequate guidelines to operate as a check on their conduct and discretion. *Id.* at 22. Local 94 points to the Affidavit of Ronald K. Fisher and asserts that even Mr. Fisher admits that "the Access Committee is 'self-managed' and collectively answerable only to the Manager of Nuclear Security, himself a member of the Committee." *Id.* at 23; Def.'s Ex. 6 at 94–96, App. 2, Fisher Dep. Local 94 also refers to John Gerrity's Affidavit, wherein Mr. Gerrity describes how security personnel have used site access as ***406** a basis to "intimidate, control, and harass employees at their whim." *Id.* at 24–25. For example, security personnel have suspended access authorization to employees who park in the wrong

spot in the parking lot. Def.'s Ex. 11, App. 3, Gerrity Affidavit.

[7] Nevertheless, there is no private cause of action for violations of the provisions of the Atomic Energy Act. *See Brown v. Northeast Nuclear Energy Co.*, 48 F.Supp.2d 116, 121–22 (D.Conn.1999) (stating that there is no private cause of action "in light of Congress' express prohibition against private enforcement of the Atomic Enforcement Act in 42 U.S.C. § 2271(c), which provides: 'No action shall be brought against any individual or person for any violation under this chapter ... except by the Attorney General of United States ....' "); *see also Conway v. PECO Energy, Co.*, No. CIV.A.96–7284, 1997 WL 34672, at *5 (E.D.Pa. Jan. 28, 1997). The NRC regulations do provide "private parties with a limited administrative enforcement mechanism for alleged violations, 10 C.F.R. § 2.206 (any person may request the NRC to institute a proceeding to modify, suspend or revoke a license) and vests civil and criminal enforcement authority in the NRC under 42 U.S.C. § 2271(c))." *Brown*, 48 F.Supp.2d at 122. In *Conway* the plaintiff alleged that the company's conduct in investigating his alleged drug activity and revoking his security clearance violated various NRC regulations. 1997 WL 34672, at *5. The court in *Conway* declared that "[i]t is clear ... that Congress did not intend the federal courts to be available to hear cases by a plaintiff for violation of NRC regulations of drug testing and security clearance investigations," and held that the court lacked jurisdiction over such matters. *Id.*

Similar to *Conway*, Local 94 claims PSE & G's conduct violates NRC violations by its unfair and arbitrary implementation of the Personnel Access Program. Therefore, if the Union believes that the Personnel Access Program is in violation of the NRC regulations in that it is arbitrarily implemented by PSE & G, it may appeal to the NRC pursuant to § 2.206.

IV. *CONCLUSION*

For the reasons set forth herein, Plaintiff's motion for summary judgment requesting the Court to declare that site access issues are not subject to arbitration under the grievance/arbitration provision of the CBA is granted. Defendant's cross-motion for summary judgment requesting the Court to order Plaintiff to submit to arbitration the issue of the revocation of site access for Vincent Forte is denied. Defendant's cross-motion for summary judgment requesting the Court to order Plaintiff to submit to arbitration the issue of revocation of site access for all other Local 94 represented employees whose employment may be adversely affected is denied without prejudice, subject to a new provision in the CBA specifically providing for arbitration as the appeal process for site access determinations.

Requiring a specific provision in the CBA presents a legally permissible opportunity for labor and management to come together to agree on a clear and precise method of site access review, compliant with NRC regulations, which would result in a fair and reasonable balance between the rights of union members and the safety of the public. Absent such a specific provision, the current appeal procedure as set forth in PSE & G's Personnel Access Program complies with NRC regulations and is the applicable method of review.

D.N.J.,2001.
Public Service Elec. & Gas Co. v. Local 94 Intern. Broth. of Elec. Workers
140 F.Supp.2d 384, 169 L.R.R.M. (BNA) 2364, 143 Lab.Cas. P 10,986

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 16-1219

ENTERGY OPERATIONS, INC.
Plaintiff – Appellant

v.

UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA INTERNATIONAL UNION; UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA LOCAL 23
Defendants – Appellees

On Appeal from the United States District Court
for the Eastern District of Arkansas – Western Division

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Dated: March 7, 2016

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellant Entergy Operations, Inc., seeks to reverse the District Court's Order and Judgment upholding the arbitration award issued by Arbitrator Robert F. Curtis in a labor arbitration arising under the collective bargaining agreement between Entergy and the United Government Security Officers of America International Union and its Local 23. At issue in this case is whether the Arbitrator violated public policy by ordering the reinstatement of a Nuclear Security Officer who, due to a medical condition, cannot comply with federal safety regulations regarding the use of a respirator. Also at issue is whether the Arbitrator exceeded his powers and authority by, for example, requiring Entergy to violate federal regulations and compelling Entergy to re-employ a Nuclear Security Officer who is not fully qualified as required by the labor contract.

The District Court denied Entergy's motion for summary judgment to vacate the Arbitrator's award and, instead, granted summary judgment to the Union, enforcing the award. Entergy asserts, among other arguments, that the District Court failed to apply the appropriate standard of review for an arbitration involving public safety issues at a nuclear power plant. Accordingly, the Company appeals.

Entergy requests oral argument in the amount of 30 minutes per side because of the nuclear safety and public policy concerns that are at issue.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1A, Plaintiff-Appellant Entergy Operations, Inc., states that its parent corporation is Entergy Corporation, which is publicly traded and which owns more than 10 percent of its stock.

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JURISDICTIONAL STATEMENT

This case involves an action to vacate an arbitration award under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185. The case was filed in the United States District Court for the Eastern District of Arkansas – Western Division. The District Court issued its final Memorandum and Order and its corresponding Judgment on January 8, 2016, from which Entergy timely appealed on January 15, 2016, pursuant to 28 U.S.C. § 1291 and Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

This appeal is from a final Order and Judgment by the District Court that disposes of all parties' claims, and jurisdiction is appropriate in this Court.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in refusing to vacate (and enforcing) the labor Arbitrator's award because the award violates public policy with respect to nuclear plant security.

Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers (AFL-CIO), 834 F.2d 1424 (8th Cir. 1987)

W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757 (1983)

Eastern Assoc. Coal v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000)

Taormina v. Int'l Union, 798 F. Supp. 193 (S.D.N.Y. 1992)

2. Whether the District Court erred in refusing to vacate (and enforcing) the labor Arbitrator's award because the Arbitrator exceeded the powers and authority conferred on him by a collective bargaining agreement.

Doerfer Eng'g, a Div. of Container Corp. of Am. v. N.L.R.B., 79 F.3d 101 (8th Cir. 1996)

John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO, 913 F.2d 544 (8th Cir. 1990)

Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F.2d 562, 563 (8th Cir. 1964)

STATEMENT OF THE CASE

I. Background on the Company and the Nuclear Security Officers

Entergy Operations, Inc. ("Entergy" or the "Company"), operates a nuclear power plant in Russellville, Arkansas. (A. Vol. I, 00309).[1] The plant is called Arkansas Nuclear One ("ANO"), and like all nuclear power plants in the United States, it is secured, guarded and defended by a highly skilled and well-armed force of Nuclear Security Officers, as required by law. (A. Vol. II, 00460, 00466, 00501; 00513, 00519, 00553; 00767-00769).

As ANO's Nuclear Security Manager Josh Toben ("Toben") explains about the role of Nuclear Security Officers:

> Q. ... Mr. Toben, does the position of armed security officer have to be prepared to stand and fight to defend the plant?
>
> A. ... That's their primary role.
>
> As an armed security officer, our primary role is to defend the public ... and the people at the plant against ... radiological sabotage. So we have a very specific design basis or a threat that we have to defend against that's given to us by the regulators [i.e., the U.S. Nuclear Regulatory Commission]. The regulator says, "You'll defend against this many bad guys with this many guns," kind of thing.
>
> And then we have to go, "Okay."

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[1] Citations to the Appendix shall be noted as "A. Vol.__," indicating the page and volume number.

> Now all of our plan and qualifications have to meet that ability to defend against that threat. So each one of our officers are equipped with what they need in order to defend against the threat that's provided.
>
> * * *
>
> We defend against multiple potential attacks from multiple different locations[,] be it air, water, or land ... . And with that ... our folks have to be able to defend against it immediately.
>
> So we position ourselves throughout the site ... . We're just kind of waiting for that potential threat and being able to defend against it.

(A. Vol. I, 00380, 00384).

II. The Labor Contract and Its Provisions

The United Government Security Officers of America International Union with its Local 23 (collectively, the "Union") is the collective bargaining representative of the Nuclear Security Officers at ANO. (A. Vol. II, 00466; 00519). There is a collective bargaining agreement ("CBA," which is a labor contract) between the Company and the Union that governs the terms and conditions of the Nuclear Security Officers' employment. (A. Vol. II, 00510-00562; 00457-00509).[2] Included within the CBA is a "Grievance and Arbitration" provision whereby the Union can challenge a decision by the Company, including the discharge of an employee. (A. Vol. II, 00475-00477; 00528-00530). The

[2] The first CBA cited was the CBA in effect at the time of the grievance; the second is the CBA in effect at the time of the labor arbitration.

