September 22, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	IA-20-008
JOSEPH SHEA	)	

JOSEPH SHEA'S MOTION TO SET ASIDE THE IMMEDIATE EFFECTIVENESS OF AN ORDER BANNING HIM FROM ENGAGING IN NRC-LICENSED ACTIVITIES, ANSWER, AND REQUEST FOR HEARING

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Contents

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Pursuant to 10 C.F.R. § 2.202 and the U.S. Nuclear Regulatory Commission's ("NRC") August 24, 2020 Order[1] in this proceeding, Mr. Joseph Shea hereby (1) requests that the Order's immediate effectiveness be set aside;[2] (2) answers the Order; and (3) requests that the Order be set for hearing.

I. Introduction

On August 24, 2020, the NRC's Office of Enforcement took the extraordinary step of *immediately banning* Mr. Joseph Shea from engaging in NRC-licensed activities for actions he

[1] Joseph Shea, Order Prohibiting Involvement in NRC-Licensed Activities, Immediately Effective, IA-20-008 (Aug. 24, 2020), (the "Order").

[2] In accordance with the provision in 10 C.F.R. § 2.202(c)(2)(i) that the motion to set aside the immediate effectiveness of the Order "must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on," attached to this Motion are (1) an Affidavit of Joseph Shea (the "Shea Affidavit"); and (2) selected exhibits that Mr. Shea provided to the NRC for his PEC. In addition, the Motion references, but does not attach due to privacy and other concerns, (1) other exhibits provided to the NRC at Mr. Shea's PEC, (2) the transcript of Mr. Shea's PEC, and (3) exhibits to the Office of Investigations Report No. 2-2019-015. All of this record evidence is available to the Commission and demonstrates that Mr. Shea did not engage in deliberate misconduct or otherwise cause any violation of NRC's employee protection requirements, and that the immediate effectiveness of the Order should be set aside.

properly took when he terminated an individual found to have engaged in sustained pattern of disrespectful behavior that violated the Tennessee Valley Authority ("TVA") Code of Conduct and other policies. Mr. Shea took the action based on (1) his own knowledge that the individual was, among other disrespectful behaviors, making false, derogatory statements regarding one of Mr. Shea's subordinates; and (2) findings from independent entities within TVA that concluded termination was appropriate.

The individual's conduct was the subject of an independent investigation by the TVA Office of General Counsel. More specifically, the investigation conducted by TVA's Office of General Counsel concluded that the individual's statements about Mr. Shea's subordinate amounted to a pattern of harassment, retaliation, and disrespectful conduct. Mr. Shea received and agreed with the Office of General Counsel's recommendation to separate the individual from the company because of her conduct. Mr. Shea rightly believed that this action was consistent with both his duty as a senior manager to ensure a harassment-free and professional workplace,[3] and with 10 C.F.R. § 50.7(d), which explicitly states that no one is "immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations."[4]

In addition, in accordance with TVA policies and procedures, Mr. Shea presented his proposal to separate the individual from the company to the TVA Executive Review Board ("ERB"),[5] which included an outside auditor. The outside auditor found that the ERB was

[3] Transcript of Pre-decisional Enforcement Conference Re Joe Shea, No. IA-20-008 at 84 (June 25, 2020) (Hereinafter "Shea PEC Tr.") ("I believed it was my responsibility to ensure a respectful and harassment-free workplace.").

[4] Shea PEC Tr. at 37 ("I acted . . . consistent with the provisions of 10 CFR 50.7(d).").

[5] Pursuant to TVA procedures, the Executive Review Board "Ensures that the discipline is not taken because an employee engaged in activities protected by the employee protection regulations of 10 CFR 50.7." *See* TVA NGP-SPP-01.7.4 at Sec. 3.1.1, *Adverse Employment Action and the Executive Review Board*, Revision 2 (Aug. 13, 2018).

conducted in accordance with applicable procedures.[6] All members of the ERB unanimously agreed that separating the individual from the company was consistent with 10 C.F.R. § 50.7.[7]

Yet, The NRC Office of Enforcement has inexplicably found that Mr. Shea deliberately took this action in retaliation against the individual for engaging in protected activities, despite the overwhelming evidence that Mr. Shea (and TVA) presented to the contrary. The NRC Staff has immediately banned Mr. Shea without first conducting an adjudicatory proceeding because it has—in hindsight—decided that: the falsehoods and disrespectful statements made by the individual were protected activity; Mr. Shea (an experienced nuclear industry supervisor with a stellar record), and apparently the ERB members (including an independent auditor), the Office of General Counsel, and Human Resources were all in error; and the firing of the individual was deliberate misconduct.

The lack of credible foundation for the immediate ban against Mr. Shea is laid bare by the fact that the alleged "chilled work environment concerns" that the Staff concluded were the individual's "protected activity" were actually numerous disrespectful and deliberately false statements, including statements made to the TVA OGC investigator, and other statements made to Mr. Shea related to processing the individual's *expense voucher reimbursements* while the individual was on loan to an industry trade organization. None of these statements claimed the existence of a chilled work environment or otherwise indicated that the individual was hesitant to raise nuclear safety concerns. These statements were completely untethered from anything remotely resembling a "nuclear safety" concern or other "protected activity" under Section 50.7.

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[6] Shea PEC Exhibit 27 (Fifth Independent Auditor's Report of the TVA Adverse Employment Actin Process for the Semester Ending 12/31/2018, which is the outside auditor's report for the period that included the ERB for the former corporate employee's adverse action).

[7] *See* Shea PEC Exhibit 26 (a copy of the complete ERB package). Provided at **Attachment 3** is a redacted excerpt from Shea PEC Exhibit 26.

The Staff's Order has placed individuals in Mr. Shea's position, and the entire nuclear industry, in an impossible dilemma. A manager who receives and attempts to resolve the results of an independent investigation by disciplining an individual found to have engaged in inappropriate conduct might now face an immediate ban without at least first being provided the opportunity to defend himself in an adjudicatory proceeding. And an employee can use even the smallest hint of engaging in protected activity as a shield allowing that person to spread falsehoods and derogatory comments about fellow employees at will, without consequence. In fact, the immediate ban here without a hearing will merely embolden such behavior. That cannot be what the Commission intends, particularly in light of 10 C.F.R. § 50.7(d), which allows managers to take action against employees for nonprohibited reasons.

An Order banning an individual from engaging in NRC-licensed activities can ruin a person's career. As one judge on an Atomic Safety and Licensing Board panel has stated, such a ban is a "career death sentence."[8] For this reason, a ban, especially one that is effective immediately without a full evidentiary hearing before a neutral decisionmaker, cannot be issued lightly. Accordingly, as discussed in detail below, the Commission must set aside the immediate effectiveness of this Order for multiple reasons.

First, there is no legal basis for issuing an immediately effective ban to Mr. Shea because the NRC Staff has failed to demonstrate that such a ban is "necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property," pursuant to Atomic Energy Act § 161(b). The Staff provides no justification for making the ban immediately effective, other than its conclusory assertion that "pursuant to 10 CFR 2.202, the significance of Mr. Joseph Shea's wrongdoing described above is such that this Order be

[8] *Geisen*, LBP-09-24, 70 N.R.C. 676, 805 (2009) (Farrar, J., additional views).

immediately effective."[9] On the contrary, Mr. Shea presents no risk to public health and safety. Nor could such a case be made, based on his thirty-year track record in the nuclear field (including over a decade with the NRC), or on the alleged violation at issue here, which concerns a well-founded personnel decision. Thus, an immediate ban is neither necessary nor desirable.

Second, even assuming the Commission inexplicably believes that such a risk to public health and safety exists, the Staff has not met its factual burden to demonstrate it is necessary that the Order be effective immediately. Pursuant to 10 C.F.R. § 2.202(c)(2)(i), the immediate ban must be set aside if it is not based on adequate evidence, but rather is based on mere suspicion, unfounded allegations, or error.[10] Those are the circumstances here. The Order lacks adequate evidence because it fails to even address Mr. Shea's substantial showing that, pursuant to 10 C.F.R. § 50.7(d), his actions were justified due to legitimate, non-prohibited considerations. In addition, rather than relying on direct evidence, the Office of Investigation Report[11] underlying the Order is based on mere Staff "assumptions," unfounded conclusions, and is riddled with fundamental errors.[12]

II. Factual and Procedural Background

A. Factual Summary

Because the facts are critical to understanding why an immediate ban is clearly inappropriate, this Section describes the critical facts, all of which (and more) were presented to

[9] Order at 4.

[10] *Safety Light Corp.*, LBP-05-2, 61 NRC 53, 61 (2005).

[11] Office of Investigation ("OI") Report of Investigation number 2-2019-015 ("OI Report 2-2019-015").

[12] The presence of numerous mistakes in the OI Report calls into doubt the inspector's position as a credible observer and whether the inspector's observations can be credited as "adequate evidence" within the meaning of 10 C.F.R. § 2.202(c)(2)(i). *See Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC 211, 225 (1996).

the Staff by Mr. Shea and his counsel during Mr. Shea's pre-decisional enforcement conference ("PEC").

Until August 24, 2020, when the NRC Office of Enforcement issued the Order, Mr. Shea was serving as the Vice President of Nuclear Technology Innovation at the Tennessee Valley Authority. When the circumstances and events underlying the Order occurred, Mr. Shea was serving as the Vice President, Regulatory Affairs and Support Services.

Mr. Shea started his public service career by serving for five years in the United States Navy. After his military service, Mr. Shea worked at the NRC for approximately nineteen years, including serving in the Office of Nuclear Reactor Regulation and Nuclear Material Safety and Safeguards as a licensing project manager, the Office of the Executive Director for Operations as Chief of the Regional Operations section, the Office of Nuclear Security and Incident response as the Director of Nuclear Security Policy, and finally in Region II in roles that included the Director of Reactor Projects, Reactor Safety, and Fuel Facility Inspection.[13] For the past ten years, Mr. Shea has continued in public service by working for TVA.

The Order stems from Mr. Shea's January 14, 2019 decision to terminate the employment of a former corporate employee for deliberately undermining and making false, disrespectful, and harassing statements about her direct supervisor, Ms. Erin Henderson,[14] over the course of several months in 2018 in violation of TVA's rules and policies.

The relevant facts and circumstances here began in March 2018. Specifically, on March 9, 2018, Ms. Henderson filed a complaint alleging that several of her co-workers, including the former corporate employee, were creating a hostile environment for her in the workplace. Ms.

[13] Shea PEC Tr. at 22-23.

[14] The former corporate employee was a manager in TVA's corporate office, an indirect report of Mr. Shea's, and a direct report of Ms. Erin Henderson, then the Director of Corporate Nuclear Licensing.

Henderson submitted her complaint to Mr. Shea and TVA's Corporate Nuclear Human Resources Director. After consultations with Human Resources ("HR"), the Office of General Counsel ("OGC"), and TVA senior management, it was determined that OGC would conduct an independent investigation into Ms. Henderson's allegations.[15] OGC ultimately substantiated in part Ms. Henderson's allegations.

During the period that the investigation was underway and investigation conclusions were pending, the former corporate employee made unfounded, disrespectful, and false allegations about Ms. Henderson directly to Mr. Shea on no less than four occasions (March 29, May 7, June 9, and late June/July 2018). For relevant context, these statements were made while TVA was coordinating the former corporate employee's loanee assignment to the Nuclear Energy Institute ("NEI") (the nuclear industry's trade association located in Washington, D.C.), an assignment which the former corporate employee had proposed.

On March 29, 2018, the former corporate employee alleged that Ms. Henderson was "unreasonable" and was attempting to "effectively block" her loanee opportunity with NEI,[16] even though the former corporate employee knew Ms. Henderson was moving the loanee assignment forward by email correspondence on which the former corporate employee had been copied the day prior.[17] This was the first of a number of unsolicited, disrespectful, and plainly false allegations that the former corporate employee made against Ms. Henderson.

The former corporate employee began her NEI loanee assignment on or about April 29, 2018. A few weeks into her assignment, on May 7, 2018, the former corporate employee sent an

[15] Shea PEC Tr. at 48.

[16] Shea PEC Exhibit 7 (March 29, 2018 email from the former corporate employee to Mr. Shea).

[17] Shea PEC Exhibit 6 at 7 (March 28, 2018 email from Ms. Henderson to Mr. Shea and the former corporate employee providing an "FYI on status" regarding the draft agreement for the loanee assignment).

unsolicited email to Mr. Shea complaining about the lack of detail in a TVA memorandum explaining how TVA would reimburse her travel expenses associated with that assignment. Without any basis whatsoever, the former corporate employee claimed that Ms. Henderson was going to use the former corporate employee's travel vouchers as an "investigative tool" against her.[18] More specifically, the former corporate employee alleged,

> I know that [Ms. Henderson] has used HR to investigate people, reported people to ECP, threatened to have people for cause drug tested, pulled badging gate records and *probably a lot more actions that I'm not aware of*. She has demonstrated a longstanding pattern of using TVA processes as punitive and retaliatory tools. Based on the lack of detail in her 'NEI Loanee Confirmation 2018' document, I anticipate her using my travel vouchers as an investigative tool.[19]

The former corporate employee's email then proposed that the former corporate employee work with Mr. Shea, rather than her direct supervisor, Ms. Henderson, and his Executive Management Assistant on the travel vouchers.[20] The former corporate employee's email made no reference to any nuclear safety concern, or otherwise suggested she was unwilling to raise such concerns.

