



In the Matter of:

DOUGLAS JONES,

COMPLAINANT,

v.

UNITED STATES ENRICHMENT CORPORATION,

RESPONDENT.

**ARB CASE NOS. 02-093
03-010**

ALJ CASE NO. 01-ERA-21

DATE: April 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**John Frith Stewart, Esq., Jeffrey C. Trapp, Esq., Segal, Stewart, Cutler, Lindsay,
Janes & Berry, Louisville, Kentucky**

For the Respondent:

**Charles C. Thebaud, Jr., Esq., John E. Matthews, Esq., Morgan, Lewis &
Bockius, Washington, D.C.**

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Douglas W. Jones filed a complaint against the United States Enrichment Corporation (USEC) under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1995),¹ and its implementing

¹ The statute provides, in pertinent part, that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” notified a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refused to engage in a practice made unlawful by the ERA or AEA,

Continued . . .

regulations at 29 C.F.R. Part 24 (2003). He alleged that USEC terminated his employment due to his protected activity while developing equipment training programs at USEC's Paducah, Kentucky gaseous diffusion plant.

In his Recommended Decision and Order, the Administrative Law Judge (ALJ) concluded that USEC discharged Jones in retaliation for his protected activity.² Therefore, the ALJ ordered USEC to reinstate Jones. He awarded Jones back pay, compensatory damages, other job-related benefits, and attorney's fees. USEC asks us to review the ALJ's recommended decision. Jones asks that we review the ALJ's attorney's fees award. We reverse the ALJ and deny Jones's complaint.

BACKGROUND

In 1998 USEC, a private company, took over the Paducah gaseous diffusion plant from Lockheed Martin Utility Services, which had operated it under contract with the federal government. The Paducah plant is "the middle step" in the overall process of making uranium ore into fuel for commercial nuclear reactors. The plant enriches uranium hexafluoride gas in the U235 isotope and then ships the enriched uranium hexafluoride to a fuel pellet fabricator for use in commercial reactors. JX 3 at 13.

The takeover and privatization led to a reduction-in-force (RIF) in 1999, and several employees in USEC's training department volunteered for the RIF. JX 3 at 14, 16. Jones, who began work for USEC in 1988 as an industrial hygiene technician, was working in Paducah's independent assessments department in 1999 and was subject to the RIF. TR at 46, 265-66. To avoid the RIF, Jones transferred to the training department in April 1999 and replaced two rifed employees.³ TR at 47-54, 61-63. At the time that he joined the training department, Jones was not an experienced trainer. However, Jones had a bachelor's degree, a college teaching certificate, and was a scuba diving instructor, trained to teach students how to use scuba equipment safely. TR at 46, 52-53.

testified regarding provisions or proposed provisions of the ERA or AEA, or commenced, caused to be commenced or is about to commence or cause, or testified, assisted or participated in a proceeding under the ERA or AEA to carry out the purposes of this chapter or the AEA as amended. 42 U.S.C.A. § 5851(a)(1).

² The following abbreviations shall be used: Claimant's Exhibit, CX; Respondent's Exhibit, RX; Hearing Transcript, TR; Joint Exhibit, JX; and Recommended Decision and Order, R. D. & O.

³ Russell Starkey, head of the training department, testified that he knew Jones was in the pool of potential RIF candidates before he came to the training department in April 1999. TR at 265-66. Jones had avoided an earlier reduction in force by transferring to another department and had actively sought the transfer to Starkey's department. JX 3 at 15, 19-21; TR at 61-63.

As part of his new duties, Jones was responsible for the mobile industrial equipment (MIE) program. TR at 62; JX 3 at 23-24. His supervisor, Ron Fowler, told him to learn how to operate various pieces of MIE and to develop training modules.⁴ TR at 63. Jones was not impressed with the quality of the training his predecessors had done and resolved to do better. TR at 64-66.