"Grievance and Arbitration" provision contains the following restriction on a labor arbitrator's authority:

> The Arbitrator's authority shall be limited to finding a direct violation of the express purpose of the contract provision or provisions in question other than an implied or indirect purpose. The Arbitrator cannot modify, amend, add to, detract from or alter the provisions of this contract nor substitute his judgment for that of management. In the event that an Arbitrator shall determine that an employee has violated a Company rule, regulation or policy for which said employee was charged, the Arbitrator shall not have the right to reduce, modify, or in any way alter the penalty assessed by the Company.

(A. Vol. II, 00476; 00529) (emphasis added).

The CBA also contains a "Management Rights" provision which makes clear that the Company exclusively retains numerous rights and functions of management (unless they are expressly modified or limited by other specific CBA provisions):

> [T]hese exclusive rights of management include, among others, the right to: establish or continue policies, practices and procedures for the conduct of business and from time to time change or abolish such policies, practices or procedures; ... determine, and from time to time, re-determine the number, location, and type of its operations, the methods, processes, materials and equipment to be employed and the type of work to be undertaken and products to be handled; institute or discontinue procedures or operations; ... determine the number and type of employees required to safely perform any and all functions; assign work to its employees in accordance with requirements determined by management; establish and change work assignments; establish or modify job duties and classifications; determine methods of work and establish standards of performance; determine the qualifications ... and ability of employees; determine the work load and work performance level including work standards ... .

(A. Vol. II, 00464; 00517).

Furthermore, the CBA contains an "Article 30" on "Training, Testing and Qualifications," and that Article includes the following provisions:

> Section 30.01
> ... The Company may ... perform training and testing to meet industry standards for obtaining and maintaining various job titles and task qualifications. Employees will attend such training and successfully complete the training and testing requirements as established by industry standards. Failure to attend or successfully complete training and testing requirements may result in remediation or discharge.
>
> * * *
>
> Section 30.03
> Employees who hold positions that require a federal, state, or local license or certification must achieve and maintain these licenses or certifications in order to maintain the associated position.

(A. Vol. II, 00553; see also A. Vol. II, 00501).

Importantly, the CBA recognizes only one job classification: "Nuclear Security Officer." (A. Vol. II, 00556; 00504). Nowhere in the CBA is there an article, section or provision that identifies a light-duty job classification, that establishes any other position besides "Nuclear Security Officer," or that sets up a permanent post or work area for a Nuclear Security Officer. (A. Vol. II, 00457-00509; 00510-00562).

In light of the critical importance of securing a nuclear plant like ANO, the parties included sections in the CBA addressing how the security function must be constant. Section 6.01 of the CBA states in part: "The parties hereto [i.e., the

Company and the Union] agree that the public health and safety, national security, [and] the protection of the Nuclear Station and its employees mandate that there will be complete and uninterrupted security protection at the site at all times." (A. Vol. II, 00520; 00467). Similarly, Section 6.02 prohibits the Union and any of the Nuclear Security Officers from striking or stopping work — and from even just slowing down work. (A. Vol. II, 00520; 00467).

Finally, Section 3.02 of the CBA states, "Nothing in this Agreement shall be deemed to require the Company ... to commit an ... act, which is forbidden, by law or regulation." (A. Vol. II, 00516; see also A. Vol. II, 00463, which contains slightly modified wording.)

III. NRC and OSHA Regulations on Respirators at Nuclear Power Plants

The U.S. Nuclear Regulatory Commission ("NRC") is charged by the federal government to oversee and regulate various functions at nuclear power plants, including the security function. (See the NRC's "About Us" tab on its website at http:www.nrc.gov/about-nrc.html (last visited on 02/18/2016)). For example, in the context of the issue at hand — a respirator issue — the NRC tells the Company what security risks it needs to protect against, and the design of the respirator mask is then tied to, or based on, those risks enumerated by the NRC. (A. Vol. I, 00354).

The NRC has regulations and regulatory guides on the subject of respiratory protection. (E.g., 10 C.F.R. Part 73, App. B at §§ V.A.5(b), VI.B.2(a)(1), VI.G.2(b)(1); A. Vol. I, 00355-00357). In addition, the U.S. Occupational Safety and Health Administration ("OSHA") has standards that govern respirator use and testing. These regulations or regulatory guides prohibit the presence of facial hair for respirator wearers as follows (with emphasis added):

- "The licensee [i.e., Entergy] shall ensure that no objects, materials or substances, such as facial hair, or any conditions that interfere with the face-facepiece seal or valve function, and that are under the control of the respirator wearer, are present between the skin of the wearer's face and the sealing surface of a tight-fitting respirator facepiece." 10 C.F.R. § 20.1703(h).

- "Anything in the face-to-facepiece seal area of a tight-fitting respirator that is under the control of the respirator user is prohibited by 10 CFR 20.1703(h). Materials in this area might interfere with the seal of the respirator, might prevent proper exhalation valve function, or might impair the operation of a facepiece-mounted air regulator. The list of prohibited materials includes (but is not necessarily limited to) facial hair of any kind in the seal area (the worker must be clean-shaven) ... ." NRC Regulatory Guide 8.15, § 6.2. (A. Vol. II, 00634).

- "The employer shall not permit respirators with tight-fitting facepieces to be worn by employees who have [f]acial hair that comes between the sealing surface of the facepiece and the face ... ." 29 C.F.R. § 1910.134(g)(1)(i)(A). (A. Vol. II, 00660).

- "Individuals whose duties and responsibilities are directly associated with effective implementation of the Commission-approved security plans ... may not have any physical conditions that would adversely affect their performance of assigned security duties and responsibilities." 10 C.F.R. Part 73, App. B at § VI.B.2(a)(1).

IV. Respirator Program and Requirements for ANO's Nuclear Security Officers

In compliance with NRC and OSHA regulations, ANO has a "Respiratory Protection Program." (A. Vol. II, 00671-00697). Nuclear Security Officers carry a gas mask while on duty, and they must be able to achieve a "tight fit" with the respirators that are provided to them because the only thing that they have available to protect themselves and defend against the threat of gas is the tight-fitting respirator. (A. Vol. I, 00381-00384).

There is a requisite time-frame within which the Nuclear Security Officer must don the mask, and it is a small one — less than 30 seconds. (A. Vol. I, 00383). There is no time for an officer to go somewhere to shave in order to achieve a tight fit or seal between their face and the respirator. (A. Vol. I, 00383-00384).

Each Nuclear Security Officer must meet three criteria to be respirator-user qualified: (1) training; (2) a respirator physical examination; and (3) a fit test. (A. Vol. I, 00325). Regarding the latter criterion, the Company conducts fit tests on an annual basis for each Nuclear Security Officer. (A. Vol. I, 00325; 00341). The Company's Radiation Protection department is in charge of fit-testing, and it conducts about 500 to 600 fit tests each year. (A. Vol. I, 00342-00343, 00347). As explained by the Senior Technical Training Instructor at ANO, David Rasmusson ("Rasmusson"), the fit test is "something that is done to ensure that the

wearer can get a[n] adequate seal to meet a minimum threshold, ... so that we have confidence that they can achieve that standard, maintain that standard while they're working throughout the time that they're using a respirator."[3] (A. Vol. I, 00325).

The concept — indeed, the government standard as established by the NRC and OSHA — is that nothing should interfere with the ability of the respirator to effectively form a seal to the wearer's face. (A. Vol. I, 00331). The "sealing surface" area of an individual's face includes, but is not limited to, the individual's chin area, which matches up, when the respirator is donned, with the respirator's chin cup. (A. Vol. I, 00331-00333, 00345). That chin area, of course, corresponds with where a male grows a goatee. (Judicial notice pursuant to Fed. R. Evid. 201).

With regard to fit-testing procedures, OSHA regulations mandate that "[t]he [fit] test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface, such as stubble beard growth, beard, mustache or sideburns which cross the respirator sealing surface." (Appendix A to § 1910.134: Fit Testing Procedures (Mandatory): Part I. OSHA-Accepted Fit Test Protocols at ¶ 9 (emphasis added)). Employees have notice that they will be fit-tested. (A. Vol. I, 00341). The Company tracks qualifications for annual training through an electronic learning management system, and Nuclear Security Officers receive

[3] The Union has never previously filed a grievance regarding the fit test process or results — at least not during Rasmusson's several years of performing fit tests. (A. Vol. I, 00326-00327).

automatic notice when a qualification such as fit-testing is coming due. (A. Vol. I, 00342). In terms of how recently a typical male employee must have needed to shave (to the skin) before presenting for a respirator fit test, the answer is preferably within 12 hours, but no more than 24 hours, prior to the test. (A. Vol. I, 00333-00334).