As Mr. Shea explained during his PEC, he was most troubled by the former corporate employee's vague, obviously unfounded, and disrespectful statement that Ms. Henderson had taken "probably a lot more actions that [the former corporate employee] was not aware of."[21] This demonstrated to Mr. Shea that the former corporate employee—a leader within TVA—was comfortable making derogatory, clearly speculative, and unsubstantiated claims about Ms. Henderson.

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[18] Shea PEC Exhibit 11 (May 7, 2018 email from the former corporate employee to Mr. Shea). Provided at **Attachment 1** is a redacted copy of Shea PEC Exhibit 12, which is an email chain that includes the May 7, 2018 email from the former corporate employee.

[19] Shea PEC Exhibit 11 (emphasis added).

[20] *Id.*

[21] Shea PEC Tr. at 58 ("These words in particular demonstrated to me that [the former corporate employee] was comfortable spreading false, or at least unsubstantiated, information about Ms. Henderson by stating this to me. By the very words [the former corporate employee] used, "actions that I am not aware of," she acknowledged the unfounded nature of the reference to, probably a lot more actions.").

Mr. Shea appropriately sought assistance regarding how to address the former corporate employee's May 7 statements.[22] Mr. Shea, having already engaged OGC as a neutral and experienced investigatory entity, approached OGC and HR again—this time for advice on how to evaluate the former corporate employee's assertions. He forwarded the former corporate employee's May 7 email to OGC and HR believing it could be related to Ms. Henderson's case.[23] Mr. Shea acknowledged that OGC or HR could decide to handle the matters separately. Mr. Shea's forwarding email stated: "Please advise if you agree or see a different way to act on this."[24] This statement shows Mr. Shea's commitment to having the various assertions examined by credible investigators independent of his own organization and to solicit their advice regarding next steps, if any. OGC decided to address the statements made in the May 7 email as part of its ongoing, independent investigation.[25] And Mr. Shea told the former corporate employee that her allegations would be addressed by an appropriately independent reviewing party.[26]

However, the former corporate employee's derogatory, disrespectful, and unfounded claims about Ms. Henderson did not stop there. In a June 9, 2018 email to Mr. Shea, the former corporate employee—again without any factual basis—alleged, "I know I've got to get my travel in. This is getting ridiculous. We are now floating my rent. But I've been afraid of what will happen as soon as I start submitting vouchers. I don't even try to understand my boss and why she does what she does, but I do know that she never gives up."[27] These statements contained no

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[22] Shea PEC Tr. at 58.

[23] Shea PEC Exhibit 12 (May 7, 2018 email from Mr. Shea to a TVA OGC attorney and Human Resources Director, forwarding the former corporate employee's May 7 email). Provided at **Attachment 1** is a redacted copy of Shea PEC Exhibit 12 (highlighting added).

[24] *Id.*

[25] *Id.*

[26] Shea PEC Exhibit 14 (May 14, 2018 email from Mr. Shea to the former corporate employee).

[27] Shea PEC Exhibit 18 (June 9, 2018 email from the former corporate employee to Mr. Shea). Provided at **Attachment 2** is a redacted copy of Shea PEC Exhibit 18.

explanation regarding what was ridiculous, why anything that Ms. Henderson was doing caused the former corporate employee to "float her rent," what the former corporate employee was "afraid of," what Ms. Henderson "does," or how she "never gives up." Also absent from the former corporate employee's email was any concern related to nuclear safety.

As he demonstrated at his PEC, Mr. Shea responded in part, "Not sure why anything is getting ridiculous.... have you submitted something already? [My Executive Management Assistant] has been monitoring and hasn't seen anything hit the system. What are you referring to 'does what she does' and 'never gives up'? Is there something beyond your last email?"[28] In response, the former corporate employee again provided Mr. Shea with no support for her claims, and responded only, "It's ridiculous because I'm afraid and haven't submitted, so now we're floating. *No action has been taken to my knowledge yet*."[29] The former corporate employee's statement that "[n]o action has been taken to [her] knowledge yet" was yet another indication that she was comfortable making derogatory, completely speculative, and unsubstantiated claims about Ms. Henderson.

Still, the former corporate employee's specious claims about Ms. Henderson did not stop. In late June or early July, the former corporate employee texted Mr. Shea asking that he help "push [her] May voucher through" because Mr. Shea's Executive Management Assistant may be getting "different directions from management that could be hanging things up."[30] The former corporate employee's use of the term "management" was a thinly-veiled reference to Ms. Henderson. As he had done previously, Mr. Shea asked for more information. He responded, "What are you referring

[28] *Id.*

[29] *Id.* (emphasis added).

[30] Shea PEC Exhibit 21 (text messages from late June 2018-early July 2018, between the former corporate employee and Mr. Shea, discussing the status of her travel voucher submittals).

to as different direction from management? Since [my Executive Management Assistant] and I are actively engaged in your May package, what is leading you to believe there is such a different direction?"[31] She replied only, "Past experience," with no further information or support.[32] Not satisfied with this non-responsive, vague and unsupported answer, Mr. Shea asked again, "If you have a factual basis for your assertion regarding different direction, please provide that."[33] He received no response. Mr. Shea called the former corporate employee on July 2 in yet another attempt to understand the basis for her claims against Ms. Henderson.[34] But the former corporate employee still provided nothing further.[35]

In August 2018, after the OGC investigation had reached a conclusion with respect to another individual named in Ms. Henderson's complaint (a former Sequoyah plant employee), Mr. Shea's contemporaneous notes from discussions with OGC reflect OGC's finding that the former corporate employee's "types of behaviors are harassing, still reviewing."[36] On August 30, 2018, OGC recommended that the former corporate employee be separated from the company, either by a no-fault separation agreement or termination, because it found that the former corporate employee's pattern of behaviors towards Ms. Henderson as described above violated multiple TVA policies and federal law.[37]

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Shea PEC Tr. at 69.

[35] *Id.*

[36] Shea PEC Exhibit 24 (Mr. Shea's contemporaneous handwritten notes from an August 16, 2018 meeting discussing TVA OGC's report on its investigation into Ms. Henderson's hostile work environment complaint").

[37] *See* OI Report 2-2019-015 Exhibit 14, which includes a copy of the "TVA OGC Supplemental Report on [the former corporate employee] dated August 30, 2018"). This is a privileged and confidential TVA legal memorandum that the Staff obtained without authorization from, and by means unknown to, TVA, and declined to return to TVA once TVA learned it was in the Staff's possession. The Staff's possession of this memorandum remains under protest by TVA.

With this recommendation in hand, and his own determination that the former corporate employee's statements crossed an unacceptable line, Mr. Shea decided to separate her from the company, through a no-fault separation agreement or by termination if she did not accept that agreement.[38]

As required by TVA procedures, however, this potential adverse employment action had to first be reviewed by the TVA Executive Review Board, or "ERB." The purpose of the ERB is to ensure that a personnel action is consistent with company practices, and not based on retaliation for protected activities. More specifically, the ERB adds independence and deliberative input to proposed personnel actions. The ERB is specifically focused on ensuring that activity protected under 10 C.F.R. § 50.7 does not form the basis for the action, and that the action is consistent with action taken for similarly situated employees. The ERB process also considers negative impacts to a Safety Conscious Work Environment and develops mitigation plans as necessary.

The ERB convened on September 19, 2018. Over a half a dozen individuals participated in or witnessed the ERB.[39] They included TVA's Senior Vice President for Operations (the ERB Chair); an attorney from OGC; a representative from Human Resources; TVA's Nuclear Safety Culture Monitoring Panel Chairperson; TVA's ECP Program Manager (Corporate); and an independent, outside consultant who attended in an auditing role.[40] These individuals—including the OGC and Human Resources representatives—were completely independent of the underlying events.

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[38] Shea PEC Tr. at 74-75.

[39] *See* Shea PEC Exhibit 26 (a copy of the complete ERB package). Provided at **Attachment 3** is a redacted excerpt from Shea PEC Exhibit 26.

[40] *Id.*

As described in the ERB package, the basis for offering the former corporate employee a no-fault separation agreement was that she had been found, through the independent investigation, to have acted in violation of three TVA policies as well as Federal law.[41] Specifically, the investigation concluded that the former corporate employee had engaged in a sustained campaign of disrespectful and harassing conduct over a lengthy period of time.[42] The ERB members concluded that the proposed action was based on legitimate non-retaliatory reasons.[43] They found that the action was consistent with TVA policies, procedures, and past practices. Not one ERB member dissented from any of these conclusions.[44] The ERB auditor found that the ERB was conducted consistent with applicable procedures.[45]

Following the ERB's conclusion that the facts showed the proposed adverse action was not based on retaliation, the former corporate employee was offered a no-fault separation agreement on October 25, 2018. She initially accepted a revised agreement on December 5, 2018, but rescinded her acceptance on December 11, 2018, as was her right. TVA convened an ERB update before proceeding with terminating her from the company to consider additional information submitted by the former corporate employee.[46] The ERB update reached the same conclusions, with no dissenting views recorded—the action was based on legitimate non-retaliatory reasons. It was also consistent with TVA policies, procedures, and past practices.[47] Armed with these

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[41] *Id.*

[42] *Id.* at 1.

[43] *Id.* at 2. (Question 1 of the ERB Record of Action states, "The proposed action is based on legitimate, non-retaliatory reasons" before checkboxes of "Yes" or "No." The ERB for the former corporate employee marked "Yes.").

[44] *Id.* at 2.; *see also* OI Report 2-2019-015 at 29 ("The vote was unanimous for the [former corporate employee] ERB with no dissenting opinions as documented in the ERB package.").

[45] Shea PEC Exhibit 27 (Fifth Independent Auditor's Report of the TVA Adverse Employment Actin Process for the Semester Ending 12/31/2018, which is the outside auditor's report for the period that included the ERB for the former corporate employee's adverse action).

[46] Shea PEC Exhibit 32 (December 18, 2018 ERB Update).

[47] *Id.*

independent conclusions, Mr. Shea terminated the former corporate employee's employment on January 14, 2019.[48]

In summary, Mr. Shea took action to separate the former corporate employee from TVA because she made numerous, unfounded, false, and disrespectful statements about her supervisor, Ms. Henderson.[49] Mr. Shea's action was supported by an OGC recommendation that independently evaluated the former corporate employee's conduct and concluded that termination was legally supportable. And Mr. Shea followed the independent ERB process, which confirmed that the action was taken for legitimate reasons. According to the NRC Staff's Order, not only were all these people wrong, but Mr. Shea was *intentionally* wrong (and engaged in an act of deliberate misconduct) such that he must be immediately banned from NRC-licensed activities, even though he followed the required process, solicited and received the input of many others (including independent parties), and acted consistently with those procedures and that input.

B. Notice of Apparent Violation

On March 2, 2020, the NRC Staff issued to Mr. Shea a Notice of Apparent Violation, No. IA-20-008 ("NOAV").[50] The NOAV stated that based on its recent investigation, the Staff had reason to believe Mr. Shea engaged in deliberate misconduct in violation of 10 C.F.R. § 50.5 which caused TVA to "discriminate against [the] former corporate employee for engaging in protected activity" in violation of 10 C.F.R. § 50.7.[51] Specifically, the NOAV stated that the former corporate employee had "engaged in a protected activity by raising concerns of a chilled work

[48] Shea PEC Exhibit 33 (January 14, 2019 letter terminating the former corporate employee).

[49] Shea PEC Tr. at 84 ("In summary, I ultimately took action to terminate [the former corporate employee] because I believed [she was] engaged in disrespectful and harassing conduct towards Erin Henderson and I believed it was my responsibility to ensure a respectful and harassment-free workplace.").

[50] March 2, 2020 NRC Letter to Mr. Shea, Subject: Nuclear Regulatory Commission Office of Investigations Report No. 2-2019-015, IA-20-008 ("NOAV"). Enclosure 1 to the Letter is the Apparent Violation.

[51] NOAV, Enclosure 1 at 1.

environment to [Mr. Shea] and a TVA attorney during a TVA Office of the General Counsel investigation."[52] The Staff also provided a redacted copy of the OI Report 2-2019-015.

C. Pre-Decisional Enforcement Conference and Subsequent Order

On June 25, 2020, Mr. Shea participated in a Pre-Decisional Enforcement Conference ("PEC"), at which he provided overwhelming, detailed evidence demonstrating that he did not engage in deliberate misconduct with the intent to cause TVA to violate the Commission's requirements or otherwise retaliate against the former corporate employee for engaging in protected activities. In addition, Mr. Shea identified a number of factual and legal errors in the OI Report 2-2019-015, and also provided documentation and information contradicting a number of key assumptions made in the OI Report 2-2019-015.

Nevertheless, on August 24, 2020, the NRC Staff issued the Order to Mr. Shea, banning him from engaging in NRC licensed activities, effective immediately.

III. Argument

Absent a threat to public health and safety, the NRC simply has no legal authority to bypass Mr. Shea's due process rights by issuing him a ban prior to providing him with a hearing. And even assuming the Commission has such authority, it has failed to meet its burden to demonstrate that the Order is based on adequate evidence. Rather, as demonstrated below, the Order is based on mere suspicion, unfounded allegations, and clear error. For these reasons, the immediate effectiveness of the Order must be set aside.

[52] *Id.*

A. The Commission Has No Authority To Issue An Immediately Effective Ban Under The Circumstances Of This Case

The NRC generally derives its statutory authority to issue Orders from Section 161 of the Atomic Energy Act ("AEA"). Section 161(b) allows the Commission to issue orders that are "*necessary or desirable* to promote the common defense and security or to protect health or to minimize danger to life or property."[53] And Section 161(i) allows, in pertinent part, the NRC to prescribe an order as it may deem "necessary" to govern regulated activity "in order to protect health and to minimize danger to life or property."[54] However, after an over thirty-year career of compliance with NRC regulations, Mr. Shea cannot possibly be said to now present such an imminent threat to public health and safety because he carried out a personnel decision to terminate an employee consistent with the advice and feedback of TVA's OGC, HR, and TVA's ERB.