His first project involved a new Occupational Safety and Health Administration (OSHA) regulation that was to become effective in December 1999. TR at 70-78. The regulation required Jones to develop a training module for powered industrial trucks (PITs), a segment of the MIE program.⁵ But Jones began to experience what he called “frustrations and roadblocks” as he tried to obtain information and materials to produce this module. TR at 84. He stated that he got “zero specific guidance” from Fowler, and that Russell Starkey, manager of the training department, listened to him describe the problems he was having, but simply directed him to “fix them.” TR at 79-85.

Jones did not complete the PIT project in time to meet the December 1999 deadline. CX 16B; TR at 109-12. Therefore, upper management directed him to file an assessment tracking report (ATR). These reports are part of USEC’s Business Prioritization System, “a plant-wide tickler system” to ensure that problems and issues, such as non-compliance with OSHA rules, are formally noted, followed up, and corrected. JX 3 at 26; TR at 268-69. Between May 13, 1999, and March 23, 2000, Jones filed 13 ATRs concerning deficiencies he found in training records, instructional materials, and operating licenses. *Id.* Jones filed the ATR concerning the PIT project on December 9, 1999. CX 26.

Jones continued to experience problems carrying out his duties, and on January 10, 2000, he requested that he be assigned to a different job. CX 8. He made this request because he felt that his “lack of progress is making the Training Organization appear ineffective and disorganized,” because he was “having a difficult time communicating the problems” he perceived, because “[m]obile industrial equipment is not my area of expertise,” because there “are probably other personnel who would do a much better job than me in this area due to experience and expertise,” because the “plant needs an expert in this area,” and, finally, because of “my peace of mind.” *Id.* Starkey denied his request but assigned Ed Craven, a more experienced employee, to work on the MIE program with Jones. Danny Bucy, a group manager, was assigned to supervise Jones and Craven. TR at 270-72.

⁴ A module consists of written and visual instruction that a trainer presents to employees to ensure that they operate equipment safely. JX 1 at 8-9, 16.

⁵ The PITs at Paducah consisted of forklifts, fork trucks, tow motors and tractors, flat form lift trucks, hand trucks, cylinder haulers, handlers, industrial crane trucks, carry deck cranes, and yard tractors. JX 1 at 34.

Shortly thereafter, though no longer his immediate supervisor, Fowler evaluated Jones on his mid-year progress. Fowler gave him a “meets expectations” rating on four performance factors but a “below expectations” in the performance factor relating to job knowledge, initiative, and interpersonal skills. CX 10. Jones protested the evaluation. He stated that when he had taken over the MIE program, he had no experience or training in mobile industrial equipment, and that Fowler had offered insufficient guidance. Jones added that he had not received training to be a classroom instructor or a training materials developer. In this same employee concerns report, he warned that an inadequate MIE training program would put employee safety at risk. CX 11.

In response to Jones’s protest, investigators in USEC’s human resources department interviewed Jones’s managers, Fowler, Bucy, and Starkey. The investigators recommended no change in Jones’s mid-year rating. CX 25. They found that Jones “did not demonstrate the initiative expected from an employee” at his grade level even though Jones had been referred repeatedly to procedures on how to write and develop training modules and to hundreds of training modules that could have been used as examples. *Id.*

Earlier in 2000, USEC announced another RIF because of changing business conditions. Uranium enrichment prices were down, and the market forecasts indicated a flat demand. TR at 276-78. Upper management instructed Starkey to reduce his training department force by two. Starkey consulted with his four group managers. They determined that three of the four divisions of the training department could not afford a reduction in personnel. But since the MIE program, which was part of the production support training division, would only “require about a half FTE worth of work” within the next year, Starkey and his managers decided that one of the two personnel reductions had to be made from the production training division. Jones and Craven were the only two employees in that division. TR at 279-81.

To determine who would be terminated, Starkey, Bucy, and Fowler independently rated Craven and Jones according to a list of job profile and functional “competencies” that a consulting company had developed for USEC management to use in RIF situations. TR at 281-83; CX 21(b). A group of USEC senior managers had previously determined which of the “competencies” applied to trainers like Jones and Craven. CX 18; TR at 281-283. A day or two later, Bucy, Fowler, and Starkey met and decided on a consensus rating for Jones and Craven. TR at 284-291. Jones’s overall score was considerably lower than Craven’s. CX 18. Therefore, USEC discharged Jones on July 5, 2000.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ’s recommended decision in cases arising under the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8. *See also* Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary’s authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. See Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself").