The Company has a tactical training course — a course of fire — for Nuclear Security Officers. (A. Vol. I, 00384-00385). This course of fire is a "job performance measure" that must be completed before a Nuclear Security Officer can qualify — or, after his or her initial qualification, can re-qualify on an annual basis — to go on the job. (A. Vol. I, 00384-00385, 00402-00403). As part of the course of fire, the Nuclear Security Officer must don a respirator within the specified period of time. (A. Vol. I, 00385; A. Vol. II, 00790-00791). In addition, the Nuclear Security Officer must shoot his or her handgun and rifle with his or her respirator on. (A. Vol. I, 00385).

V. Phillips' Facial Skin Condition and Separation from Employment

Michael Phillips ("Phillips") was employed as a Nuclear Security Officer at ANO. (A. Vol. I, 00427). In or around November 2012, Phillips inquired of his supervisor whether he could take his annual fit test with facial hair. (A. Vol. I, 00328). The reason for the inquiry was that, during his employment, Phillips was

diagnosed with a facial skin condition called folliculitis,[4] which prevents him from shaving in the area below his bottom lip. (A. Vol. I, 00131; 00429). Phillips' doctor, in fact, recommended hair growth in that area of 3 to 5 millimeters. (A. Vol. I, 00429).

Rasmusson was contacted about whether Phillips could be fit-tested, and his response was, "[L]et me take a look at [him]." (A. Vol. I, 00329). When the two met on or around November 13, 2012, Rasmusson saw that Phillips "had a full goatee" and said to him, "I can't do anything with that." (A. Vol. I, 00140). Rasmusson's response was based on the federal regulations prohibiting facial hair during the fit test. (A. Vol. I, 00329).

The Company then investigated what possibly could be done — i.e., how it might reasonably accommodate Phillips' skin condition. (A. Vol. I, 00372-00374, 00386-00387). No fewer than two Human Resources representatives were involved in working on the issue. (A. Vol. I, 00372-00373; see also A. Vol. II, 00760-00761). Along the way, Phillips presented a letter from his doctor, explaining that Phillips had a medical condition that would not allow him to shave his chin area. (A. Vol. I, 00374). In addition to his own doctor, Phillips was evaluated by a physician or medical review officer for the Company. (A. Vol. I,

[4] Folliculitis is an inflammation of hair follicles. It is most common in (among other places) the beard area, where shaving can irritate the hair follicles, leading to folliculitis. See http://www.webmd.com/skin-problems-and-treatments/tc/folliculitis-topic-overview (last visited on 02/23/2016).

00374). Overall, there were, as Toben explains, "several discussions about [this subject], trying to find a solution to his — to the medical condition." (A. Vol. I, 00374).

The Company's medical review officer, Dr. Andrew Monfee ("Dr. Monfee"), initially submitted a letter that recommended an exemption from shaving for Phillips. (A. Vol. I, 00372-00374; A. Vol. II, 00763). However, Toben was not sure that Dr. Monfee had all of the relevant information and understood the context. (A. Vol. I, 00375; see also A. Vol. I, 00377). Toben contacted the Company nurse (there is a nurse at ANO who is the conduit between management and the medical review officer) to explain that a doctor saying that a nuclear security officer could have a beard or goatee "was not acceptable in the respiratory protection mindset." (A. Vol. I, 00376). Dr. Monfee subsequently re-reviewed the matter and submitted a second letter, correcting his misunderstanding and withdrawing his previously recommended exemption.[5] (A. Vol. I, 00376-377; A. Vol. II, 00764).

Toben had several discussions with Phillips during this time period. (A. Vol. I, 00386-00387). Toben "tried to find an option," but he could not find one. (A. Vol. I, 00387). Toben hoped that Phillips' condition could clear up with some

[5] Dr. Monfee has the same skin condition as Phillips. (A. Vol. I, 00430). Phillips found that Dr. Monfee "sympathized with what [Phillips] was going through." (A. Vol. I, 00431). There is no record evidence that Dr. Monfee was biased against Phillips in any way. (A. Vol. I, 00303-00454).

treatment, but the doctors reported that the condition was going to last forever. (A. Vol. I, 00387).

The Company provided Phillips with a paid administrative leave of absence for more than two months while it tried to figure out a solution. (A. Vol. I, 00324; 00387; A. Vol. II, 00800). An escape-hood-type respirator and a loose-fitting respirator were both considered, with Toben doing research and talking to a leading respirator company called MSA, trying to find something that would work. (A. Vol. I, 00387-00390). He concluded that those were not workable options because they are tactically deficient. (A. Vol. I, 00352-00355, 00368, 00383, 00387-00392, 00406-00407). For example, the escape hood facilitates retreating or running away (i.e., "escaping") but inhibits the Nuclear Security Officer's ability to stand and fight whereas, in contrast, a tight-fitting respirator allows the Nuclear Security Officer to get his weapon up and engage in combat (e.g., to counterattack as necessary); and a loose-fitting respirator protects against particulates but not gases. (A. Vol. I, 00352-00355, 00368, 00383, 00389). As Toben explained without contradiction, "No police agency, no military agency that does anything as it relates to combat missions similar to what we do that has to be defended against some type of gas wears a loose-fitting respirator." (A. Vol. I, 00389).

No Nuclear Security Officer position exists at ANO that does not require the officer to engage in an armed response. (A. Vol. I, 00275). All Nuclear Security Officers at ANO are qualified to armed status and, therefore, require respirators. Id.

There are two specific locations at ANO where the posted Nuclear Security Officers have more of a monitoring role and do not always carry a respirator: the SOCA and sally ports. (A. Vol. I, 00410-00413). However, Nuclear Security Officers posted at these locations are required to have a respirator readily available. (A. Vol. I, 00410-00411). These two posts require respirators to be donned on a non-immediate basis in the event of an all-out fight at the nuclear plant. (A. Vol. I, 00422). As Toben testified:

> Q. Is the guy at the sally port in the event of a threat, is it acceptable for that person to say, "Good luck over there. Let me know how it turns out"?
>
> A. No.
>
> They're both armed. Normally two out there, and one has a rifle for oversight. And they would be involved heavily in the fight; because that's what we do, right. Regardless of what the strategy says, this minimum amount of people, if I have more people here, they're all going to be in the fight if it was necessary.

(A. Vol. I, 00422). Additionally, the Nuclear Security Officers rotate through positions within the plant normally, and they can be required to rotate at any time. (A. Vol. I, 00413).

Notably, the Union did not propose any options that would allow the Company to accommodate Phillips' situation. (A. Vol. I, 00388). As for Phillips, he did not offer any options that the Company did not explore.[6] (A. Vol. I, 00388).

Toben talked to Phillips about a possible reassignment to other positions — non-security positions — at ANO. (A. Vol. I, 00391-00392). However, Phillips did not obtain another position outside the security bargaining unit.[7] (A. Vol. I, 00392-00393).

The Company requires all of its Nuclear Security Officers to maintain qualifications. (A. Vol. I, 00411). If a Nuclear Security Officer is not trained or is disqualified in any way, then he is not qualified to be a Nuclear Security Officer at ANO. (A. Vol. I, 00411). Accordingly, with Phillips unable to don a tight-fitting respirator and, thus, lacking qualifications, he was ultimately terminated from employment on or around January 30, 2013. (A. Vol. I, 00393).

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[6] Phillips' doctors discussed with him the possibility of hair removal or electrolysis treatment for that area of his face below his lower lip. (A. Vol. I, 00437). Phillips testified that he did not consider electrolysis because it was expensive (though he never obtained a cost estimate) and because he did not want to alter his natural physical appearance. (A. Vol. I, 00437-00438).

[7] A "MASS" test, which stands for the "Maintenance Selection Service Test," is an aptitude test used to determine whether an individual is qualified for mechanical-type (i.e., non-security) positions within ANO. (A. Vol. I, 00445-00446). Phillips took the MASS test twice — once in 2006 and another time in 2012 — and both times he was not recommended for a position. (A. Vol. I, 00447-00449; A. Vol. II, 00798).

VI. Grievance, Arbitration Hearing, Award, Reinstatement Order, and Appeal

Pursuant to the CBA, the Union filed a grievance, challenging the termination decision; and the Company considered but denied the grievance, with ANO's General Manager of Plant Operations stating: "I cannot agree to re-instate Mr. Phillips as a Security Officer based on his inability to obtain and maintain qualifications for utilizing a respirator in accordance with prescribed rules and regulations." (A. Vol. II, 00455; 00456). The grievance proceeded to an arbitration hearing on January 8, 2015, before Arbitrator Richard F. Curtis.[8] Arbitrator Curtis issued an award on March 20, 2015, finding that Phillips was not terminated for "just cause" and ordering that Phillips be reinstated. (A. Vol. I, 00264-00299; 00303).