Indeed, the Commission's authority to issue immediately effective bans has previously been a matter of debate. In the *Geisen* case, Atomic Safety and Licensing Board Panel member Judge Farrar rightly noted that immediately effective industry bans can impose "career death sentences" and have "extraordinary negative impacts" on an individual's "financial status, career development, and family life."[55] As Judge Farrar explained, there is a difference between the issue of whether an individual should be held accountable for alleged charges, and whether the individual was treated fairly in the handling of those charges.[56] Where "career death sentences" are involved, such as immediate bans, unjust outcomes can result when a sanction is "made

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[53] 42 U.S.C. § 2201(b) (emphasis added).

[54] 42 U.S.C. § 2201(i)(3).

[55] *Geisen*, LBP-09-24, 70 N.R.C. 676, 796 (Aug. 28, 2009) (Farrar, J., additional views).

[56] *Id.*

immediately effective when it need not and should not have been."[57] This is exactly the outcome that must be avoided here.

As Judge Farrar correctly admonished at the time:

> Even a layman would question whether it is permissible for the Government to direct that a person be removed from his employment and his career, effective immediately — before he has a chance to be heard — without specifying plausible, considered reasons for taking such drastic action. In any event, such an explanation is required by the very regulation that permits the Staff to issue an immediately effective Enforcement Order upon finding "that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful" — viz., section 2.202(a)(5) explicitly requires the Staff to "*state* [] *reasons"* (emphasis added) for making those findings. The Staff's merely asserting, without explaining, that such is the case is inadequate.[58]

Subsequent to *Geisen*, in 2015 the Commission completed a rulemaking, Hearings on Challenges to the Immediate Effectiveness of Orders, that made it clear the NRC Staff has the burden of persuasion to demonstrate that an immediate ban is warranted and again emphasized that protecting the public health and safety is the primary objective. In that rulemaking, the Commission determined that its expedited hearing rule "struck a balance between the governmental interests in protecting public health and safety and an interest in fairness by requiring that challenges to immediately effective orders be heard expeditiously."[59]

Referencing a 1992 rule to support this principle, the Commission stated "'an immediately effective order may cause a person to suffer loss of employment while the order is being adjudicated' but recognized that the effects of health and safety violations are paramount over an individual's right of employment."[60] Indeed, in that 1992 rulemaking process, the Commission wrote that the purpose of permitting such a ban was "to have the procedural mechanism in place

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[57] *Id.* at 797.

[58] *Id.* at 803–04.

[59] 80 Fed. Reg. 63409, 63411 (Oct. 20, 2015).

[60] *Id.*

to issue orders, as necessary, to unlicensed persons when those persons have demonstrated that future control over their activities subject to the NRC's jurisdiction is considered *necessary* to protect public health and safety or to minimize danger to life or property or to protect the common defense and security."[61]

The NRC Staff has failed to provide any justification making an immediate ban "necessary" in Mr. Shea's case. Instead, the NRC Staff makes the conclusory statement that "pursuant to 10 CFR 2.202, the significance of Mr. Joseph Shea's wrongdoing described above is such that this Order be immediately effective."[62] Such a "mere[]assertion without expla[nation] … is inadequate" to meet the requirements of 10 C.F.R. § 2.202(a)(5) and therefore does not justify the "drastic action" of an immediate ban.[63]

Nor does the remainder of the Order provide sufficient justification to necessitate an immediate ban. The NRC Staff claims that the ban itself is justified, "[g]iven the significance of the underlying issues, Mr. Joseph Shea's position within TVA that has a very broad sphere of influence, and the deliberate nature of the actions,"[64] leading the NRC to "lack[] the requisite reasonable assurance that licensed activities can be conducted in compliance with the Commission's requirements and that the health and safety of the public will be protected."[65] The Staff nowhere explains "the significance of the underlying issues"; does not define Mr. Shea's supposed "very broad sphere of influence" or explain its relevance; and does not show that Mr. Shea's actions were "deliberate." On the contrary, as the facts described above (and presented during his PEC) show, Mr. Shea attempted, in good faith, with the formal input of others, and

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[61] 56 Fed. Reg. 40664, 40665 (1991) (emphasis added).
[62] Order at 4.
[63] *Geisen*, LBP-09-24, 70 N.R.C. at 803-804 (Farrar, J., additional views).
[64] Order at 3.
[65] *Id.*

following TVA procedures, to protect one of his direct reports from a co-worker's inappropriate conduct.

Indeed, there are no threats making it necessary to ban Mr. Shea from the industry while his case goes through the NRC's adjudicatory process. It is simply unfathomable to think that Mr. Shea is an imminent threat to public health and safety, a danger to life or property, or a risk to the common defense and security, such that his very career must be taken away immediately and his reputation permanently damaged without holding an adjudicatory hearing. Mr. Shea has worked in the nuclear industry for over thirty years, without receiving a single apparent, much less an actual, violation prior to 2020 or having been involved in any incident that impacted the public health and safety. There is no credible basis for thinking he is an immediate threat to the public health and safety because he made a personnel decision in an effort to keep his workplace harassment-free and sought advice from the appropriate persons at TVA in so doing.

Because the NRC Staff's Order is vague as to its reasoning behind the immediate ban,[66] it is not clear whether the NRC Staff is asserting willful behavior as a justification for an immediate ban. In any event, APA Section 9(b), to which the Commission has referred in the past as permitting immediate bans based on willfulness,[67] provides no independent justification for the Staff's action in Mr. Shea's case. APA Section 9(b) does not permit the NRC to issue immediately effective enforcement orders to *unlicensed* individuals such as Mr. Shea. APA Section 9(b) only allows the NRC to dispense with a hearing in cases of willfulness with respect to a "withdrawal,

[66] In addition to all of the other insufficiencies in the Order, the NRC Staff's vague claims in support of immediate effectiveness of the ban are sufficient justification to overturn the ban. "Adequate evidence is deemed to exist when facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety, or interest." 57 Fed. Reg. 20,194, 20,196 (May 12, 1992). The NRC Staff provides only conclusory assertions and no *evidence* in the Order to support the use of an immediate ban. The immediate effectiveness of the ban should be set aside on this ground alone.

[67] 80 Fed. Reg. 63409, 63411 (Oct. 20, 2015).

suspension, revocation or annulment" of a *license*.[68] In Mr. Shea's case, the NRC is not withdrawing suspending, revoking, or annulling a *license*. There simply is no basis on which the Commission can justify extending its APA Section 9(b) authority over licenses to immediately ban an *unlicensed individual* such as Mr. Shea from his career and profession, even with an allegation (though incorrect) of willful misconduct without any public health or safety justification.

B. An Immediate Ban Deprives Mr. Shea Of His Right To Procedural Due Process

The immediate effectiveness of the Order should be set aside also because the Order immediately bans Mr. Shea both without a credible public health and safety justification and without an evidentiary hearing, and thus improperly deprives Mr. Shea of his rights to procedural due process.[69] Pursuit of one's profession is a fundamental liberty interest. Deprivation of that interest triggers the guarantees of the Due Process Clause.[70] By formally barring Mr. Shea from work in NRC-licensed activities, the Order affects "a cognizable 'deprivation of liberty that triggers the procedural guarantees of the Due Process Clause.'"[71] Because due process applies here, a hearing or other adjudicatory proceeding is required before a fundamental interest—such as Mr. Shea's nuclear profession—can be immediately taken away.[72]

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[68] Administrative Procedure Act, 5 U.S.C. § 558(c) (1966) (regarding the withdrawal, suspension, revocation, or annulment of any license).

[69] *Geisen*, LBP-09-24, 70 N.R.C. at 797–98 (Farrar, J., additional views) ("The agency must have the means available to ban immediately any malefactors whose continued presence in the regulated workplace creates the potential for an imminent threat to the public health and safety. Here, however, punishment was imposed in advance of trial when there was no plausible reason stated, or existent, to do so.").

[70] *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474 (1959).

[71] *See Abdelfattah v. U.S. Dept. of Homeland Sec.*, 787 F.3d 524, 538 (D.C. Cir. 2015) (quoting *Trifax Corp. v. Dist. of Columbia*, 314 F.3d 641, 643–44 (D.C. Cir. 2003)) ("[W]hen the government formally debars an individual from certain work or implements broadly preclusive criteria that prevent pursuit of a chosen career, there is a cognizable 'deprivation of liberty that triggers the procedural guarantees of the Due Process Clause.'"); *see also Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (holding "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied).

[72] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Mr. Shea has a right to be heard prior to being deprived of his nuclear profession.[73] Aside from "extraordinary situations" where a governmental interest justifies postponing a hearing, a person "must be afforded opportunity for some kind of hearing" "*[b]efore* [the] person is deprived of a protected interest."[74] "When protected interests are implicated, the right to some kind of prior hearing is paramount."[75] The need for a hearing prior to depriving someone of a fundamental interest is shown by weighing (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[76] These considerations weigh heavily against an immediately effective ban with no prior opportunity for Mr. Shea to be heard in an adjudicatory setting.

First, as noted, there is no question that the private interest at stake—Mr. Shea's long career in the nuclear industry—is a significant fundamental liberty. Indeed, the Commission itself has acknowledged the impact that an immediately effective order could impose by "caus[ing] a person to suffer loss of employment while the order is being adjudicated."[77] Contrary to the

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[73] *See, e.g., Becker v. Illinois Real Estate Admin. and Disciplinary Bd.*, 884 F.2d 955, 958 (1989)

[74] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972) (emphasis added); *see also Becker*, 884 F.2d at 958 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)) ("Inherent in due process are the concepts of notice and opportunity to be heard prior to being deprived of a protected interest unless the state's interest in an immediate deprivation outweighs the individual's interest in a pre-deprivation hearing.").

[75] *Roth*, 408 U.S. at 569–70.

[76] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[77] 57 Fed. Reg. 20194, 20195 (May 12, 1992). Notably, in this rulemaking the Commission justified the use of immediately effective orders against individuals based on willfulness by stating that it was traditionally also coupled with a public, health, and safety justification. *Id.* ("[I]mmediately effective orders have been used in cases of willfulness where the staff needed to take immediate action in order to restore reasonable assurance that the public health, safety and interest would be protected. In these cases, the immediately effective order was issued based not solely on a willful violation but also on a concurrent conclusion that the public health, safety and interest also indicated the need for immediately effective action.")

Commission's claim that industry bans implicate "*only* property rights," which can be summarily disposed of without prior notice or hearing,[78] the Supreme Court has determined that such bans in fact implicate both a property interest *and* a liberty interest, as they entirely deprive the individual of their right to pursue their chosen profession.[79] To comply with the terms of the immediately effective order, TVA immediately removed Mr. Shea from his former role (Vice President, Nuclear Technology Innovation). He has since been reassigned to a non-nuclear Rotational Management Development position reporting to the TVA Chief Operating Officer, but is currently in a non-work status and has no interaction with TVA's NRC-licensed activities.[80]

Second, "the risk of an erroneous deprivation" is substantial here. The NRC Staff had many months to conduct interviews and compile its case. But the Staff has not allowed Mr. Shea to review all of that information and challenge it, much less engage in discovery. Although NRC Staff participated in the PEC[81] with Mr. Shea, Mr. Shea and his counsel were not provided any of the information underlying the Staff's case other than a short summary of the basis for the violation, the heavily-redacted OI Report 2-2019-015, Mr. Shea's own investigative interview

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[78] 57 Fed. Reg. 20194, 20195 (May 12, 1992) (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950)) (emphasis added).

[79] *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment.").

[80] Shea Affidavit at ¶ 1.

[81] Mr. Shea's PEC was, of course, wholly inadequate to protect his due process rights. The Staff conducting the hearing consisted mainly of the same individuals who investigated and prepared Mr. Shea's Apparent Violations. They cannot be expected to have been neutral decision-makers. And Mr. Shea's counsel had no right or opportunity to cross-examine his accusers, including the NRC Staff and the former corporate employee. Indeed, the NRC Staff itself made clear during Mr. Shea's PEC that the PEC was for fact-finding and that it was *not* intended to be, nor was it, an adjudicatory hearing. Shea PEC Tr. at 13-14.They were correct. Nor do the minimal documents provided to Mr. Shea (only a heavily redacted OI Reports with none of its exhibits (except Mr. Shea's interview transcript) and the short summary of the violation) comport with the minimum requirements of due process. *See Dey v. NRC*, 264 Fed. Appx. 889, 891 (Fed. Cir. 2008) (finding that an NRC employee's minimum due process rights were met when he lost his security clearance because he "was specifically informed of the relevant allegations in a memorandum … which set forth 'at length, and in detail, the derogatory information ... consist[ing] of fifty-five separate alleged incidents'" and where the memorandum "contained nineteen pages setting forth the exact dates and the conduct alleged in connection with each allegation").

transcript, and, after the Order issued, his June 25, 2020 PEC Transcript. Among the investigation materials *not* provided to Mr. Shea include approximately two dozen interview transcripts of other unidentified personnel (their names are redacted in the OI Report) on whose testimony OI relied. Obviously, Mr. Shea has not had the appropriate opportunity to confront all of the purported evidence on which the Staff has based its Order or the people who gathered that evidence.