In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Jenkins v. United States Envtl. Pro. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB will defer to an ALJ's credibility determinations that are based on such observation. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000).

Only Jones and Starkey testified before the ALJ. The ALJ credited Jones's testimony over Starkey's. He found Starkey's explanation of Craven's superior performance not credible because, in the ALJ's opinion, Starkey was wrongly blaming Jones for his own managerial deficiencies. For the ALJ, management, not Jones was responsible for the difficulties on the MIE project. See R. D. & O. at 10-11, 22-24, 36-37, 40. But since the ALJ did not base this credibility determination on demeanor, we are not bound, as Jones contends, to give substantial weight to Jones's testimony. Complainant's Response Brief at 12-15. See *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) ("The Board gives great deference to an ALJ's credibility findings that 'rest explicitly on the evaluation of the demeanor of witnesses.'"), citing *NLRB v. Cutting*, 701 F.2d 659, 663 (7th Cir. 1983)).

ISSUE

Did Jones prove by a preponderance of the evidence that his protected activities were a contributing factor in USEC's decision to select him for the involuntary RIF?

DISCUSSION

The Legal Standard

Since this case has been tried on the merits, the relevant inquiry is whether Jones has successfully met his burden of proof that USEC retaliated against him due to his

protected activities. That burden is to prove by a preponderance of evidence that he engaged in activity that is protected under the ERA, that USEC knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action USEC took. If Jones carries this burden, we proceed to determine whether USEC has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. *See* 42 U.S.C.A. § 5851(b)(3)(C), (D); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 7-8 (Sept. 30, 2003).

We note that the ALJ misstates the legal standard when he writes that an ERA employer must establish by clear and convincing evidence that it would have taken the same adverse action “once the complainant establishes a prima facie case.” *See* R. D. & O. at 26, 27, 29, 35, 43. USEC’s clear and convincing burden of proof is in the nature of an affirmative defense and arises only if Jones has proven by a preponderance of evidence that USEC terminated his employment in part because of his protected activity. *See Kester*, slip op. at 8. USEC’s only burden after Jones makes a prima facie case of discrimination is one of production; that is, it must merely articulate a legitimate reason for terminating Jones. *See Dartey v. Zack Co. of Chicago*, 82-ERA-2, slip op. at 5 (Sec’y April 25, 1983). Thereafter, the question is discrimination vel non. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U. S. 711, 714 (1983).

Protected Activities and Adverse Action

Jones argues that he engaged in protected activity when he filed ATRs concerning violations of governmental regulations pertaining to the MIE/PIT program. He asserts that filing the ATR’s notified USEC of violations involving nuclear safety and thus advanced the ERA’s purpose of assuring public health and safety. *See* 42 U.S.C.A. § 5801(a). Furthermore, since his duties related particularly to the powered industrial trucks, some of which haul radioactive material, Jones contends that when he reported to his supervisors that he was not trained or adequately supervised to carry out these duties, he also engaged in protected activity. Complainant’s Response Brief at 15-18.

USEC counters these arguments by contending that Jones did not engage in protected activity under the ERA because he did not raise definitive and specific concerns regarding nuclear safety. Rather, USEC argues that Jones’s activities pertained only to occupational safety and health issues, not nuclear safety. USEC further contends that the training courses Jones was assigned to develop, which are the basis of his concerns, are not related to nuclear safety.⁶ Respondent’s Initial Brief at 6-12.

⁶ Two kinds of training occur at Paducah — SAT (systemic approach to training) and non-SAT. SAT training methods are developed to meet specific regulatory requirements under the licensee certificate that the Nuclear Regulatory Commission (NRC) issued to USEC. The non-SAT based training that Jones was involved with did not require the same degree of developmental rigor. JX 3 at 97-98; JX 4 at 46-47. *See* R. D. & O. at 7.