Regarding Phillips' reinstatement, he can apparently shave in order to pass a fit test. (A. Vol. I, 00431). But beyond that — i.e., after that one-time shave in order to pass the fit test — Phillips testified that he could shave, possibly, every third day at most. (A. Vol. I, 00432, 00437). Phillips acknowledged that even shaving that "often" might, over a period of time, aggravate his skin. (A. Vol. I, 00437). There is no record evidence, and no finding by the Arbitrator, that

[8] At the arbitration hearing, Phillips appeared with a goatee that was not as thick as on the day when Rasmusson evaluated him in November 2012. (A. Vol. I, 00334). Even with that shorter-length goatee, Rasmusson testified that he could not perform a fit test on Phillips — his growth was still too much — based on the applicable regulations and standards. (A. Vol. I, 00334-00335).

Phillips' condition will improve. Nevertheless, the Arbitrator instructed as follows:

> The Arbitrator must alert [Phillips] that he should not view this decision as approval to continuously remain unshaven. He is reminded herein that he must meet the annual respirator fit-testing and Tactical Qualification Course requirements. ... He shall present clean shaven at work within parameters as prescribed by his attending physician.

(A. Vol. I, 00298).

On April 22, 2015, the Company filed a Complaint in the United States District Court for the Eastern District of Arkansas – Western Division, seeking to vacate the arbitration award. (A. Vol. I, 00001-00004). The parties subsequently filed cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56. (A. Vol. II, 00801). No additional evidence was introduced in the District Court, and no oral argument was held.

On January 8, 2016, the District Court issued a five-page Memorandum and Order confirming the Arbitrator's award. (A. Vol. II, 00801-00805). The District Court credited the Company's reliance on the NRC and OSHA regulations regarding the prohibition on facial hair that would impair the face-to-facepiece seal of a respirator. However, the District Court adopted the reasoning of the Arbitrator that because the Company never actually performed the fit test on Phillips in November 2012, it could not conclude that Phillips' "medical condition prevents him from properly wearing his respirator" or that "any regulatory violation exists."

(A. Vol. II, 00804). Subsequently, on January 15, 2016, Entergy filed its Notice of Appeal. (A. Vol. II, 00807-00809). For the reasons set forth in detail below, the District Court's Judgment should be reversed and the Arbitrator's award should be vacated.

SUMMARY OF ARGUMENT

The Arbitrator's award violates public policy by forcing the Company to disregard unambiguous NRC and OSHA regulations and reinstate a Nuclear Security Officer who cannot don a respirator in the manner required by those regulations. The award also violates public policy by essentially compelling a meaningless fit test that amounts to a sham, with Phillips presumably shaving just before the fit test (so that he can pass it) but with everyone knowing full-well that, on most days after passing the test, Phillips admittedly will not be clean-shaven as required by federal regulations.

By ordering Phillips to be reinstated, the Arbitrator exceeded his powers and authority in multiple ways. For example, the CBA expressly prohibits Entergy from being required to violate federal regulations, yet the Arbitrator's reinstatement order compels the Company to commit an act — ignoring Phillips' inability on most days to wear a tight-fitting respirator due to facial hair — that plainly violates NRC and OSHA regulations. The Arbitrator also exceeded the powers and authority that the CBA conferred on him by changing the nature of the

Nuclear Security Officer position (i.e., by eliminating the requirement for Phillips to don a respirator in order to engage in combat with assailants) and by effectively requiring Entergy to employ one more Nuclear Security Officer than it really needs due to Phillips being unqualified with respect to respirator usage.

In contrast to a typical review of an arbitration award, this unique case involves public policy concerns and, thus, does not entail substantial deference to the Arbitrator. The District Court erred by not applying the correct standard of review for a case, like this one, rooted in nuclear plant safety and security.

ARGUMENT

I. The Award Should Be Vacated Because It Violates Public Policy

A. Standard of Review

The District Court plainly erred by failing to apply the correct legal standard articulated by this Circuit for a review of an arbitration award involving public policy concerns arising out of safety issues at a nuclear power plant. While substantial deference is typically owed to a labor arbitrator's decision in a run-of-the-mill matter, this Court has stated that, in contrast, "if the [labor] contract as interpreted [by the arbitrator] violates some explicit public policy, [the Court is] obliged to refrain from enforcing it." Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers (AFL-CIO), 834 F.2d 1424 (8th Cir. 1987) (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757, 766 (1983)).

Like the instant case, Iowa Elec. Light & Power Co. involved safety issues at a nuclear power facility, and in that case, this Court explained the appropriate judicial standard of review as follows:

> It is enough that [the terminated nuclear plant employee, named Schott] did know that he was short-circuiting an important safety system required by the federal government as a measure to protect the public from exposure to harmful radiation. Even if we construe the arbitrator's findings of fact in a light most favorable to the Union, we agree with the District Court that enforcement of the award returning Schott to work would violate the public policy of this nation concerning strict compliance with safety regulations at nuclear facilities.
>
> We do not, nor did the District Court, lightly invoke the public policy exception to the rule of judicial deference to arbitrators' decisions. This Court has resisted the temptation to tamper with labor awards that we might have decided differently were we the arbitrator, and we have consistently observed that "judicial review of an arbitrator's award is extremely limited. . . ." *Manhattan Coffee Co. v. International Bhd. of Teamsters, Local No. 688*, 743 F.2d 621, 624 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100, 85 L. Ed. 2d 842, 105 S. Ct. 2323 (1985). *Accord Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 750-51 (8th Cir.), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2249, 90 L. Ed. 2d 695 (1986); *Daniel Constr. Co. v. International Union of Operating Eng'rs, Local 513*, 738 F.2d 296, 299 (8th Cir. 1984). In short, the decision of an arbitrator who has not exceeded his contractual authority is almost always upheld. In this case, the arbitrator's authority is not disputed. Even so, we agree with the District Court that the arbitrator's award cannot withstand scrutiny under the narrow public policy exception articulated by the Supreme Court in *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 76 L. Ed. 2d 298, 103 S. Ct. 2177 (1983).
>
> "If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it." *Id.* at 766. Because collective bargaining agreements do not formulate public

policy, and arbitrators cannot consider matters not encompassed by the governing agreements, "the question of public policy is ultimately one for resolution by the courts." *Id.* Once the public policy question is raised, we must answer it by taking the facts as found by the arbitrator, but reviewing his conclusions de novo. *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 617 (7th Cir.), *cert. denied*, 479 U.S. 853, 107 S. Ct. 186, 93 L. Ed. 2d 120 (1986).[9] Most importantly, our considerations must be based only on public policy that is "well defined and dominant, and . . . ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66, 89 L. Ed. 744, 65 S. Ct. 442 (1945)).

The Supreme Court recently re-emphasized the narrow *W.R. Grace* standards for rejecting arbitration awards on public policy grounds in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). The Court of Appeals had affirmed the District Court, which had vacated on public policy grounds an arbitrator's award reinstating the operator of dangerous machinery who was found, during a work break, sitting in a car with a lighted marijuana cigarette in the ashtray. The Supreme Court reversed the decision by the divided three-judge panel and upheld the arbitration award. The [Supreme] Court held that the award should not have been vacated because, among other reasons, the "Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well defined and dominant' policy . . . ." *Id.*, 484 U.S. at 44. The Supreme Court also observed that the Court of Appeals had "inappropriate[ly]" drawn factual inferences from evidence rejected by the arbitrator. *Id.* Furthermore, the Supreme Court said that even if the company could prove that its employee had possessed marijuana in violation of company rules, mere possession of drugs does not necessarily offend the "public policy identified by the Court of Appeals 'against the operation of dangerous machinery by persons under the influence of drugs or alcohol.'" *Id.* (citation omitted). In contrast to the safety rules for the

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[9] At issue in this case are questions of law (as opposed to questions of fact), which this Court reviews *de novo*. Teamsters Local Union 682 v. KCI Construction Company, Inc., 384 F.3d 532, 537 (8th Cir. 2004).

> United Paperworkers — designed to protect employees inside the paper converting plant — are the safety rules that Schott violated at Iowa Electric — designed to protect not only employees, but also the general public. The public policy at stake in the two cases is simply not the same, as is evidenced by the fact that there is no federal regulatory agency specifically charged with overseeing the safe production of paper, as the NRC [U.S. Nuclear Regulatory Commission] does for nuclear power. *See infra*, at 1428.
>
> Appellant in the instant case contends that there is no "well defined and dominant" public policy specifying that workers who violate secondary containment at nuclear power plants must be fired. We conclude, however, that there is a well defined and dominant national policy requiring strict adherence to nuclear safety rules. Moreover, we conclude that this strong public policy would be violated by judicial enforcement of an arbitrator's award requiring the reinstatement of an employee who acted as Schott did under the circumstances of this case.
>
> This Court is not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds... An arbitrator may be overruled "when the award, although not requiring illegal conduct, is said to be inconsistent with some significant public policy."