Third, the Commission's interest is lacking and insufficient to justify a pre-hearing deprivation of Mr. Shea's interest in his career. Providing a hearing prior to the Order becoming effective does not increase the Commission's fiscal and administrative burden, because the Commission's regulations provide Mr. Shea a right to a hearing regardless. It is true that the Commission is broadly tasked with and has a valid interest in ensuring that licensed activities are carried out in a manner that protects public health and safety.[82] However, as stated above there is no credible basis for claiming there is such an imminent threat here, where the alleged wrongful act is carrying out a personnel action consistent with the advice of TVA's OGC and HR, as well as a review by the ERB.

For the foregoing reasons, the immediately effective ban violates Mr. Shea's due process rights and must be set aside on this ground alone.

C. Even Assuming The Commission Has The Authority To Immediately Ban Mr. Shea And Has Satisfied Due Process Requirements, It Has Applied An Incorrect Legal Standard And Failed To Meet Its Burden To Demonstrate That The Order Is Based On Adequate Evidence

Completely independent of the above arguments, the NRC Staff has also failed to meet its burden to demonstrate that the immediately effective Order is based on adequate evidence. Specifically, the Commission's regulations at 10 C.F.R. § 2.202(c)(2)(i) allow any "licensee or

[82] 42 U.S.C. § 2201(b).

other person to whom the Commission has issued an immediately effective order [to] . . . file a motion with the presiding officer to set aside the immediate effectiveness of the order on the ground that the order, including the need for immediate effectiveness, *is not based on adequate evidence but on mere suspicion, unfounded allegations, or error*" (emphasis added). The party challenging the order "has the obligation to initiate the proceeding . . . by filing the appropriate motion under 10 CFR § 2.202(c)(2)(i)."[83] This motion "must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on."[84]

The presiding officer shall uphold the immediate effectiveness of an order only "if it finds that there is adequate evidence to support immediate effectiveness,"[85] and the burden of persuasion to present adequate evidence lies with the Staff.[86] "[T]he NRC staff must show that (1) adequate evidence supports the grounds for the order and (2) immediate effectiveness is warranted."[87] The Commission elaborated on the Staff's burden in a 2015 rulemaking, noting:

> [T]he staff must satisfy a two-part test: It must demonstrate that adequate evidence—i.e., reliable, probative, and substantial (but not preponderant) evidence—supports a conclusion that (1) the licensee violated a Commission requirement (10 CFR 2.202(a)(1)), *and* (2) the violation was "willful," or the violation poses a risk to "the public health, safety, or interest" that requires immediate action (*id.* § 2.202(a)(5)).[88]

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[83] 80 Fed. Reg. 63409, 63412 n.35 (2015).

[84] 10 C.F.R. § 2.202(c)(2)(i).

[85] 10 C.F.R. § 2.202(c)(2)(viii).

[86] 80 Fed. Reg. 63409, 63412 (2015) ("This final rule clarifies that the burden of persuasion is the obligation of the NRC staff, not the party subject to the order.").

[87] 80 Fed. Reg. 63409, 63412 (2015); *see also id.* at n.36 (quoting 5 U.S.C. § 556(d)) ("The Administrative Procedure Act provides '[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'"); 10 C.F.R. § 2.202(c)(vi) ("The NRC staff bears the burden of persuading the presiding officer that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted.").

[88] *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-02, 61 N.R.C. 53, 61 (2005) (emphasis in original); *see also* 80 Fed. Reg. 63409, 63411 (citing *Safety Light Corp.* for "what the NRC staff must prove.").

Based on the bare assertions in the Order, this is a burden that the NRC Staff has not and cannot meet. Indeed, given the paucity of supporting evidence, and the Staff's reliance on a "nexus" argument as adequate evidence for making the Order immediately effective, the Staff did not even attempt to meet the Commission's well-established deliberate misconduct standard.

1. The Order Uses An Incorrect Evidentiary Standard And Thus Is Not Based on Adequate Evidence

In the Order, the Staff claims that "Mr. Joseph Shea played a significant role in the decisionmaking process to place the former employee on administrative leave and terminate the former employee."[89] The Staff also claims that it found "a *nexus* between the former corporate employee's protected activity of raising concerns about a chilled work environment and the termination of the former employee."[90] However, this determination, in addition to being based on OI Reports replete with factual inaccuracies (as will be discussed in more detail later), fails to address (let alone satisfy) the evidentiary standard under NRC precedent for a finding of deliberate misconduct under 10 C.F.R. § 50.5 or retaliation under 10 C.F.R. § 50.7.

A mere supposed "nexus" along with a summary dismissal of Mr. Shea's non-prohibited considerations is insufficient to meet the standard for deliberate misconduct. Commission precedent makes clear that a finding of deliberate misconduct requires an *intent* to commit wrongdoing. Just because two things happened—the former corporate employee allegedly engaged in protected activity at some point and she was terminated—does not mean they are connected. Much less does the mere occurrence of those two events prove intent.

Specifically, the applicable Commission rule states that, "deliberate misconduct by a person means an intentional act or omission that the person *knows* . . . Would cause a licensee . . .

[89] Order at 2.

[90] *Id.* (emphasis added).

to be in violation of any" Commission rule, regulation, or order.[91] When promulgating 10 C.F.R. § 50.5 in 1991, the Commission explicitly stated that the deliberate misconduct rule applies only to "individuals who deliberately set in motion events that would cause a violation."[92] Stated differently, the Commission explained that "[a]n individual acting in this manner has the requisite intent to act in a wrongful manner."[93] Indeed, the Commission stated that the range of actions that would subject an individual to action under the deliberate misconduct rule "does not differ significantly from the range of actions that might subject the individual to criminal prosecution."[94]

There simply is no equating the high standard for finding deliberate misconduct under 10 C.F.R. § 50.5—akin to criminal intent—and the Staff's finding here of a mere supposed "nexus" between the adverse action against the former corporate employee and her purported protected activity (per the NRC Staff, alleged "chilled work environment concerns"). Moreover, the Order makes no claim that Mr. Shea (or anyone else) knew or even considered the former corporate employee's statements to be chilled work environment concerns. This is no surprise, because the record is devoid of any evidence whatsoever suggesting Mr. Shea or any other TVA personnel—even the former corporate employee never made the claim—believed them to be so. In order to find that an individual has engaged in deliberate misconduct, the individual's intent is paramount. The Staff's unfounded belief that the former corporate employee raised "chilled work environment" concerns says nothing about whether Mr. Shea thought the employee was engaging in protected activity at the time when he confronted and dispositioned her disrespectful statements, including those that he knew to be false.

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[91] 10 C.F.R. § 50.5(c) (emphasis added).

[92] 56 Fed. Reg. at 40,679.

[93] *Id.*

[94] *Id*. at 40,675.

Nor is there any evidence in the record showing retaliatory animus by Mr. Shea or anyone else against the former corporate employee for any other ostensibly protected activity. Nor could the Staff support such a finding, given that Mr. Shea consulted with TVA OGC and HR every step of the way, and his action in this case was consistent with an independent investigation, an OGC recommendation, and the ERB review. Indeed, the Staff's finding of deliberate misconduct here is inconsistent with a very recent case where the Staff found that a manager should have consulted with internal resources on personnel actions—the very steps that Mr. Shea took here.[95] Having failed to satisfy the Commission's standards under 10 C.F.R. § 50.5, the Staff cannot claim that the Order is based on "adequate evidence" as required under 10 C.F.R. § 2.202(c)(2)(i). Accordingly, the immediate ban must be lifted.

Furthermore, apart from failing to demonstrate deliberate misconduct by Mr. Shea or anyone else, the Staff's claim that a mere "nexus" supposedly exists between protected activity and an adverse action is also not enough to demonstrate a violation of 10 C.F.R. § 50.7. In a 2004 case, the Commission deemed such a nexus argument as bearing on the first prong of the two-part Energy Reorganization Act, Section 211 evidentiary framework.[96] But satisfying the first prong does not end the analysis. Indeed, the Commission has specifically determined that meeting only that first prong is not enough under the applicable whistleblower protection regulation, 10 C.F.R. § 50.7. As the Commission stated,

> Our own whistleblower protection regulation, section 50.7, while not setting out an evidentiary framework of its own, makes clear that engaging in protected activities does not immunize employees "from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations." To give life to

[95] *See* Confirmatory Order Effective Upon Issuance for T. Saunders (ADAMS Accession No. ML19269C005) (Oct. 2019) ("Specifically, Mr. Saunders will present at: . . . . One corporate and one site level leadership meeting at Southern Nuclear on Employee Protection, based on Mr. Saunders' personal case study, and will honestly answer questions about what *he failed to do (follow STAR, seek advice from management, consult with HR, and engage with the consolidated concerns department)*.").

[96] *Tennessee Valley Authority*, CLI-04-24, 60 N.R.C. 160, 194-95 (2004).

> this provision, *we must give employers defending whistleblower discrimination charges an opportunity to prove that "legitimate reasons" or "non-prohibited considerations" justified their actions*.
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> * * * *
>
> Congress was careful in section 211, as we are in today's decision, to preserve the flexibility nuclear employers require to take appropriate action against alleged whistleblowers who also are ineffective on the job or unneeded in the workplace. . . . This tough-minded approach to employer claims of legitimate, nondiscriminatory motives effectuates the policy of Congress (and the NRC) both to encourage nuclear whistleblowers to come forward with safety-related information and not to interfere unduly with employers' prerogative to manage their workers.[97]

The Order's reliance on a supposed "nexus"[98] between protected activity and an adverse action is insufficient to satisfy Congress' carefully crafted standard and the Commission's own detailed rules.

This error is further compounded by the NRC Staff's implicit summary rejection[99] of Mr. Shea's obvious reliance on "non-prohibited considerations" as the basis for taking action against the former corporate employee. Section 50.7(d) makes it clear that engaging in protected activity does not create a shield around the employee against adverse employment actions for other reasons. Indeed, employers are entitled to take action against employees for non-prohibited reasons, and Mr. Shea discussed those non-prohibited considerations at length in his PEC. Again, it is *Mr. Shea's* intent that matters. He knew that under Section 50.7(d) adverse action can be taken for legitimate, non-prohibited reasons.[100]

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[97] *Tennessee Valley Authority*, CLI-04-24, 60 N.R.C. at 192-93.

[98] In order to have a "nexus" there must be a connection between the events. Black's Law Dictionary 2d ("A point of causal intersection, link, relation, connection."). Merely alleging that two events happened – the former corporate employee engaged in some protected activity and she was terminated – is not evidence that the two are connected. As Mr. Shea showed during his PEC, the actual evidence (not assumptions or speculation) shows that she was terminated for other, legitimate reasons.

[99] Order at 2.

[100] 10 C.F.R. § 50.7(d).

Here, Mr. Shea was concerned about the former corporate employee's behaviors. His concerns were validated when he received an independent investigation and recommendation that determined the former corporate employee was making disrespectful and harassing statements in violation of TVA policies and federal law. Mr. Shea agreed with that assessment. And he presented the adverse action to the TVA ERB to ensure the action would be taken for non-prohibited considerations. Mr. Shea's actions are hardly the behaviors of someone deliberately intending to retaliate (or to cause TVA to retaliate).

The NRC Staff's response to Mr. Shea is to assert, with no factual basis whatsoever, that the "evidence that the former employee was 'disrespectful' to the former Director of CNL" were protected activities, because the former corporate employee was "1) raising concerns about a chilled work environment in a TVA OGC interview; and 2) raising concerns about reprisal from the former Director of CNL directly to Mr. Joseph Shea."[101] These assertions are not accurate.

Although the former corporate employee made numerous negative and unsubstantiated statements about Ms. Henderson during an OGC interview, the former corporate employee did not claim that there was a chilled work environment, or that Ms. Henderson was causing one. On the contrary, as explained in the OGC investigation report, OGC "interviewed the entire staff of Ms. Henderson," including the former corporate employee, and determined that "that they do not fear raising issues or concerns and, in fact, that it is their job to do so and also they are encouraged to do so."[102] To the extent the Order claims that Mr. Shea read the OGC investigation report and learned of the former corporate employee's purported chilled work environment concerns,[103] that

[101] Order at 2-3.

[102] Shea PEC Exhibit 23 at 8 (TVA OGC Investigation Report).

[103] Order at 2.

also simply is not true. Such chilled work environment concerns are not referenced in the OGC report.[104]

Additionally, the former corporate employee again made numerous negative and unsubstantiated comments in her emails to Mr. Shea, as described in detail above, but she never alleged the existence of a chilled work environment.[105] In fact, even when the former corporate employee filed a complaint with the Department of Labor, she never claimed to have raised the existence of a chilled work environment in Ms. Henderson's organization as the reason she was purportedly being retaliated against.[106] She alleged entirely different reasons for the purported retaliation. It is the NRC Staff who in hindsight has manufactured its own chilled work environment theory based on the former corporate employee's disrespectful statements.

Moreover, the statements the former corporate employee made to Mr. Shea that the Staff has deemed "chilled work environment" concerns and thus protected activity are nothing of the sort. Controlling precedent from the United States Court of Appeals for the Sixth Circuit unequivocally states that "[t]o constitute a protected safety report, an employee's acts must implicate safety definitively and specifically."[107] Nor is "every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern" protected

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[104] What the OGC investigation report *actually states* is that the former corporate employee's statements in her May 7 email to Mr. Shea had "no details"; did "not warrant further follow up"; and rose "to the level of disrespectful conduct." Shea PEC Exhibit 23 (TVA OGC Investigation Report) 19-20, n. 69.

[105] *See* supra, Section II.A.