The ALJ found that filing the ATRs and complaining to the supervisors about being inadequately trained to develop the MIE/PIT training module constituted protected activity. R. D. & O. at 32. We will assume, without finding, that Jones engaged in protected activities when he filed the ATRs and complained about the training and supervision because we decide this case on other grounds — namely, that Jones failed to meet his burden of proof to show that his protected activities were a contributing factor in USEC’s decision to terminate his employment. *See Smalls v. South Carolina Elec. & Gas*, ALJ No. 00-ERA-027, ARB No. 01-078, slip op. at 6 (ARB Feb. 27, 2004).

The ALJ also found that USEC knew about Jones’s protected acts. R. D. & O. at 33. We agree because the record clearly demonstrates that fact.

Furthermore, the parties stipulated, and we find, that the July 5, 2000 RIF termination constitutes adverse action. But the ALJ made additional findings concerning the adverse action that USEC took against Jones. He found that the ratings that the USEC managers gave Jones in his May 23, 2000 IRIF Candidate Selection Summary, which formed the basis for the July termination, were unjustified and therefore constituted an adverse action. He also determined that Bucy’s active “shunning” of Jones and USEC’s transferring Craven to the MIE program in February 2000 were adverse actions. R. D. & O. at 33. Thus, the ALJ concluded that USEC violated the Act not only when it terminated Jones because of his protected activity, but also when it took these additional adverse actions because of protected activity. *Id.* at 43.

We make no findings as to whether these three additional events constitute adverse action because each occurred more than 180 days before Jones filed his December 21, 2000 complaint. Therefore, even if they were adverse to Jones, they are not actionable. *See* 42 U.S.C.A. § 5851 (b)(1); 29 C.F.R. § 24.3 (b) (2); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (“[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.”). Thus, the ALJ erred in concluding that USEC violated the ERA when its managers rated Jones lower than Craven, when Bucy allegedly shunned Jones, and when Craven was assigned to the MIE program.

Causation

Jones has not produced “direct” evidence that USEC terminated his employment because of his protected activity. *See Aikens*, 460 U.S. at 716 (“[T]he question facing triers of fact in discrimination cases is both sensitive and difficult . . . There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”).

Therefore, in determining whether Jones demonstrated that his protected activity was a contributing factor in USEC’s decision to terminate his employment, we apply the established and familiar Title VII methodology wherein after the complainant has established a prima facie case and the employer has rebutted it, the complainant attempts to prove that the employer’s reason for the adverse action is a pretext. *See Kester*, slip op. at 5 n.12. And though we may infer that USEC discriminated if Jones convinces us

that USEC's reason for terminating him is a pretext, Jones still must demonstrate by a preponderance of the evidence that USEC terminated his employment, at least in part, because of protected activity. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 519, 524 (1993).

USEC asserts that it terminated Jones's employment because Craven had objectively better qualifications, training, and performance. Respondent's Initial Brief at 3. Jones argues that the reason USEC gives for terminating him, not Craven, is false. What actually happened, Jones contends, is that because of his protected activity, USEC managers stymied his efforts to perform his duties, unnecessarily assigned Craven to the MIE program, gave him an unwarranted rating on his mid-year evaluation, shunned him, and employed an unfair method and highly subjective, "hidden" criteria in the test it used to choose him for termination. Complainant's Response Brief at 23-28. In short, Jones claims that USEC did not terminate his employment for legitimate reasons, but that he was "set up" because of his protected activities. *Id.* at 6. We conclude, however, that Jones has not shown that USEC's proffered reason was a pretext for discrimination.

Pretext Analysis

1. USEC did not prevent Jones from using available training procedures and human resources to complete his assignments.

Jones contends that his managers set him up to perform poorly when they failed to provide him with sufficient guidance and training. This thwarted his efforts to develop proper training modules for the MIE program. Complainant's Response Brief at 3-7. USEC answers that even if Jones's managers should have done a better job of guiding and supervising Jones, they nevertheless encouraged Jones to take the initiative and correct the training problems he raised. Respondent's Initial Brief at 17-19. The ALJ found that Jones's managers abrogated their responsibilities in training Jones because of his protected activities, thereby setting Jones up for the RIF termination. *R. D. & O.* at 35-37, 41-42.