Iowa Elec. Light & Power Co., 834 F.2d at 1426-27 & nn.2-3 (emphasis added) (citations omitted).

The District Court ignored the above-quoted standard in its decision. More to the point, even though Entergy actually block-quoted (for the lower court's benefit) Iowa Elec. Light & Power Co. in the same manner as above, the District Court stunningly missed the mark by stating that "[b]oth sides agree that judicial review of this labor arbitration decision is 'very narrow and very deferential.'" (A. Vol. II, 00803). The much more deferential — and incorrect — standard applied

by the District Court effected the wrong result: judicial confirmation of a public-policy violation. This Court, unlike the lower court, should follow the standard of review set forth in Iowa Elec. Light & Power Co., which, in turn, will lead this Court to vacate the arbitration award for public-policy reasons.

B. Public Policy Is Indeed Triggered

It is well-established that nuclear power plants are highly regulated and invoke significant safety concerns. Iowa Elec. Light & Power Co., 834 F.2d at 1426-28 & nn.2-3; see also, e.g., Taormina v. Int'l Union, 798 F. Supp. 193, 195 & n.3 (S.D.N.Y. 1992) ("The importance of safety in nuclear facility management has been made clear by congressional action (42 USC 2131-42) and regulatory implementation (10 CFR pt 50), under which each plant develops its own safety precautions as a condition of obtaining or retaining a federal license."). As this Court has explained:

> From the very beginning of the nuclear power industry, the safety of nuclear power plants has been a matter of public concern. The federal government has been heavily involved in the planning, construction, and operation of nuclear plants since the enactment of the Atomic Energy Act and creation of the Atomic Energy Commission (AEC) in 1954. The NRC, the successor to the AEC, has promulgated volumes of safety rules that govern all nuclear power plants. *See, e.g.*, 42 U.S.C. § 2131-41; 10 C.F.R. pt. 50. Each plant, in turn, develops its own more detailed specifications and regulations in order to obtain and then maintain its federal license. For example, the Company's Technical Specification Section 3.7.c.1 lays out the requirements for "secondary containment integrity." Any violation of any rules must be reported to the NRC; the NRC responds by issuing enforcement penalties against the offending facility.

> The Supreme Court has recognized the critical role of this federal safety system for nuclear power plants: "The Commission's prime area of concern in the licensing context . . . is national security, public health, and safety." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 550, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978) (citing 42 U.S.C. §§ 2132, 2133, 2201). The "regulatory scheme . . . is 'virtually unique in the degree to which broad responsibility is reposed in the [NRC] . . . .'" *Carstens v. NRC*, 239 U.S. App. D.C. 393, 742 F.2d 1546, 1551 (D.C. Cir. 1984) (quoting *Siegel v. AEC*, 130 U.S. App. D.C. 307, 400 F.2d 778, 783 (D.C. Cir. 1968)), *cert. denied*, 471 U.S. 1136, 105 S. Ct. 2675, 86 L. Ed. 2d 694 (1985). Nothing could be plainer than the public interest in the safe operation of nuclear power plants that underlies this panoply of federal regulations.

Iowa Elec. Light & Power Co., 834 F.2d at 1427-28.

C. Phillips' Reinstatement Violates Public Policy

In cases invoking the aforesaid public policy standard, a reviewing Court must focus on whether the arbitration award ordering the grievant's *reinstatement* — as opposed to the *conduct* or *misconduct* by the grievant himself — runs contrary to an explicit, well-defined and dominant national policy, as ascertained by reference to positive law. Eastern Assoc. Coal v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000). Notably, Phillips' own conduct or misconduct is not at issue in this case (as it would be if, say, he had been discharged for drug use or attendance shortcomings). Rather, this Court must focus squarely on whether reinstating Phillips — into the only job classification and position contemplated by the CBA, and with his admitted inability to remain clean-shaven — violates or

(alternatively) is inconsistent with the ban on facial hair within mandatory respirator regulations issued by the NRC and OSHA.[10]

The Arbitrator violated public policy by ordering Phillips' reinstatement to the Nuclear Security Officer position at ANO with the following admonition:

> The Arbitrator must alert [Phillips] that he should not view this decision as approval to continuously remain unshaven. He is reminded herein that he must meet the annual respirator fit-testing and Tactical Qualification Course requirements. ... He shall present clean shaven at work within parameters as prescribed by his attending physician.

(A. Vol. I, 00298).

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[10] Regarding Phillips' inability to shave, the District Court refers in footnote 1 of its Memorandum and Order (A. Vol. II, 00801) to its decision in a case involving "a dispute over facial hair" in which the District Court's decision was eventually overturned by the U.S. Supreme Court. Holt v. Hobbs, No. 5:11-CV-00164-BSM, 2012 WL 994481, at *8 (E.D. Ark. Jan. 27, 2012), report and recommendation adopted, No. 5:11CV00164 BMS, 2012 WL 993403 (E.D. Ark. Mar. 23, 2012), aff'd, 509 F. App'x 561 (8th Cir. 2013), rev'd, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015) (unpublished). To the extent that the District Court suggests the Holt decision is analogous to the instant matter, any such comparison is inapposite. This Court should not be influenced by the Holt decision because the instant case is easily distinguished on both the facts and the law. Although both cases involve facial hair, the similarities end there. Holt considered an interpretation of 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act of 2000 — laws that are not implicated at present. While Holt arguably involved safety concerns in a correctional facility in the context of individual rights, these concerns are distinct from the public policy concerns involving nuclear security at issue here. The District Court refers to Holt anecdotally in describing the parties' consenting to Magistrate Judge Volpe performing judicial review of the arbitration decision. The District Court correctly does not imply that the Holt decision should impact the analysis in the instant matter.

That above-quoted paragraph exposes the Arbitrator's decision as inherently flawed and unworkable as a matter of public policy, for several reasons.

1. The Arbitrator's Decision Violates NRC and OSHA Regulations

The NRC and OSHA have issued specific regulations pertaining to the use and testing of respiratory equipment. The relevant regulations are as follows:

- **10 CFR § 20.1703(h).** This NRC regulation, which is entitled "Use of individual respiratory protection equipment," is within the NRC's "Standards for Protection Against Radiation." Sub-part "(h)" states as follows (with emphasis added):

  > The licensee [i.e., Entergy] shall ensure that no objects, materials or substances, such as facial hair, or any conditions that interfere with the face-facepiece seal or valve function, and that are under the control of the respirator wearer, are present between the skin of the wearer's face and the sealing surface of a tight-fitting respirator facepiece.

- **NRC Regulatory Guide section 8.15.** Section 6.2, which is entitled "Face-to-Facepiece Seal Integrity," states as follows (with emphasis added):

  > Anything in the face-to-facepiece seal area of a tight-fitting respirator that is under the control of the respirator user is prohibited by 10 CFR 20.1703(h). Materials in this area might interfere with the seal of the respirator, might prevent proper exhalation valve function, or might impair the operation of a facepiece-mounted air regulator. The list of prohibited materials includes (but is not necessarily limited to) facial hair of any kind in the seal area (the worker must be clean-shaven)....

- **29 CFR § 1910.134(g).** This OSHA regulation, which covers the subject of "Respiratory Protection," states as follows (with emphasis added):

Use of respirators. This paragraph requires employers to establish and implement procedures for the proper use of respirators.[11] These requirements include prohibiting conditions that may result in facepiece seal leakage ... .

(1) *Facepiece seal protection.*

(i) The employer shall not permit respirators with tight-fitting facepieces to be worn by employees who have:

(A) Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function;[12] or

(B) Any condition that interferes with the face-to-facepiece seal or valve function.

* * *

(iii) For all tight-fitting respirators, the employer shall ensure that employees perform a user seal check each time they put on the respirator using the procedures in appendix B-1 or procedures recommended by the respirator

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[11] NRC Regulatory Guide 5.75 (A. Vol. II, 00641-00656) states as follows: "Licensees [i.e., nuclear plant operators like Entergy] that issue respiratory protection equipment for the purpose of complying with Commission-approved security plans should establish a respiratory protection program consistent with 29 CFR 1910.134 ... ." The Company, in turn, has established such a program. (A. Vol. II, 00671-00697; 00698-00722).

[12] See also, e.g., A. Vol. II, 00577-00616: stating as follows, with emphasis added, with respect to the American National Standards Institute's standard for respiratory protection: "A respirator, either positive or negative pressure, equipped with a facepiece (tight or loose fitting) shall not be worn if facial hair comes between the sealing surface of the facepiece and the face or if facial hair interferes with valve function."); A. Vol. II, 00750-00759 (stating as follows, with emphasis added, in the second-to-last page of the exhibit within a letter from OSHA to the U.S. Air Force: "OSHA's position is that any hair growth in the face sealing area is unacceptable.").