[106] The former corporate employee filed a Department of Labor complaint on December 18, 2018, with amended complaints made on January 14, 2019 and May 2, 2019. In her December 18, 2018 letter, the former corporate employee alleged her protected activities included "(1) the failure of Watts Bar to comply with the NRC's fatigue rule requirements, 10 C.F.R. Part 26; (2) the failure of Sequoyah to comply with the NRC's "Fukushima" requirements; (3) TVA's inadequate response to the NRC's March 23, 2016 [Watt's Bar] Chilled Work Environment Letter; (4) the failure to perform TS Surveillances during extended outages at Watts Bar; and (5) the failure of Browns Ferry to address the valve failures." TVA and the former corporate employee settled her complaint in January 2020.

[107] *Amer. Nuclear Res. Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

activity.[108] The Staff's claim that the former corporate employee raised concerns to Mr. Shea about "reprisal,"[109] had nothing to do with nuclear safety. The former corporate employee's statements to Mr. Shea concerned the processing of expense reimbursement vouchers. The former corporate employee's claim, for example, that she would float her rent out of concern that Ms. Henderson might scrutinize a rent reimbursement request is not only factually unfounded, but completely divorced from anything resembling a nuclear safety or chilled work environment concern or any other protected activity.

Whatever the Staff's basis for concluding that the former corporate employee's disrespectful statements amounted to protected chilled work environment concerns, it is far from obvious (to say the least), and the Order provides no further credible explanation. In these circumstances, Mr. Shea should not have his career in the nuclear profession immediately stripped away, without a hearing, on the basis of such a thin rationale that flies in the face of explicit and controlling legal precedent.

2. Mr. Shea Unequivocally Denies The Allegations In The Order

As described in his sworn Affidavit, and his answer and request for hearing below, Mr. Shea denies the allegations in the Order.[110] Mr. Shea's sworn statement that he did not knowingly take action intended to retaliate against the former corporate employee is strong evidence in favor of lifting the ban's immediate effectiveness. In addition, as Mr. Shea recounts in his Affidavit, training modules he has taken from the Society of Human Resources Management confirm that he acted appropriately when he sought expert assistance from TVA OGC and Human Resources on

[108] *Amer. Nuclear Res. Inc.*, 134 F.3d at 1295.

[109] Order at 2-3.

[110] Shea Affidavit at ¶¶ 5-7.

how to address the former corporate employee's disrespectful conduct.[111] Mr. Shea should not be immediately banned from his nuclear profession when the actual evidence shows his actions were consistent with well-understood human resources practices.

3. The Immediate Ban Must Be Set Aside Because It Is Based On Mere Suspicion, Unfounded Allegations And Legal And Factual Errors

The Order claims to rely on "evidence developed during an [investigation completed by NRC OI related to TVA (OI Report No. 2-2019-015)] and subsequent staff analysis."[112] However, the OI Report underlying the Order contains numerous flaws, including improper assumptions amounting to mere suspicion, unfounded allegations, and numerous clear legal and factual errors.[113] Because the Order contains little detail, it is unclear to what aspects of the OI Report form the basis for the Order's conclusions. Accordingly, the discussion below describes the OI Report's numerous flaws, demonstrating that the NRC Staff lacks sufficient evidence to support an immediate ban as required under 10 C.F.R. § 2.202(c)(2)(i).

a. The OI Report Contains No More Than Mere Suspicion

Rather than rely on direct evidence, the Staff OI Report supporting the Order heavily relied on a purported "reasonable assumption." Assumptions—reasonable or otherwise—are not evidence. Rather, they are the complete *absence* of evidence, and cannot justify immediately taking away Mr. Shea's profession without an adjudicatory hearing.

Pages 42-49 of OI Report 2-2019-015 provides the "Agent's Analysis" of the investigation. This includes a section entitled "Was the Protected Activity a Contributing Factor to the Adverse

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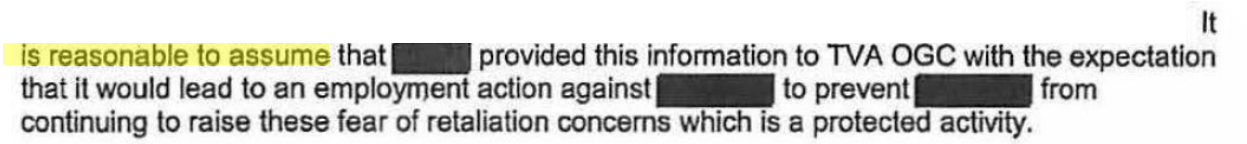
[111] *Id.* at ¶ 9.

[112] Order at 2.

[113] The presence of numerous mistakes in the OI Report calls into question the investigator's credibility and therefore whether the Report is "adequate evidence" within the meaning of 10 C.F.R. § 2.202(c)(2)(i). *See Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC at 225.

Action?" beginning on page 44 of the Report.[114] Rather than demonstrate by direct evidence that Mr. Shea engaged in deliberate misconduct, or that any of the former corporate employee's alleged protected activities contributed to her termination from employment, OI Report 2-2019-015 merely states, on page 49, the investigation's "assumption" that this is what happened:


It is reasonable to assume that [redacted] provided this information to TVA OGC with the expectation that it would lead to an employment action against [redacted] to prevent [redacted] from continuing to raise these fear of retaliation concerns which is a protected activity.

The unredacted version of this statement appears to say:

> It is reasonable to assume that [Mr. Shea] provided this information to TVA OGC with the expectation that it would lead to an employment action against [the former corporate employee] to prevent [the former corporate employee] from continuing to raise these fear of retaliation concerns . . ."

The phrase "this information" appears to be referring to the unsolicited emails the former corporate employee sent to Mr. Shea regarding her travel voucher reimbursements, in which she made knowingly false and disrespectful accusations against Ms. Henderson. The actual evidence demonstrates that the investigation's assumption is not reasonable at all. For example, Mr. Shea forwarded to HR and OGC the former corporate employee's May 7, 2018 email and sought their advice on how to handle it. Specifically, Mr. Shea stated, "I propose that this be provided to [the OGC Investigator] within the scope of his current work. Please advise if you agree or see a different way to act on this."[115] Thus, the actual contemporaneous evidence shows that Mr. Shea asked appropriate internal resources for assistance regarding how to handle a personnel matter, and was open to different means to handle it. This is not evidence of an intent to retaliate. Rather,

[114] OI Report 2-2019-015 at 44.

[115] Shea PEC Exhibit 12 (May 7, 2018 email from Mr. Shea to a TVA OGC attorney and Human Resources Director, forwarding the former corporate employee's May 7 email). Provided at **Attachment 1** is a redacted copy of Shea PEC Exhibit 12 (highlighting added).

it is evidence of intent to handle a difficult situation properly in accordance with applicable policies and procedures.

Further, a few weeks later when discussing the former corporate employee's May 7 statements with OGC, Mr. Shea explicitly recommended that the former corporate employee be interviewed again to "pull[] the string" on each of her assertions. He requested support from OGC "in getting specific facts, analyses and conclusions that are independent."[116] He asked for "well documented analyses and conclusions whatever they might be."[117] Again, these contemporaneous statements by Mr. Shea bely any purported assumptions made by the Staff that Mr. Shea expected an adverse employment action against the former corporate employee as a direct consequence of his forwarding her statements to Human Resources and OGC. Rather, these statements are clear and convincing evidence that Mr. Shea had no preconceived notions as to what (if any) action should result. Accordingly, contrary to the Staff's assumptions, the actual evidence shows that Mr. Shea repeatedly sought assistance from OGC and HR throughout these events.

For the foregoing reasons, the OI Report underlying the Order is based on mere suspicion, not evidence. There is no justification for immediately banning an individual for five years and giving him a career death sentence based on an OI investigator's so-called "reasonable assumption" that ignores direct evidence, and without even first conducting an adjudicatory hearing. Consistent with 10 C.F.R. § 2.202(c)(2), the Order's immediate effectiveness should be set aside.

b. The OI Report Is Based On Unfounded Allegations

[116] Shea PEC Exhibit 17 at 3 (May 31, 2018 email from Mr. Shea to Human Resources, copying TVA OGC). Provided at **Attachment 4** is a redacted copy of Shea PEC Exhibit 17 (highlighting added).

[117] *Id.* As documented in Shea PEC Exhibit 17, OGC "strongly disagree[d]" with Mr. Shea's recommendation for a further interview of the former corporate employee because it "would do more harm than good, as it allows the harassing behavior that was identified in [the OGC investigation] report to be perpetuated." Provided at **Attachment 4** is a redacted copy of Shea PEC Exhibit 17 (highlighting added).

In addition to relying on mere suspicion, the OI Report is improperly based on unfounded allegations.[118] As an initial matter, the OI Report contains extensive redactions, making it difficult to ascertain the source of the statements potentially relied upon by the NRC Staff. Compounding this issue, the NRC Staff fails to even establish which statements it relies upon for the Order. The unspecified nature of the evidence and the extensive redactions in the OI report make it nearly impossible for Mr. Shea to challenge the specific evidence underlying the Order (which is unknown), or to challenge the witness testimony or any hearsay upon which the Order is based.

For example, to the extent the Staff relied on testimony from the former corporate employee, such reliance is unsound. The direct evidence presented at Mr. Shea's PEC and as set forth above demonstrates that the former corporate employee was comfortable spreading derogatory, clearly speculative, and unsubstantiated claims about Ms. Henderson.[119] The former corporate employee spread similar derogatory and false claims in the parallel Department of Labor proceeding while she was on paid leave and after her termination.

For example, on December 18, 2018, the former corporate employee wrote the Department of Labor that, "Ms. Henderson had a remarkable fast promotion trajectory (upon information and belief, her father is a good friend of Chip Pardee, who was then TVA's Chief Operating Officer)."[120] Only weeks later, the former corporate employee perpetuated this myth by falsely

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[118] Of note, there are numerous errors in the OI Report that do not appear to bear on the NRC findings in the Order. While we have addressed some of those errors, we have also attempted to keep this Motion focused on matters relevant to the Order at hand. If the NRC's justifications evolve to encompass additional information from the OI report, we note that, under Commission precedent, the notice of apparent violation must be reissued upon the development of additional evidence and Mr. Shea must be given an additional chance to respond. *Tennessee Valley Authority*, CLI-04-24, 60 N.R.C. at 204. Because the NRC's Staff's Order is so bare of support, we would ask the Commission to consider any new justification as additional evidence warranting either a revised apparent violation or the opportunity to reply to that new justification to provide Mr. Shea with sufficient notice to respond to the evidence against him. To the extent that it becomes clear that the NRC has relied on the testimony of demonstrably unreliable witnesses in issuing of the Order, Mr. Shea reserves the right to challenge that testimony.

[119] *See* discussion *supra* at Section II.A and Shea PEC Tr. at 58.

[120] [Former Corporate Employee] Complaint Letter to Kurt Petermeyer, Director, Region IV, Occupational Safety and Health Administration at 3 (Dec. 18, 2018).

stating to the Department of Labor on January 31, 2019, that, "Henderson's father, Roy West, was a former VP for TVA and made sure his daughter got the promotion."[121] Ms. Henderson's father is not Roy West, does not know Chip Pardee, and is not even in the nuclear industry. As Ms. Henderson stated during her OI Interview, her father installed doors and windows in Philadelphia, before becoming an inner-city school teacher.[122] The former corporate employee's willingness to continue to spread falsehoods while on paid leave and following her separation from the company undermines her credibility, her "general trustworthiness" and "specific motivation to fabricate information regarding [the company]."[123] As such, the NRC cannot rely on her statements "as sufficiently reliable to provide 'adequate evidence' for [] allegations absent sufficient independent corroborating information."[124]

Other examples of unfounded allegations in OI Report 2-2019-015 abound. One is the assertion that Mr. Shea stated that the former corporate employee's alleged "protected activities" were a central and required function of her job and were not protected activity.[125] OI Report 2-2019-015 provides no citation for that reference. Mr. Shea's OI interview transcript contains no such statement. As Mr. Shea stated during his PEC, the former corporate employee and almost every other person employed by the nuclear regulatory team engages in protected activity every day as part of their job.[126] Because protected activities were a central and required job function for the former corporate employee, it would be an underlying assumption in the adverse action

[121] Memorandum of Interview of [Former Corporate Employee] with Department of Labor Investigator on January 31, 2019 at 1.

[122] OI Transcript of Proceeding (Henderson), NRC-0406, (June 12, 2019) (Docket No. 2-2019-015) Tr. 18:11-14.

[123] *Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC at 219.

[124] *Id.* at 220.

[125] OI Report 2-2019-015 at 43.

[126] Shea PEC Tr. at 89.

review process conducted by the ERB that she had participated in protected activities.[127] Nonetheless, the ERB found that the adverse action against the former corporate employee was not based on retaliation for protected activities.[128]

Another example of an unfounded allegation in OI Report 2-2019-015 is the Staff's assertion that it was "especially concerning" that Mr. Shea asked the former corporate employee to provide support for her claims against Ms. Henderson because Mr. Shea had knowledge of prior Employee Concern Program ("ECP") investigation findings involving Ms. Henderson.[129] However, there is nothing "especially concerning" about this. First, it was entirely appropriate for Mr. Shea—the former corporate employee's second-level supervisor—to ask her essentially, "what do you mean?" in response to her allegations against Ms. Henderson. Second, the Staff has mischaracterized the ECP reports' findings. Two of the prior ECP investigations involving Ms. Henderson were not substantiated.[130] One investigation, NEC-17-00683, was substantiated in part, but explicitly found no retaliatory intent by Ms. Henderson.[131] Thus, it was not "especially concerning" that Mr. Shea asked the former corporate employee to provide some basis for her claims against Ms. Henderson. Indeed, it would have been especially concerning if Mr. Shea had taken action against Ms. Henderson based on the former corporate employee's vague claims without obtaining from her relevant details and additional facts.