When Jones first came to the MIE program, Starkey waived certain training requirements because of Jones's background and teaching experience. The understanding was that Jones would acquire on-the-job training and assume responsibility. *CX 2, TR* at 182-83, 209, 265-68. Initially, Jones responded. He learned how to operate a forklift, overhead crane, and self-propelled work platform, and sought the advice of other employees on developing training modules. *TR* at 66-67, 210-14.

But problems set in as Jones tried to develop the PIT module. He complained that he could not get the information and materials to produce the module. *TR* 84-85. Then he took a "training the trainer" course in March 2000. He testified that this course, which was SAT-based, consisted of training procedures that had been "readily available" for his review all along. *TR* at 212. He also admitted that he never asked for any special training on how to prepare MIE modules. *TR* at 211. He stated that he could have interviewed the employees who operated the equipment to obtain input and guidance in

developing a training module. TR at 213. He added that others in the training department were willing to help him. TR at 75. Jones further admitted that one manager, who was not even in the training department, did “the majority” of the work for an action plan that Fowler had requested him to develop. TR at 215-16; RX 2.

Furthermore, Jones’s managers enthusiastically supported his efforts to develop training modules. JX 3 at 25-27, CX 3-4; TR at 80-90, 187-89. Responding to a November 1, 1999 memorandum from Jones about a plan for addressing the MIE program, Starkey commented: “This all seems to make good sense to me. Good job.” CX 3. Similarly, when Jones asked about extending an OSHA interpretation concerning end-loaders to equipment like golf carts, Starkey responded: “Your reasoning appears sound to me. Go for it.” CX 4, TR at 87. Based on information Jones provided, Starkey instructed two managers to file an ATR to address the issue. CX 5, 26.

Moreover, Fowler responded to Jones’s memorandum concerning a technical review of training modules: “Keep on looking. It appears you have a marvelous opportunity to excel!!!!” CX 6. Fowler also told Jones: “I appreciate the aggressive nature you’re demonstrating in finding and identifying these issues. It appears guidance toward a cure is what you need now. Good work!” Finally, Starkey and Fowler both approved Jones’s request to order a \$395.00 video package on OSHA training for forklift operators. Fowler stated that he completely agreed that the purchase of the package was “the way to go!” Starkey ordered Jones to “get the whole package.” CX 7.

Thus, the record does not support Jones’s argument, and the ALJ’s finding, that USEC managers were to blame for Jones’s poor performance. USEC managers did not ignore his requests for help. They wanted him to demonstrate initiative and advised him to develop action plans and propose solutions, not make excuses for his inaction. By his own admissions, Jones failed to help himself enough to meet the expectations of his managers. More importantly, even if USEC’s training managers could have done a better job of supervising and training Jones, Jones has not shown that any such lack of supervision and training was motivated by his protected activity.

2. The assignment of Craven to the MIE program was a legitimate business response to Jones’s failure to develop the necessary training modules.

Jones argues that USEC was predisposed to discharge him because he had raised so many safety concerns about the training modules. Jones claims that Starkey’s assignment of Craven to work with him on the MIE program at the same time that RIF layoffs were announced at the Paducah plant evidences this predisposition. According to Jones, by assigning Craven to the MIE program, USEC set the stage for eventually selecting Craven when the time came to decide which of the two to terminate. Complainant’s Response Brief at 27. USEC counters that Starkey assigned Craven because Jones had admitted that he could not handle the MIE program. Respondent’s Initial Brief at 24. The ALJ found that USEC’s motivation in assigning Craven to Jones’s training group was “so there could be a comparative analysis” to eventually lay off Jones. R. D. & O. at 34.