> manufacturer that the employer demonstrates are as effective as those in appendix B-1 of this section.

- **OSHA's Appendix B-1 to 29 CFR § 1910.134(g).** This appendix, which is referenced just above, states as follows (with emphasis added) after the title "User Seal Check Procedures (Mandatory)":

  > The individual who uses a tight-fitting respirator is to perform a user seal check to ensure that an adequate seal is achieved each time the respirator is put on.[13]

Phillips explicitly admitted at the arbitration hearing that he can shave, at most, every third day because of his folliculitis condition.[14] (A. Vol. I, 00432, 00437). That infrequency is not acceptable in connection with the aforesaid binding governmental standards. The record clearly establishes that Phillips' inability to remain clean-shaven prevents him from complying with NRC and

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[13] The seal is so important because, as the respirator manual itself provides, "The mask will not furnish protection unless all inhaled air is drawn through the canister." (A. Vol. II, 00568).

[14] There is no doubt that a Court's review of an arbitration award may include a study of the entire record, including the transcript of the arbitration proceeding. *See, e.g.*, John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO, 913 F.2d 544, 560 (8th Cir. 1990) (quotation omitted) ("After reviewing the record, the arbitration clause, and the issue submitted for arbitration, we are similarly persuaded that the arbitrator failed to stay 'within the areas marked out for his consideration.'"); National Post Office Mailhandlers, Watchmen, Messengers & Group Leaders Div., Laborers Int'l Union of N. Am., AFL-CIO v. United States Postal Service, 751 F.2d 834, 843 (6th Cir. 1985) (citations omitted) ("[W]here the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award, it can fairly be said that the arbitrator 'exceeded [his] powers, or so imperfectly executed them' that vacation may be proper.").

OSHA regulations pertaining to respirator use.[15] Accordingly, this Court should overturn the District Court's decision and vacate the Arbitrator's award because Phillips' reinstatement violates federal regulations and, hence, public policy associated with nuclear plant security.[16] As an NRC regulation states: "Individuals whose duties and responsibilities are directly associated with effective implementation of ... security plans ... may not have any physical conditions that would adversely affect their performance of assigned security duties and responsibilities." 10 C.F.R. Part 73, App. B at § VI.B.2(a)(1). Phillips has such a condition because it prevents him from properly donning a respirator, so public policy bars his reinstatement.[17]

2. *The Company's Refusal to Conduct a Fit Test Was Appropriate Then and Immaterial Now*

The Arbitrator and the District Court improperly focused on whether the Company actually conducted a fit test on Phillips on November 13, 2012. The

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[15] There is no evidence in the record that the condition will improve or that Phillips, in the future, will be able to shave more regularly.

[16] Iowa Elec. Light & Power Co., 834 F.2d at 1430 ("[W]e agree with the District Court that the unmistakable public policy favoring the strict observance of federally-mandated safety regulations at nuclear power plants requires that the arbitrator's award ordering Schott's reinstatement be vacated."); Taormina, 798 F. Supp. at 196 ("National policy permitting employers to insist upon strict fulfillment of duty by security personnel in sensitive facilities is, indeed, not confined to nuclear facilities, see cases cited in Iowa Electric at 1428, but is clearly preeminent in that context.").

[17] For the same reasons why the Arbitrator's reinstatement order violates public policy, the Company had "just cause" to terminate Phillips.

District Court was persuaded that NRC and OSHA regulations apply, but stated more than once in its Opinion that the Company's failure to test Phillips created a factual gap in the record: "Because Entergy never tested Mr. Phillips, I cannot conclude any regulatory violation exists ... While the mask might not have functioned properly on November 13, 2012, there is no evidence to support this conclusion ... Here, there are no facts to support a conclusion that the mask would not seal properly." (A. Vol. II, 00804).

That line of reasoning — aside from ignoring the reality of most workdays *after* the test when Phillips will not be able to shave — contravenes the OSHA mandate that a fit test cannot be conducted if the wearer has facial hair:

- **OSHA's Appendix A to 29 CFR § 1910.134 Fit Testing Procedures (Mandatory):** ***Part I. OSHA-Accepted Fit Test Protocols*** **at ¶ 9:**

  The test shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface, such as stubble beard growth, beard, mustache or sideburns which cross the respirator sealing surface.

Based on that federal regulation, after Phillips inquired with his supervisor about taking the fit test with facial hair present due to his inability to shave regularly, Rasmusson appropriately determined that he could not fit-test Phillips. (A. Vol. I, 00329). Contrary to what the Union has suggested, this was not a scenario where a Nuclear Security Officer was caught off-guard by an impromptu fit test; instead, Phillips' knowledge of the potential limitations of his facial

condition prompted the inquiry about fit-testing with facial hair. (A. Vol. I, 00328). Whether or not the test was conducted *that day* (or on any other specific day thereafter) was, and is, immaterial. The real (and appropriately broader) question before the Court is whether the Company must employ a Nuclear Security Officer who cannot comply with federal regulations due to his medical condition on *most given days*. OSHA has already provided guidance on this question, and its answer is a clear "no."[18]

A proper review of the arbitration award requires the Court to go beyond the fit test itself and beyond, in isolation, the day of the fit test. Once again, Phillips has explicitly admitted that he can shave only, at best, every one in three days. (A. Vol. I, 00432, 00437). The fit test examines a Nuclear Security Officer's facial-hair condition at one precise (and planned) moment in time, and there is no question that Phillips could schedule the test on one of the "minority" days on which he could shave. Passing the test that way does not solve or eliminate the bigger issue. There is a clear and unresolvable contradiction between Phillips' inability to remain clean-shaven on a regular basis and the OSHA guidance that a Nuclear Security Officer must be able to "pass the [fit] test everyday." (A. Vol. II, 00750-00759).

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[18] See A. Vol. II, 00750-00759, an OSHA letter to the U.S. Air Force, with OSHA stating, "The question is not whether the bearded person can pass the fit test on a given day, but whether he can pass the test everyday. ..."

3. *The Arbitrator's Award Effects a Fit Test That Is a Sham*

The Arbitrator's violation of public policy is highlighted by his "reminde[r]" to Phillips that he (Phillips) "must meet the annual respirator fit-testing ... requirement[]." (A. Vol. I, 00298). If the Arbitrator's award were to be followed, with Phillips appearing for his fit test upon reinstatement, one of two things would happen. Either Phillips would not be allowed to take the fit test because he would not be clean-shaven on that day (i.e., the fit test would occur on one of the "more typical" days when he has not shaved since a day or two earlier, if not three days earlier); or Phillips (more likely) would pass the fit test because he will have shaved earlier on the day of the test (i.e., the fit test would occur on one of the "less typical" days when he has shaved). The former scenario is not acceptable because it brings the parties to the same place where they are now: a Nuclear Security Officer who must be terminated for failure to comply with federal testing requirements. The second scenario is even more problematic in the sense that the Arbitrator has practically and effectively turned the fit test, for Phillips, into a sham.

The record shows that Nuclear Security Officers are prompted when their annual fit-testing is due, and they are required to schedule the tests themselves. (A. Vol. I, 00342). If Phillips schedules the test and shaves immediately beforehand in order to pass it, then Entergy, the Union and Phillips will all know full-well that

the test is both meaningless and a sham given that Phillips, subsequently, cannot regularly maintain the same level of zero hair growth. The Arbitrator's award ignores this scenario or outcome and instead encourages — really, even worse, *requires* — the parties to engage in this conduct, which violates the substance, spirit and intent of NRC and OSHA regulations. Indeed, while Phillips would presumably pass the fit test and be re-employed, his "sham fit test" would place at risk the safety of Phillips, his colleagues and the public because his admitted inability to remain clean-shaven on a regular basis would prevent him from quickly donning his respirator to engage in combat, as his job requires him to do, on most workdays following the "successful" fit test. The Company, as a commercially licensed operator of a nuclear power plant, has a responsibility to secure the plant by adhering to NRC and OSHA respirator standards, as opposed to effectively winking at an employee as he passes a fit test before marching forward to fall short of respirator standards on most future workdays.

4. The Arbitrator's Decision Requires Phillips to Do What He Cannot Do

The Arbitrator's decision also violates public policy because the Arbitrator has directed that Phillips "shall present clean-shaven at work within the parameters as prescribed by his attending physician." (A. Vol. I, 00298). That explicit direction to Phillips cannot be squared with Phillips' own admissions that he can shave, possibly, every third day at most ... and that shaving even that "often"

(read: infrequently) might, over a period of time, aggravate his skin. (A. Vol. I, 00432, 00437). There is no evidence in the record that Phillips' medical condition permits him to be "clean-shaven." Thus, the arbitration award is inherently contradictory and unworkable.