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[127] *Id.* at 89-90.

[128] *See* Shea PEC Exhibit 26.

[129] OI Report 2-2019-015 at 45.

[130] OI Report 2-2019-015 Exhibit 7 includes copies of the reports for ECP Investigation No. NEC-16-00638 and ECP Investigation No. NEC-17-00410.

[131] OI Report 2-2019-015 Exhibit 7 includes a copy of the ECP Investigation No. NEC-17-00683 report.

For the foregoing reasons, the Order is based on unfounded allegations, not evidence. Thus, pursuant to Commission regulations at 10 C.F.R. § 2.202(c)(2), the Order's immediate effectiveness should be set aside.

c. The OI Report Is Based On Numerous Legal And Factual Errors

The OI Report upon which the Order relies also contains numerous legal and factual errors, which Mr. Shea and his counsel highlighted during his PEC.

First, the Staff claimed that the statements the former corporate employee made were accurate and truthful to the best of her knowledge because they were "rooted in truth, in that the activities occurred but were *arguably* not based on the reasons that [the former corporate employee] believed."[132] This assertion is on its face preposterous. If the activities were not based on the reasons the former corporate employee stated, then her statements were not truthful.

To drive the point home: the Staff has immediately stripped away Mr. Shea's ability to pursue his profession because Mr. Shea took action to address the former corporate employee's disrespectful, specious, and false statements, when even the Staff admits that those statements were "arguably" unbound from any factual basis. Mr. Shea should not be immediately deprived of his profession pending an adjudication of circumstances that the Staff concedes are "arguable" at best.

More importantly, certain of the former corporate employee's assertions were obviously not "rooted in truth." Specifically, the Staff did not take into account the former corporate employee's May 7, 2018 e-mail that Ms. Henderson was allegedly responsible for certain, purportedly punitive actions and, "probably a lot more actions that [the former corporate employee

[132] OI Report 2-2019-015 at 45 (emphasis added).

was] not aware of."[133] This is a broad, sweeping indictment with no specificity and therefore cannot be "accurate" or rooted in "truthfulness." The words themselves admit to no actual knowledge of the truth. Stating that an individual has engaged in "probably a lot more actions that [the alleger was] not aware of" cannot possibly be considered a protected activity.

Second, the OI Report mischaracterized a July 2, 2018 phone call Mr. Shea had with the former corporate employee and his Executive Management Assistant.

The former corporate employee stated in the Report that she did not provide any further details on the phone call due to the presence of the Executive Management Assistant, and because she thought Mr. Shea was "trying to catch [her] saying something negative about a manager to a subordinate which is against TVA policy."[134] There is absolutely no evidence that Mr. Shea was trying to "catch" the former corporate employee by asking her to amplify a previous remark. He was trying to further understand the former corporate employee's claims against Ms. Henderson. Even if there was some inadvertent confusion caused on Mr. Shea's part by including his Executive Management Assistant on the phone call, it should be noted that, twice before, Mr. Shea had given the former corporate employee the opportunity to elaborate on her allegations against Ms. Henderson to him, and him alone. Mr. Shea gave her that opportunity in his June 9, 2018 response to the former corporate employee's e-mail of the same day,[135] and through text messages where Mr. Shea asked the former corporate employee to elaborate on why she believed she was getting

[133] Shea PEC Exhibit 12 (May 7, 2018 email from Mr. Shea to a TVA OGC attorney and Human Resources Director, forwarding the former corporate employee's May 7 email). Provided at **Attachment 1** is a redacted copy of Shea PEC Exhibit 12 (highlighting added).

[134] OI Report 2-2019-015 at 10.

[135] Shea PEC Exhibit 18. Provided at **Attachment 2** is a redacted copy of Shea PEC Exhibit 18.

different directions from management regarding her travel vouchers.[136] She provided no meaningful response to either of those offers.

Third, the OI Report 2-2019-015 erroneously asserts that multiple TVA policies were violated during the former corporate employee's adverse employment action, apparently in an effort to infer retaliatory intent on behalf of Mr. Shea and TVA.

More specifically, according to the OI Report the former corporate employee's termination "seems contrary to TVA's procedure on Employee Discipline related to 'progressive discipline.'"[137] The Order doubles down on this error when stating that Mr. Shea "admitted that he did not counsel the former employee about the asserted disrespectful behavior,"[138] without providing any explanation of why such counseling was required or why the lack thereof matters. These baseless assertions are nothing more than transparent attempts to infer that the lack of counseling is evidence of wrongdoing.

Contrary to the OI Report's statements, TVA policies do not require the use of progressive discipline in every case. Thus, the absence of progressive discipline is not evidence of wrongdoing or retaliation. TVA's Employee Discipline Policy provides that individual circumstances play a role, and the circumstances may warrant termination without progressive discipline, as was determined here.[139] The OI Report even acknowledges this, when it says the termination only "seems" contrary to the procedure.

Indeed, Mr. Shea's action here is even consistent with the *NRC's* own policies regarding progressive discipline. The Office of Investigation and Office of Enforcement might be shocked

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[136] Shea PEC Exhibit 21 (text messages from late June 2018-early July 2018, between the former corporate employee and Mr. Shea, discussing the status of her travel voucher submittals).

[137] OI Report 2-2019-015 at 47.

[138] Order at 3.

[139] TVA-SPP-11.316, Employee Discipline, Revision 6 (Sept. 11, 2018).

to learn that the Commission's own internal discipline policy does not require progressive discipline. Rather, it provides that "a supervisor *may* consider actions that are progressive in nature," and that "discipline need not follow any specific sequence."[140] Mr. Shea acted in a manner consistent with TVA (and NRC) procedure. Accordingly, whether Mr. Shea "counseled" the former corporate employee is irrelevant and cannot be relied upon as a basis for making the Order immediately effective.

Furthermore, Mr. Shea explained at his PEC why the former corporate employee was terminated. Specifically, he considered the former corporate employee's job level and the seriousness of the offense as the most important factors.[141] Yet, the Order nowhere addresses Mr. Shea's legitimate, credible basis for termination.

The OI Report also asserts that "TVA may have violated their own policy by administering adverse employment action (no-fault separation agreement and paid administrative leave) to [the former corporate employee] before final approval of ERB documents with signatures."[142] But no such violation occurred. TVA provided the former corporate employee with a copy of the no-fault separation agreement after the ERB Chair signed the ERB package, as required by the ERB procedure. As OI Report 2-2019-015 itself notes, "the initial voluntary separation agreement was dated October 25, 2018,"[143] which was the date the former corporate employee was provided with the no-fault separation agreement. This is also confirmed by the former corporate employee's own

[140] U.S. Nuclear Regulatory Commission Directive Handbook (DH) 10.99, Discipline and Adverse Actions, DT-20-08, Vol. 10, Personnel Management, Part 4: Labor Relations, Discipline, Grievances, Appeals, RIFs (Jul. 7, 2020) at pp. 4, *available at* https://www.nrc.gov/docs/ML2016/ML20169A245.pdf (emphasis added).

[141] Shea PEC Tr. at 156.

[142] OI Report 2-2019-015 at 46.

[143] OI Report 2-2019-015 at 20.

December 18, 2018 Department of Labor Complaint[144] and the December 18, 2018 ERB Update,[145] which both state that she received her no-fault separation agreement on October 25.[146] This occurred in accordance with TVA's ERB procedure, after the ERB Chair signed the ERB Record of Action on *October 19, 2018*.[147] The OI Report once again conveniently ignored critical exculpatory evidence, which was also presented at Mr. Shea's PEC.

In addition, the NRC Staff inferred during Mr. Shea's PEC that he violated TVA procedure by failing to refer to the TVA Office of Inspector General ("OIG") the investigation's findings that the former corporate employee violated federal law.[148] Page 46 of the OI Report 2-2019-015 similarly states:

> It should be noted that TVA managers involved in this matter failed to notify TVA's OIG of this violation of federal law contrary to TVA procedures

The OI Report is incorrect again. TVA's OIG Procedure does not mandate the referral of all personnel matters to the OIG. As noted in Section 1.0 of TVA's OIG Procedure, "[t]he Office of the Inspector General (OIG) . . . helps assure that TVA programs are effective, efficient and free from waste, fraud and abuse."[149] As the TVA OIG reported in its most recent semiannual report to Congress, the role of OIG's "[i]nvestigations team [is to] proactively and reactively uncover[] activity related to fraud, waste, and abuse in TVA programs and operations."[150] As Mr. Shea

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[144] [Former Corporate Employee] Complaint Letter to Kurt Petermeyer, Director, Region IV, Occupational Safety and Health Administration at 3 (Dec. 18, 2018).

[145] Shea PEC Exhibit 32 (December 18, 2018 ERB Update).

[146] The former corporate employee claimed during Mr. Shea's June 25, 2020 PEC that she was provided a copy of her no-fault separation agreement on October 15, 2018. Shea PEC Tr. at 103-04. But her recollection is at odds with her own Department of Labor complaint, which was submitted less than two months after the October 25 meeting.

[147] Shea PEC Exhibit 26 (a copy of the complete ERB package). Provided at **Attachment 3** is a redacted excerpt from Shea PEC Exhibit 26.

[148] Shea PEC Tr. at 144-45.

[149] TVA-SPP-11.8.5, Cooperation with the Office of the Inspector General, Revision 3 (Aug. 7, 2015).

[150] *Semiannual Report, Office of the Inspector General Tennessee Valley Authority* (March 31, 2020) at 19, https://oig.tva.gov/reports/semi68.pdf.

explained in his PEC and as TVA stated in a follow up letter it provided to the NRC,[151] the violations of federal law identified in the OGC investigation were not matters of fraud, waste, or abuse. Nor were they otherwise related to the mismanagement of federal funds. Therefore, they were not matters requiring referral to the OIG. Instead, TVA handled the matters through its own internal investigation, as it does for the vast majority of routine personnel matters, which was entirely consistent with TVA practice and procedure.

Pursuant to 10 C.F.R. § 2.202(c)(2), the Commission cannot justify upholding an immediate five-year ban against Mr. Shea—ruining his professional career without a hearing—based on an OI Report that is replete with such obvious errors. Indeed, these errors call the entire Report's credibility into question and demonstrate that the Report cannot be used as a basis for "adequate evidence."

IV. Conclusion Regarding Motion To Set Aside

As discussed herein, the former corporate employee's termination from TVA was based solely on her inappropriate statements and conduct, and not protected activity. This was confirmed by Mr. Shea and the TVA Executive Review Board. The Commission has no authority to take the drastic action of immediately banning Mr. Shea from the industry in the circumstances set forth above, without satisfying Mr. Shea's due process right to an adjudicatory hearing. The NRC Staff has failed to demonstrate an immediate risk to public health and safety, nor is there any actual deliberate misconduct sufficient to justify an immediate ban.

[151] Letter from TVA Counsel to Director, NRC Office of Enforcement, Providing Supplemental Information for Docket Nos. EA-20-006; EA-20-007; IA-20-008; IA-20-009; IA-20-022 (July 6, 2020).

Moreover, the Staff has not met its burden to show that "adequate evidence" supports the Order's immediate effectiveness, even if there were a public health and safety concern. Rather, the Order is improperly based on mere suspicion, unfounded allegations, and many obvious errors. Accordingly, pursuant to 10 C.F.R. § 2.202(c)(2), the immediately effective ban must be set aside.

V. Answer And Request For Hearing

In accordance with the facts laid out above, and the NRC's failure to establish a violation of 10 C.F.R. § 50.5 or 10 C.F.R. § 50.7, in this Section V (as required by the Order) Mr. Joseph Shea hereby denies the allegations set forth in the Order, answers that Order, and requests a hearing.

The NRC issued the Order purportedly because the NRC determined that Mr. Shea engaged in deliberate misconduct causing TVA to violate the employee protection requirements of 10 C.F.R. § 50.7 when the former corporate employee was terminated. The NRC issued the Order notwithstanding the fact that Mr. Shea demonstrated through overwhelming evidence at his PEC held on June 25, 2020, that he did not engage in deliberate misconduct, nor did he otherwise take any retaliatory act against the former corporate employee. Absent deliberate misconduct, there is no basis for the NRC to sustain the Order. Mr. Shea, therefore, does not consent to the Order and requests an adjudicatory hearing seeking dismissal of the proceeding.

A. Mr. Shea Does Not Consent to the NRC Staff's Order

Mr. Shea does not consent to the Order and respectfully requests a hearing because he did not engage in deliberate misconduct or cause TVA to be in violation of 10 C.F.R. § 50.7. The Order specifically cites to 10 C.F.R. § 50.5, which provides that "deliberate misconduct by a person means an intentional act or omission that the person *knows* would cause a licensee to be in violation

of a condition of a license issued by the Commission" (emphasis added). But, as discussed in extensive detail above, that is not what happened here.

Mr. Shea referred Ms. Henderson's harassment complaint to independent entities (the TVA OGC and HR). He subsequently sought further guidance from those independent entities regarding how to address the former corporate employee's conduct after she made statements to Mr. Shea about Ms. Henderson. Ultimately, an independent investigation conducted by the TVA OGC concluded that the former corporate employee's statements amounted to a pattern of harassment, retaliation, and disrespectful conduct towards Ms. Henderson.

Mr. Shea received and agreed with OGC's recommendation to separate the former corporate employee from the company because of her conduct. Mr. Shea rightly believed that this action was consistent with his duty as a senior manager to ensure a harassment-free and professional workplace, and with 10 C.F.R. § 50.7(d), which explicitly states that no one is "immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations." In accordance with TVA policies and procedures, Mr. Shea presented his proposal to separate the former corporate employee from the company to the TVA ERB. All members of the ERB *unanimously agreed* that separating her from the company was consistent with 10 C.F.R. § 50.7.

When he took action against the former corporate employee, Mr. Shea considered the rule allowing action against an employee for non-prohibited considerations pursuant to 10 C.F.R. § 50.7(d). Mr. Shea, TVA's OGC, TVA's HR Department, and TVA's ERB all agreed that the actions taken against the former corporate employee were for nonprohibited considerations, pursuant to 10 C.F.R. § 50.7(d). As such, Mr. Shea did not cause TVA to violate 10 C.F.R. § 50.7,

and it is legally impossible for Mr. Shea to have engaged in a deliberate misconduct violation under 10 C.F.R. § 50.5 when he believed he was acting for legitimate reasons under the rule.

More specifically:

- Mr. Shea admits that he placed a former corporate employee on paid administrative leave on October 15, 2018 and terminated her employment on January 14, 2019. However, Mr. Shea denies this action was taken in any part because the former corporate employee engaged in protected activity, including raising concerns about a chilled work environment.
- Mr. Shea admits that he received a copy of the TVA OGC report prepared by an OGC attorney on or around May 31, 2020, discussing the results of an investigation into Ms. Henderson's harassment claim. However, Mr. Shea can neither admit nor deny that he was in receipt of the "draft report" identified in the Order, as the NRC Staff has not identified the date of the "draft report." Mr. Shea further denies the Order's implication that the OGC report identified chilled work environment "concerns" of the former corporate employee.[152] The OGC report contains no reference to the former corporate employee claiming the existence of a chilled work environment, nor does it otherwise suggest that the former corporate employee was unwilling to raise nuclear safety concerns.
- Mr. Shea admits that he received a March 9, 2018 complaint identifying the former corporate employee as a potential contributor to a hostile work environment.
- Mr. Shea denies that the former corporate employee was identified as "the source of a chilled work environment complaint made to the NRC" in the March 9, 2018 complaint. The complaint itself makes no such statement. Mr. Shea denies any knowledge of the

[152] While the Order does not identify what "concerns" are allegedly in the OGC report, it appears that the NRC Staff intended to reference the same "chilled work environment concerns" that the it claims were allegedly raised in a "TVA OGC interview." *See* Order at 2-3.

former corporate employee making a chilled work environment complaint to the NRC prior to taking adverse employment action against her.

- Mr. Shea admits that he played a significant role in the decisionmaking process to place the former corporate employee on administrative leave and terminating her employment.
- Mr. Shea denies there is a "nexus" between the former corporate employee's raising of chilled work environment concerns and her termination. Mr. Shea was not aware of the former corporate employee's making a chilled work environment complaint to the NRC, prior to taking the adverse actions against her. The former corporate employee never raised chilled work environment concerns to Mr. Shea. Mr. Shea denies that the former corporate employee's statements spreading false, derogatory, and unsubstantiated information about Ms. Henderson to Mr. Shea were chilled work environment concerns.
- Mr. Shea admits in part that he terminated the former corporate employee for being disrespectful to Ms. Henderson. As stated during his PEC, he "acted to separate [the former corporate employee] from the company under a full belief that the action was being taken responsive to finding that [she] had participated in an ongoing campaign of disrespectful and harassing conduct, that included repeated statements that her supervisor had initiated inappropriate investigations of TVA employees for vindictive motive, despite having no reasonable basis or specific knowledge to support those statements."[153]
- Mr. Shea denies that the examples used in the TVA OGC report as evidence that the former employee was disrespectful were concerns about a chilled work environment or concerns about reprisal for protected activity.

[153] Shea PEC Tr. at 35-36.

- Mr. Shea admits that he did not formally counsel the former corporate employee about her disrespectful behavior prior to her separation from the company. He did, however, ask her multiple times to explain the basis for her statements, to which he received either no response or non-responsive answers. Furthermore, Mr. Shea adds that progressive discipline is not required under TVA procedures, and that TVA leaders—as was the former corporate employee—are held to a higher standard of conduct. Mr. Shea denies that the lack of formal counseling is evidence of retaliation or intent to retaliate.
- Mr. Shea denies that he caused TVA to be in violation of 10 C.F.R. § 50.7. Mr. Shea acted to separate the former corporate employee from the company under his belief that the action was being taken responsive to the finding that the former corporate employee had participated in an ongoing campaign of disrespectful conduct (including false, derogatory, and harassing statements) that included repeated statements the former corporate employee made that her supervisor, Erin Henderson, had initiated inappropriate investigations of TVA employees for vindictive motives despite having no reasonable basis or specific knowledge to support those statements.

As required under to 10 C.F.R. § 2.202(b), in the attached Affidavit, Mr. Shea affirms the truthfulness and accuracy of the information contained in this Answer to the Order.[154]

B. Request for a Hearing on the NRC Staff's Order

For the foregoing reasons, Mr. Shea does not consent to the Order, respectfully requests a hearing on the Order and the matters described herein, and requests that the Commission or presiding officer issue an order dismissing this proceeding against him.

[154] Shea Affidavit at ¶ 12.

Respectfully submitted,

/s Electronically Signed by Timothy J. V. Walsh/

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September 22, 2020

Counsel for Mr. Joseph Shea

September 22, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of JOSEPH SHEA	IA-20-008

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joseph Shea's Motion To Set Aside The Immediate Effectiveness Of An Order Banning Him From Engaging In NRC-Licensed Activities, Answer, And Request For Hearing has been served through the E-Filing system on the participants in the above-captioned proceeding, this 22nd day of September, 2020.

/Signed electronically by Timothy J. V. Walsh/
Timothy J. V. Walsh

docVerify

Shea Affidavit for Motion to Set Aside Immediate Effectiveness.pdf

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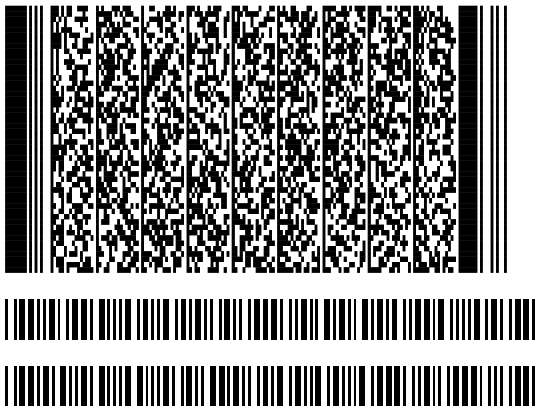
E-Signature 1: Joseph William Shea (JWS)
September 22, 2020 07:32:17 -8:00 [B599A71442ED] [76.97.176.151]
sheajwilliam2020@gmail.com (Principal) (ID Verified)

E-Signature Notary: Sylvia A. Davis (sad)
September 22, 2020 07:32:17 -8:00 [556B0A99DCAC] [204.227.246.8]
sylviadav7@gmail.com
I, Sylvia A. Davis, did witness the participants named above electronically sign this document.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
	)	IA-20-008
JOSEPH SHEA	)	
	)	
	)	

AFFIDAVIT OF JOSEPH SHEA

1. My name is Joseph Shea. I am currently employed by the Tennessee Valley Authority ("TVA") in a Rotational Management Development position reporting to the Chief Operating Officer. I am currently in a non-work status and have no interaction with TVA's NRC-licensed activities. I have no direct reports in my current position.

2. Prior to August 24, 2020, I served as the TVA Vice President, Nuclear Technology Innovation. Prior to this role, I served as the TVA Vice President, Regulatory Affairs.

3. On August 24, 2020, the Nuclear Regulatory Commission (NRC) Office of Enforcement Director issued to me an immediately effective Order prohibiting me from engaging in NRC-licensed activities for a period of five years.

4. I submit this affidavit in support of the accompanying pleading entitled "Joseph Shea's Motion to Set Aside the Immediate Effectiveness of an Order Banning Him From Engaging In NRC-Licensed Activities, Answer, and Request for Hearing" (Motion).

5. As described in the Motion, I deny the allegations in the Order and respectfully request that the immediate effectiveness of the Order be set aside pending an adjudication on the merits.

6. More specifically, I unequivocally deny that I placed the former corporate employee on paid administrative leave and then terminated her employment *because* she engaged in protected activities.

7. As I explained to the NRC during my June 25, 2020 pre-decisional enforcement conference (PEC), and as detailed in the accompanying Motion, I acted to separate the former corporate employee from employment with TVA in the full belief that the action was being taken in response to findings that the former corporate employee had participated in a sustained pattern of disrespectful and harassing conduct directed at her supervisor, Ms. Erin Henderson.

8. As described in the Motion, on March 9, 2018, Ms. Henderson submitted to me and to TVA Human Resources a complaint alleging that several of her co-workers, including the former corporate employee, were creating a hostile environment for her in the workplace. After discussions with Human Resources, the Office of General Counsel, and TVA management, I sought an independent investigation of Ms. Henderson's March 9, 2018 complaint from the Office of General Counsel, a neutral and experienced investigatory entity. When the former corporate employee raised various issues in her May 7, 2018 email, I again approached the Office of General Counsel and Human Resources for advice on how to evaluate the former corporate employee's statements.

9. Since these events transpired, I have taken multiple training modules offered by the Society for Human Resource Management (SHRM), one of the premier Human Resource certification organizations in the United States. The SHRM training repeatedly emphasizes the complexity of harassment claims and further emphasizes that a manager should seek expert assistance when becoming aware of a potentially harassing situation, just as I did in these circumstances.

10. The pursuit of a neutral inquiry for harassment complaints is also highly consistent with the NRC's own "Policy and Procedure for Preventing and Eliminating Harassing Conduct in the Workplace" as was presented in COMSECY-06-0060, the "NRC Policy for Preventing and Eliminating Harassing Conduct in the Workplace."

11. As I explained at the PEC and as further discussed in the accompanying Motion, the results of the independent investigation assured me that any subsequent adverse action would be based on nonprohibited considerations, and *not because* the former corporate employee had participated in a protected activity. I further was assured by the review conducted by TVA's Executive Review Board, whose function is to confirm that adverse actions are not taken based on protected activity. The Staff's assertion in the Notice of Violation that I deliberately took the adverse actions in part based on the former corporate employee engaging in protected activity is simply not true.

12. Pursuant to 10 C.F.R. § 2.202(b), as detailed in the Motion, I have answered the specific allegations in the Order, contested them, and have demanded a hearing on them. To the best of my knowledge and belief, the statements contained in the accompanying Motion are true and correct.

I declare under penalty of perjury under the laws of the United States that the foregoing and the statements made in the accompanying Motion are true and correct to the best of my knowledge and belief.

Executed on this 22nd day of September 2020.

Joseph William Shea
Signed on 2020/09/22 07:32:17 -8:00

Joseph Shea
710 Culworth Manor
Alpharetta, GA 30022
(678) 733-5784
josephshea@bellsouth.net

STATE OF MARYLAND)
) ss.
COUNTY OF PRINCE GEORGE'S)

Sworn to and subscribed before me, a Notary Public, this 22nd day of September, 2020.

Signed on 2020/09/22 07:32:17 -8:00

Sylvia A. Davis, Notary Public
My Commission Expires: August 18, 2021

SYLVIA A DAVIS
NOTARY PUBLIC
PRINCE GEORGES COUNTY
MARYLAND
My Commission Expires Aug 18, 2021

Notary Stamp 2020/09/22 07:32:17 PST 556B0A99DCAC

4852-8534-4710.v5

ATTACHMENT 1

From: [redacted]
Sent: Monday, May 07, 2018 11:56 AM
To: Shea, Joseph W [redacted]; [redacted]
Cc: [redacted]
Subject: RE: [redacted] NEI Loanee Confirmation 2018

Thank you, I will provide this to [redacted]. I was the person who interfaced with [redacted] on outlining her travel details, so I'm familiar with this.

[redacted]
Office of the General Counsel

Tennessee Valley Authority
400 W. Summit Hill Dr., [redacted]
Knoxville, TN 37902

[redacted]

From: Shea, Joseph W
Sent: Monday, May 07, 2018 11:46 AM
To: [redacted]
Cc: [redacted]
Subject: Fwd: [redacted] NEI Loanee Confirmation 2018

[redacted]

Please read below. I propose that this be provided to [redacted] within the scope of his current work. Please advise if you agree or see a different way to act on this. If you agree, please forward to [redacted].

I intend to respond to [redacted] today just letting her know that I received her email and will let her know if my plans in the near future....

Please advise.
Thanks
Joe

---------- Forwarded message ----------

From: [redacted]
Date: May 7, 2018 at 10:11:44 AM CDT
Subject: [redacted] NEI Loanee Confirmation 2018
To: Shea, Joseph W

TVA External Message. Please use caution when opening.

Joe,

I am concerned with the lack of commitment to write the details that we worked on as a team for my TVA reimbursements. I typed up a detailed proposal and Erin, [redacted] and I met to discuss the proposal 3 times with each of us researching specific questions. The team reached an agreement on the specifics. Erin assigned [redacted] to document what we agreed on, as you directed, so we wouldn't have misunderstandings in the middle of my temporary duty assignment. Erin told [redacted] that she didn't need too many details in his write-up, but I was shocked to see what Erin sent out. It contained none of the particulars we agreed on. So, yesterday I sent both you and Erin a short write-up containing the facts the team agreed on.