The Arbitrator, by his use of the phrase "shall present clean-shaven at work," is ordering Phillips to do something that he cannot do: shave virtually every day. Or else the Arbitrator, by his use of the phrase "as prescribed by [Phillips'] attending physician," is recognizing that Phillips cannot shave that often but is nevertheless allowing Phillips, and requiring the Company, to ignore or skirt NRC and OSHA regulations. Both of those results are unworkable and unacceptable in light of the indisputably significant public policy in play. Accordingly, the Court should vacate the Arbitrator's decision.

5. *The Arbitrator's Decision Violates Public Policy By Overruling A Medical Professional*

The Arbitrator's award also violates public policy by overruling Dr. Monfee's medical opinion. Federal regulations require a licensee like Entergy to establish a respirator program; and within that program, NRC rules require a medical review officer to make medical determinations when needed. (A. Vol. II 00629). Specifically, 10 C.F.R. § 20.1703(c)(5)(iii) requires a "[d]etermination by a physician that the individual user is medically fit to use respiratory protection equipment." The Company indeed established a program (A. Vol. II, 00686) as

well as a medical review officer, and the Company activated that officer on this matter. Dr. Monfee (although sharing the same skin condition as Phillips and being undisputedly sympathetic to him) ultimately did not find Phillips, with his medical condition, to be medically fit to use respiratory protection equipment. Yet in the absence of a requisite medical determination clearing Phillips for respirator use, the Arbitrator nevertheless found that Phillips' discharge was improper, and, thus, ordered Phillips' reinstatement. In the end, the Arbitrator — who has no medical background whatsoever — just plain overruled the doctor. Based on all facts and circumstances, the Arbitrator's overruling should not stand as a matter of public policy.[19]

II. The Award Must Be Vacated Because the Arbitrator Exceeded His Powers and Authority

The Arbitrator's decision also should be vacated because the Arbitrator exceeded his powers and authority.

A. Standard of Review

A court examines on appeal whether "the arbitrator had the power to make the award that he made." Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471, 80 F.3d 284, 287 (8th Cir. 1996). "A reviewing court ... may vacate an arbitration award when the award does not derive its essence from the

[19] In addition, the Arbitrator exceeded his power and authority in this regard because paragraph 5 within Section 13.02 of the CBA prohibits him from substituting his judgment for the Company's, yet he has done just that.

collective bargaining agreement, or when the arbitrator ignores the plain language of the contract." Id. (citations omitted); see also Doerfer Eng'g, a Div. of Container Corp. of Am. v. N.L.R.B., 79 F.3d 101, 103 (8th Cir. 1996) (citation omitted) ("We are fully aware that an arbitrator cannot exceed the authority given to him by the collective bargaining agreement or decide matters parties have not submitted to him."). Where "a court concludes that the arbitrator did not stay within the bounds of his authority, [the] principle of deference inevitably gives way ... to the greater principle that an award not drawing its essence from the agreement is not entitled to judicial enforcement." John Morrell & Co., 913 F.2d at 559-60 (citing Centralab v. Local No. 816, Int'l Union of Elec. Workers, 827 F.2d 1210, 1217 (8th Cir. 1987)).

B. The Arbitrator Cannot Require Entergy to Violate NRC/OSHA Regulations

The Arbitrator exceeded his authority by issuing an award that requires the Company to violate the terms of the CBA by thwarting federal regulations. Section 3.02 of the CBA states, "Nothing in this Agreement shall be deemed to require the Company ... to commit an ... act, which is forbidden, by law or regulation." (A. Vol. II 00516; see also A. Vol. II 00463). Also, in paragraph 5 of Section 13.02, the CBA states, "The Arbitrator cannot modify, amend, add to, detract from or alter the provisions of this contract nor substitute his judgment for that of management." (A. Vol. II, 00529; 00476).

Based on those two CBA provisions, the Arbitrator is barred as a matter of contract from requiring the Company to employ or re-employ a Nuclear Security Officer who, contrary to NRC and OSHA regulations, cannot effectively don a tight-fitting respirator. The Arbitrator's reinstatement order violates Section 3.02 of the CBA because it requires the Company to commit acts barred by federal regulation; and paragraph 5 of Section 13.02 of the CBA prohibits the Arbitrator from detracting from Section 3.02. By entering an award that contravenes those sections of the CBA, the Arbitrator violated the plain language of the contract, meaning that his award should be vacated. See Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F.2d 562, 563 (8th Cir. 1964) ("If the authority to make the foregoing award cannot be found or legitimately assumed from the terms of the arbitration agreement, then the arbitrator did exceed his authority ...").

C. The Arbitrator's Award Ignores the CBA's Testing Provision

The Arbitrator also exceeded his authority by entering an award that requires the Company to disregard the parties' agreement in the CBA with respect to training and testing. In Sections 30.01 and 30.03, the CBA provides:

> ... The Company may ... perform training and testing to meet industry standards for obtaining and maintaining various job titles and task qualifications. Employees will attend such training and successfully complete the training and testing requirements as established by industry standards. Failure to attend or successfully complete training and testing requirements may result in remediation or discharge.

* * *

> Employees who hold positions that require a federal, state, or local license or certification must achieve and maintain these licenses or certifications in order to maintain the associated position.

Based on those CBA provisions, the Company had the contractual right to require Phillips to achieve industry standards (pursuant to NRC and OSHA regulations) with respect to respirators. Phillips was unable to meet those standards due to his folliculitis, and therefore discharge was permissible and appropriate under the terms of the CBA.

Conversely, pursuant to paragraph 5 of Section 13.02 of the CBA, the Arbitrator did not have the right (i.e., the power or authority) to ignore or bypass (i.e., detract from) the above-quoted provisions. Requiring the Company to reinstate an employee who cannot comply with the training and testing procedures mandated by the CBA is an explicit abuse of authority by the Arbitrator. Accordingly, the Arbitrator's decision should be vacated.

D. The Arbitrator's Award Reinstates Phillips to a Position That Does Not Exist

The Company cannot reinstate Phillips and allow him to work as a Nuclear Security Officer because he cannot effectively don a tight-fitting respirator on most workdays. The Arbitrator's award, thus, raises the question of how the Company is to reinstate Phillips without running afoul of federal regulations and/or without compromising nuclear security interests.

The record demonstrates that there is no position for a Nuclear Security Officer at ANO that does not require the individual to don a respirator and/or to pass the annual fit-test. The CBA provides for only one classification or position: Nuclear Security Officer. (A. Vol. II, 00556; 00504). Section 30.01 of the CBA requires — without any noted or permitted exceptions — that Nuclear Security Officers meet industry standards (or else be subject to discharge). Nowhere in the CBA is there an article, section, provision, paragraph, sentence or fragment that discusses (let alone allows for or arranges) any type of permanent (or even semi-permanent) post, that restricts Entergy's ability to make assignments, or that identifies some sort of lesser or light-duty type of job. (A. Vol. II, 00457-00509; 00510-00562). To the contrary, Section 4.01 of the CBA gives Entergy the bargained-for and exclusive management right to:

> establish or continue ... practices and procedures for the conduct of business and from time to time change or abolish such ... practices or procedures; ... determine, and from time to time, re-determine the number, location, and type of its operations, the methods, processes, ... and the type of work to be undertaken ... ; institute or discontinue policies or operations; assign work to its employees in accordance with requirements determined by management; establish and change work assignments; establish or modify job duties and classifications; determine methods of work ... ; determine the qualifications ... and ability of employees; determine the ... work performance level including work standards ... ."

(A. Vol. II, 00464; 00517).

As Toben explained at the hearing, ANO's Nuclear Security Officers are "all trained and qualified the same." (A. Vol. I, 00412, with emphasis added). That fact dovetails not only with there being just one single job classification (Nuclear Security Officer) but also with the CBA's sweeping, no-exceptions statement, in section 30.01, that Nuclear Security Officers must meet industry standards. Indeed, as Toben elaborated (with emphasis added):

> We train all of our officers under that qualification to maintain the armed security officer qualification that meets up to it, and everybody is trained like that. If you're not trained or [are] disqualified in any section of that, then you're not qualified to be an armed security officer.

(A. Vol. I, 00411).

In sum, there is simply no position or sub-position within the bargaining unit that is exempt from the respirator requirement. Even the Arbitrator understood this point, when he explained in his decision as follows:

> One requirement of the NRC is that ANO have a written respiratory protection program[, and] an element of this respiratory protection program requires that Nuclear Security Officers be provided respirators; are able to quickly don this respirator; and then are able to provide the requisite armed response while wearing this respirator. This requirement applies to all Nuclear Security Officers at ANO.

(A. Vol. I, 00275, with emphasis added). Yet by overturning Phillips' termination and reinstating him, the Arbitrator effectively swept to the side the above-quoted language and exceeded his authority by essentially forcing the Company to create a

permanent, going-forward position that does not exist: a Nuclear Security Officer who cannot properly don a respirator on most days.