I am thrilled to have the CNO's support in allowing me to participate as an NEI loanee. I know it's a significant investment on the part of TVA. I will be processing large travel vouchers through [redacted] and will follow all TVA, Federal and NEI requirements to the best of my ability. I know I will get audited based on the amount of dollars that will be processed through vouchers and I believe all the research the team did will result in clean audits. However, I know that Erin has used HR to investigate people, reported people to ECP, threatened to have people for cause drug tested, pulled badging gate records and probably a lot more actions that I'm not aware of. She has demonstrated a longstanding pattern of using TVA processes as punitive and retaliatory tools. Based on the lack of detail in her "NEI Loanee Confirmation 2018" document, I anticipate her using my travel vouchers as an investigative tool.

I propose I work with you, as my approver, and [redacted] on the travel vouchers and if there's anything in question, I be notified so I can promptly correct the issue vs. being investigated.

I also intend to report directly to you, which was the level in the organization that my predecessor, [redacted], reported to. I don't anticipate any additional burden to you, as [redacted] is my NEI supervisor.

I am asking for your help in this matter.

Thanks,

From: [redacted]
Sent: Monday, May 7, 2018 8:05 AM
To: [redacted]
Subject: Fwd: [redacted] NEI Loanee Confirmation 2018

Sent from my iPhone

Begin forwarded message:

> **From:** "Henderson, Erin Kathleen" [redacted]
> **Date:** May 7, 2018 at 6:18:05 AM EDT
> **To:** [redacted]
> **Cc:** "Shea, Joseph W" [redacted], [redacted]
> **Subject: Re:** [redacted] **NEI Loanee Confirmation 2018**
>
> [redacted],
>
> The memo states you are on continuous travel status and all of the benefits outlined in the travel policies are available to you. The trip home once per month at TVA's expense is not specified in the policy so it was included in the memo to ensure it was clear that we agreed to do that.
>
> [redacted] interfaced with OGC on drafting the memo. He's out for the next few weeks if you want to give him a call when he gets back in.
>
> Erin
>
> On May 6, 2018, at 7:56 PM, [redacted] wrote:
>
> > Joe/Erin,
> > I appreciate the attached NEI Loanee Confirmation memo signed by Erin and sent to me (attached). However, it doesn't document detailed expenses as previously suggested by Joe. Written details of what was agreed upon for travel and housing compensation is essential, so we don't have questions or different interpretations in the future. I've compiled what we agreed on for expenses based on multiple meetings and e-mails. See attached.
> >
> > [redacted]

ATTACHMENT 2

From: [redacted]
Sent: Saturday, June 9, 2018 9:29 AM
To: Shea, Joseph W
Subject: Re: Travel

It's ridiculous because I'm afraid and haven't submitted, so now we're floating. No action has been taken to my knowledge yet.

Sent from my iPhone

> On Jun 9, 2018, at 8:23 AM, Shea, Joseph W <jwshea@tva.gov> wrote:
>
> [redacted]
>
> Ok. Take care of your health.
>
> As I mentioned on the phone, [redacted] will be handling your voucher reviews and has approval authority for me. Not sure why anything is getting ridiculous.... have you submitted something already? [redacted] has been monitoring and hasn't seen anything hit the system.
>
> What are you referring to "does what she does" and "never gives up"? Is there something beyond your last email?
>
> Joe
>
>
>
>
>> On June 9, 2018 at 5:56:04 AM EDT, [redacted] wrote:
>> Joe,
>> I know I've got to get my travel in. This is getting ridiculous. We are now floating my rent. But I've been afraid what will happen as soon as I start submitting vouchers. I don't even try to understand my boss and why she does what she does, but I do know that she never gives up.
>>
>> I'll get on with the vouchers. [redacted]
>>
>> [redacted]
>>
>> Sent from my iPhone

ATTACHMENT 3

Executive Review Board

Record of Action

For purposes of this form the term "Employee" is defined as TVA employees, contractors and vendor workforce personnel."

Employee Type: *(check one)* ☒ **TVA employee** ☐ **Contractor**

ERB Case No. [redacted]

Employee Name: [redacted]

Employee No.: [redacted]

Employee Job Title: [redacted]

Employee Group: [redacted]

Date ERB Convened:

Time ERB Convened:

Time ERB Concluded:

Case Summary:

Proposed Action:

Justification for proposed action: Based on the attached investigation report dated August 10, 2018 and followup analysis dated August 30, 2018, [redacted] was found to have been in violation of these three policies which are subject to discipline pursuant to TVA-SPP-11.316, Employee Discipline, Appendix B, Section 1.1, Violation of Ethical Laws or TVA Code of Conduct; Section1.5 1, Harassment/Intimidation/Retaliation/Discrimination (HIRD). These sections provide for disciplinary action up to and including termination when an employee engages in behavior that is a violation of the ethic laws or Code of Conduct, and when an employee engages in harassment and retaliation.

[redacted] behaviors, as described in the attached report, repeatedly undermined and disrespected her supervisor by insinuating that her supervisor, Ms. Henderson, had initiated inappropriate investigations of TVA employees, for vindictive motives, despite having provided no reasonable basis or specific knowledge to support that assertion. [redacted] has continued to push this unsupported theory throughout the period of the investigation, making these assertions to the attorney investigator, as well as to the Vice President, Nuclear Regulatory Affairs and Support Services, in various written communications. [redacted] has repeatedly been tardy in entering travel expenses into TVA's travel reimbursement system for vague and unsupported reasons tied back to those unsubstantiated and inaccurate representations of Ms. Henderson's motives. Overall, this disrespectful and harassing conduct directed toward Ms. Henderson is actionable under the law. "[D]isrespectful conduct is unacceptable and not conducive to a stable working atmosphere, and ... agencies are entitled to expect employees to conduct themselves in conformance with accepted standards." Ray v. Dep't of the Army, 97 M.S.P.R. 101, ¶ 58 (2004), aff'd, 176 Fed.Appx. 110 (Fed. Cir. 2006) (internal citations omitted). A subordinate who engages in harassment of a supervisor has engaged in such disrespectful conduct. Lewis v. Dep't of Veterans Affairs, 80 M.S.P.R. 472, ¶ 8 (1998) ("[I]nsolent disrespect towards supervisors so seriously undermines the capacity of management to maintain employee efficiency and discipline that no agency should be expected to exercise forbearance for such conduct more than once."). In this case, [redacted] has engaged in a sustained campaign of disrespectful conduct over a lengthy period of time, and has in fact continued to perpetuate that conduct in the midst of the investigation conducted into that exact harassment. This misconduct has hindered Ms.

Executive Review Board

Record of Action

Henderson's ability to execute her job responsibilities and has potentially undermined her standing with her subordinates. When an employee has engaged in such "intentional, repeated, and serious" misconduct, termination is an appropriate remedy. As a result, consistent SPP-11.316, it is recommended that [redacted] be removed from TVA employment.

Review Summary:

1	The proposed action is based on legitimate, non-retaliatory reasons.	☒ Yes	☐ No
2	The proposed action is compliant with TVA policies, procedures and/or past practices.	☒ Yes	☐ No
3	The proposed action has potential to create a negative impact on workforce SCWE?	☒ Yes	☐ No
	If "Yes," has a SCWE Mitigation Plan been prepared and approved? If "Yes," ensure planned mitigating actions are listed on Attachment 4.	☒ Yes	☐ No

Did any ERB members have a dissenting view with the conclusions or actions of the ERB? ☐ Yes ☒ No
If Yes, provide a brief summary of the reasons for the dissenting view(s).

ERB Decision

List of all voting ERB members present. (indicate name of person in role or N/A if no voting member in that role)

Chair: [redacted]

Director of Plant Support: [redacted]

HR: [redacted]

Legal Counsel- [redacted]

Other Witnesses attending ERB: [redacted]

☒ The ERB does not object to the proposed employment action

☐ The ERB objects to the proposed employment action

- ☐ Alternative employment action proposed and accepted
- ☐ Alternative employment action proposed but rejected

☐ The ERB cannot render a decision until additional information is provided and/or questions are answered. (Attach questions and/or directives to obtain additional information)

Executive Review Board

Record of Action

A second ERB meeting for this case is set for (date/time)

Prepared by (print name): [redacted] Title: [redacted] 10/19/18

ERB Chair or delegate Signature [redacted] Date 10/19/18

Resultant ERB records are complete and accurate with the required approvals submitted for recordkeeping.

Plant Support Director/Corp NSCMP Chair or Delegate [redacted] Date 10/22/18

Resultant ERB records are verified complete prior to filing for recordkeeping

Human Resources [redacted] Date 10/22/18

ATTACHMENT 4

From: [redacted]
Sent: Thursday, May 31, 2018 7:05 PM
To: Shea, Joseph W; [redacted]
Cc: [redacted]
Subject: RE: Follow up

Thank you. We will update the report and get it to you as soon as possible.

[redacted]

-------- Original Message --------
Subject: RE: Follow up
From: "Shea, Joseph W"
Date: May 31, 2018, 5:51 PM
To: [redacted]" ,"[redacted]"
[redacted]
Perfect. If you can amend the report accordingly, my concerns will be met. That will provide the documentation that was missing.
Thanks for the thorough consideration and response.
[redacted]

On May 31, 2018 at 5:26:09 PM EDT, [redacted] wrote:

Joe,

I'm sorry I missed your call earlier. I was in meetings all afternoon and so I thought it may be better to send an email to capture my thoughts. First, I strongly disagree that any investigation of [redacted]'s allegations in her email is warranted. In fact, I think any further investigation would do more harm than good, as it allows the harassing behavior that was identified in [redacted]'s report to be perpetuated. [redacted] was identified as having participated in the harassment of the last several years. Her email and the allegations therein are clearly part of that same pattern. To take further action, when the other investigation just concluded and found no substance to any of these types of allegations against Erin, could be interpreted as management allowing further harassment against a whistleblower (Erin) to occur.

I've discussed this with both [redacted] and [redacted], and they concur. [redacted] confirmed that he considered [redacted]'s email during the investigation and that he concluded that the email was simply further evidence of the pattern of harassing behavior that has been occurring over the last several years. [redacted] has suggested including the footnote below in the investigative report to specifically address the allegations in the email, which I think will help to assuage your concerns about appearing to take no action in response to the email. This would allow you to respond to [redacted] that the most recent investigation looked into her allegations and found that they were unfounded and part of this pattern of harassing behavior.

On May 7, 2018, after [redacted]'s interview and after reporting to NEI, [redacted] sent Mr. Shea an email, proposing that Mr. Shea, not Ms. Henderson, review and approve her travel voucher for the duration of assignment at NEI, because, as she alleges, Ms. Henderson "has used HR to investigate people, reported people

to ECP, threatened to have people for cause drug tested, pulled badging gate records and probably a lot more actions that I'm not aware of" and that she "anticipate[s] [Ms. Henderson] using [her] travel vouchers as an investigative tool." [redacted] made two of these allegations—purportedly inappropriately having people investigated by HR and pulling of gate records—during her interview. However, as set out in this Report, HR was justified under, among other things, the TVA Code of Conduct to conduct an investigation into the relationship between [redacted] and [redacted] and HR, not Ms. Henderson, pulled [redacted]'s and [redacted]'s gate records. The remaining allegations in [redacted]'s email is more of the same, with no details, and do not warrant further follow-up. Nevertheless, out of an abundance of caution, I suggest that Mr. Shea and [redacted] process [redacted]'s travel voucher during her assignment at NEI.

Please let me know if you have any questions.

[redacted]
Office of the General Counsel

Tennessee Valley Authority
400 W. Summit Hill Dr., [redacted]
Knoxville, TN 37902

[redacted]

From: Shea, Joseph W
Sent: Thursday, May 31, 2018 12:39 PM
To: [redacted]
Cc: [redacted]
Subject: Follow up

[redacted],

Thanks for your support over the past few days. As a follow up to one thread of our conversation, I still need assistance putting together a documented evaluation that is directly responsive and conclusive regarding [redacted]'s allegation from earlier in May. I have a call in to [redacted] to discuss and I know both you and [redacted] have discussed with [redacted] to some degree. While I understand that [redacted]'s report talks about [redacted]'s role and behaviors, there is no documented reference to her allegation. What I am concerned about and can't accept is that it leaves me in a position to have to back extract snippets from [redacted]'s report to draw conclusions

regarding [redacted]'s allegation . This is problematic and unacceptable because those conclusions will not be "independent" as (1) they properly should be and (2) I advised [redacted] with [redacted]'s assent that they would be.

As I shared with you, I think this is a relatively simple matter of an additional interview with [redacted] and Erin that pull's the string on each of [redacted]'s itemized assertions. What I specifically think was missed in the OGC treatment of [redacted]'s email is the assertion that Erin initiated HR investigations in a retaliatory or vindictive manner. I strongly suspect that was actually a reference to the 2018 investigation [redacted] did of [redacted] regarding the claim by one of [redacted]'s employees that [redacted] had chilled the employee over a safety culture matter. Which sounds similar to the protected whistleblower aspect that [redacted] so thoroughly documented for [redacted]. Regardless, I need support in getting specific facts, analyses and conclusions that are independent.

Like I said, I have a call in to [redacted] to discuss but am not sure where that will lead. Thus, as you and I discussed, we may need to get [redacted] to look and document this piece- as inefficient as that might be.

The OGC report was exceptionally well done on the themes it drew conclusions on; however; I still have a separate but strongly linked allegation in my plate and am looking for the organization's support to draw equally well documented analyses and conclusions whatever they might be.

Thanks for your support.

Joe