E. Permanent Placement at the SOCA or Sally Port Is Not Contemplated by the CBA and Exceeds the Arbitrator's Authority

The Union contends that Phillips should just be effectively planted in one of two monitoring posts: the SOCA port or the sally port.[20] Such a permanent, going-forward solution is not workable and contradicts the CBA in several ways.[21]

With respect to the sally port, Toben specifically testified that "[t]he officer at the sally port sometimes stands in the response position, which requires him to have his gas mask." (A. Vol. I, 00414). Accordingly, the sally port is not a realistic or workable option because the same rigorous standards for quickly donning the respirator indeed sometimes apply. The record demonstrates that, in the event of an attack, even the Nuclear Security Officers assigned to the sally port would be involved heavily in the fight. (A. Vol. I, 00422).

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[20] Even the Arbitrator was not dictating or suggesting that Phillips be placed in the sally port or SOCA port on a permanent basis. If he was, it does not follow that his award (A. 00298) requires Phillips to remain clean-shaven and to pass the annual fit test. These steps would not be necessary if the Arbitrator truly believed that Phillips could be permanently stationed at the SOCA or sally ports. Moreover, the award explicitly references returning Phillips to his "former position," which was a Nuclear Security Officer not specifically stationed at one particular place, nor exempted from the Company's training and testing requirements.

[21] Some of these reasons also highlight that Phillips' permanent assignment in the sally or SOCA port would violate public policy.

Additionally, the Nuclear Security Officers rotate through positions within the plant normally, and they can be required to rotate at any time. (A. Vol. I, 00412). The CBA does not contemplate that any Nuclear Security Officer, including Phillips, should be exempted from rotating.[22] Regardless of how often or infrequently they do or do not rotate, they are all still qualified — completely qualified — as Nuclear Security Officers. (A. Vol. I, 00417-00421). Indeed, there is no other position under the CBA besides being an armed Nuclear Security Officer who is fully qualified. (A. Vol. I,00421).

As the court in Taormina, supra, stated: "Public policy in the nuclear area mandates that employers be permitted to insist upon fulfillment of ***all*** assigned duties even if a labor contract would point the other way." Taormina, 798 F. Supp. at 195 n.3 (citing Iowa Elec. Light & Power Co., supra) (emphasis added). Here, the CBA does not point the other way, which shows that the Arbitrator violated not only public policy but also the restrictions imposed on him by the terms of the CBA.

While the Union attempts to couch Phillips' permanent placement in the SOCA port as a reasonable accommodation under Section 15.03 of the CBA, that section does not at all require a reasonable accommodation. Rather, that section

[22] Toben testified that the Nuclear Security Officers at SOCA port "don't always rotate" — testimony that is not the equivalent of saying that Nuclear Security Officers at the SOCA port "never" rotate. (A. Vol. I, 00414).

states only that the CBA will not be a barrier to the Company offering a reasonable accommodation. (A. Vol. II, 00479; 00532).

The U.S. Equal Employment Opportunity Commission ("EEOC") is the federal agency charged with expertise in matters of reasonable accommodations to employees with disabilities; and the Americans with Disabilities Act is the federal law (enforced by the EEOC) that would compel a reasonable accommodation. Interestingly, the EEOC actually reviewed and dismissed a charge of disability discrimination filed by Phillips — a very telling fact and event.[23]

The Company's reasonable accommodations to Phillips included more than two months of paid leave, the involvement of its Human Resources department, attempts at reassigning Phillips to another job, and otherwise making efforts to see

[23] After Phillips was discharged, he filed a charge against Entergy with the EEOC, and the EEOC investigated the charge and ultimately dismissed it in the Company's favor (A. Vol. II, 00770-00771). The EEOC's dismissal of Phillips' charge, coupled with case law involving similar respirator issues in the context of federal statutory discrimination claims, shows that the EEOC understood what the Arbitrator did not: that Phillips is not qualified to be a Nuclear Security Officer. See e.g., Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984) (affirming summary judgment to the employer, who was not required to run afoul of state-law health and safety standards for a plaintiff who performed job duties involving potential exposure to toxic gases but who could not achieve a tight-fitting seal when wearing a respirator — as his position required — because his religious beliefs prevented him from shaving); Stewart v. City of Houston, Civil Action No. H-07-4021, 2009 U.S. Dist. LEXIS 79188, at *32-*42 (S.D. Tex. Aug. 7, 2009) (recommending that summary judgment be granted to the employer where its grooming policy was necessary for safety reasons because the required respirators could not be used effectively by persons with facial hair) (and cases cited therein), adopted, 2009 U.S. Dist. LEXIS 79174 (S.D. Tex. Sept. 3, 2009), aff'd, 372 Fed. Appx. 475 (5th Cir. 2010) (unpublished).

what might be worked out. (A. Vol. I, 00324, 00387-390, A. Vol. II, 00800). The CBA does not require the Company, as some sort of misguided reasonable accommodation, to employ a Nuclear Security Officer who cannot meet federal training and testing standards, and any other reading of the CBA constitutes (in addition to a violation of public policy) an impermissible addition to the contract in violation of the "Grievance and Arbitration" provision's restrictions on an arbitrator's power and authority.

F. The Award Contravenes the CBA by Requiring the Company to Change the Nuclear Security Officer Position

The Arbitrator also exceeded the restrictions imposed on him by the CBA by ignoring the Management Rights provision that indisputably gives the Company the management power and authority to "determine the number and type of employees required to safely perform any and all functions[.]" (A. Vol. II, 00464; 00517). If the Arbitrator's decision is enforced, then the Arbitrator is essentially compelling Entergy to create a position that does not exist in the CBA and, hence, to employ one more Nuclear Security Officer than it needs or wants to. (A. Vol. I, 00417-00421). That one extra Nuclear Security Officer is obviously Phillips, who would need to be placed somewhere at the plant — at no less than the full pay-rate of a Nuclear Security Officer, of course, because that it is the only job classification in the CBA — but who could not be counted on to safely defend the plant on most days. By effectively requiring Entergy to staff a full component of

Nuclear Security Officers, and then to add Phillips as an extra because he cannot fully perform his duties, the Arbitrator has impermissibly usurped the Company's bargained-for and exclusive management right to determine the number of Nuclear Security Officers that are needed; and in the process, the Arbitrator has exceeded his power and authority under Section 13.02 of the CBA, which states, "The Arbitrator cannot modify, amend, add to, detract from or alter the provisions of this contract nor substitute his judgment for that of management."

Phillips' inability to properly don a respirator is not something to be excused from a practical standpoint because, unfortunately, we live in a world where the threat of terror is all too real. Nuclear facilities like ANO are responsible for ensuring that their Nuclear Security Officers are fully and constantly equipped to handle a major terrorist attack. To that end, Section 6.01 of the CBA states in part (with emphasis added): "The parties hereto [i.e., the Company and the Union] agree that the public health and safety, national security, [and] the protection of the Nuclear Station and its employees mandate that there will be complete and uninterrupted security protection at the site at all times." (A. Vol. II, 00520; 00467). Similarly, Section 6.02 prohibits the Union and any of the Nuclear Security Officers from striking or stopping work — and from even just slowing down work. (A. Vol. II, 00520; 00467). Those two CBA sections highlight how even the Union fully recognizes and agrees that the nuclear security function is a

sacred one that is not to be compromised with even just a single Nuclear Security Officer (Phillips) who is not fully qualified and functional.

In the event of an all-out fight involving gas, Phillips and every other Nuclear Security Officer at ANO would be compelled to wear a respirator that works. A fight is the *raison d'être* for the position at issue, Nuclear Security Officer. And an all-out fight is the *raison d'être* for a full force of Nuclear Security Officers. By suggesting that Phillips could be put in a post where an "immediate" armed response would not be necessary and where an "immediate" donning of a respirator would not be necessary, the Arbitrator exceeded his authority by changing the nature of the only classification and position in the bargaining unit. The attending result, if Phillips were to be reinstated, would be that the Company would have one Nuclear Security Officer who, unless it happens to be a less-than-typical "shaving day" for him, could not timely don his respirator — and, thus, would be unable to defend or counterattack — in the event of an offensive action by terrorists using gas as a weapon.

CONCLUSION

This Court should reverse the District Court's Judgment and, in turn, vacate the arbitration award.

Respectfully submitted,

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Dated: March 7, 2016

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25A(a), I hereby certify that on this 7th day of March, 2016, I electronically filed the foregoing brief, along with the accompanying addendum, with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that this brief, along with the accompanying memorandum was served via CM/ECF upon Steven Rauls, Esq., who is a registered CM/ECF user. I have sent the foregoing document by Federal Express to the following non-CM/ECF participants: Robert Kapitan, Esq.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,892 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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Dated: March 7, 2016

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This Brief and the addendum hereto have been scanned for viruses and are virus-free.

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