When he joined Fowler's training group, Jones assumed responsibility for the MIE program and was told to learn how to operate various pieces of equipment and develop training modules for powered industrial trucks (PITs). TR at 52, 62-63; JX 3 at 20, 23-24. Despite his work background and teaching experience, Jones's progress from April 1999 to January 2000 "was very slow. Very, very slow." TR at 267. In fact, Jones admitted in a January 12, 2000 self-assessment that, although he had identified problems with the MIE program, he had not "implemented effective corrective actions yet." CX 9.

An example of Jones's slow progress is the fact that he missed the December 1999 deadline to revise the forklift training program. CX 16; TR at 109-12, 216, 243. In February 2000, Jones blamed this failure and other problems on management, which he stated had not given him sufficient training and guidance. CX 23. But Jones's managers blamed him. As already noted, they reported that Jones lacked initiative in fixing the problems he encountered despite the available "how-to" procedures and "numerous training modules that could have been used as examples" for developing the training programs. CX 25.

And even though he blamed management for his failures, Jones himself requested a "job assignment change" in January 2000 because he could not handle the MIE program duties. CX 8. As a result, Starkey transferred the MIE program from Fowler to Bucy, and brought in Craven, who had taken on other problem programs and done "some very creative and innovative things with them." CX 27, RX 3; TR at 275-76. In fact, by August 2000 Craven had produced all the required training modules for the MIE program. TR at 291-92.

Given these facts, we find that Starkey assigned Craven to work with Jones and Bucy to rescue a failing program that Jones acknowledged he had not been able to manage. Starkey was responsible for overall training and fixed the MIE situation when he assigned a known trouble-shooter, Craven, to the program. The fact that USEC announced a RIF at approximately the same time that Craven was transferred to the MIE program in February 2000 is merely coincidental, not conspiratorial. And the relatively close proximity of Craven's transfer in February 2000 to "fix" the MIE program and Jones's RIF rating in May 2000 does not support an inference that USEC plotted to oust Jones. Therefore, we conclude that transferring Craven to the MIE program was a legitimate business response to Jones's failure to develop and implement necessary training modules.

3. Jones has not shown that his mid-year evaluation was not a legitimate performance rating.

Jones contends that his mid-year performance evaluation on February 8, 2000, is additional evidence that USEC was setting him up for the RIF discharge. Complainant's Response Brief at 6-7. Jones asserts that he did not deserve a "below goals/expectations" rating for his "job knowledge, initiative, interpersonal skills." CX 10. USEC argues that Jones deserved the rating, based on his performance from July through January 2000. Respondent's Initial Brief at 18-25. The ALJ found that the performance rating and

management's response to Jones's protest about the rating "set up the scenario" for Jones's managers to select him for the RIF. R. D. & O. at 41.

When Jones started work in the training department, he agreed to an annual performance plan under which he would be rated for achieving certain goals. These goals included completing 90 percent or more of his assignments on schedule, assuming responsibility for the MIE program, and revising training modules to comply with safety rules and regulations. CX 2. Six months later, Jones assessed his own performance and admitted that while he had "documented various problems" with the MIE program, he had not "implemented effective corrective actions yet" and needed training as an instructor/developer to correct the problems effectively. CX 9.

On February 7, 2000, Fowler evaluated Jones's work in a mid-year appraisal report. Fowler gave Jones a "meets expectations" rating in four of the five performance factor areas, but a "below expectations" in the performance factor involving job knowledge, initiative, and interpersonal skills. Fowler stated that Jones was working on a project he had inherited, one "that nobody knew had so many problems," and which Jones was trying to correct "but is needing help." CX 9, 10. Jones protested the "below expectations" rating and filed an "employee concerns" report, stating that he was tasked with fixing the MIE program, but was not supplied with the guidance, support, or tools to do so. CX 23.

USEC's human resources department investigated Jones's protest. It found that Jones's managers, Starkey, Bucy, and Fowler, had all agreed that, with his background, Jones was "well qualified to write training modules, given the available how-to procedures and the numerous training modules that could have been used as examples." But it also found that Jones had not shown sufficient initiative in developing the necessary training programs or in seeking the procedures and examples of training modules that were available. CX 25. Starkey testified that Jones raised safety issues about the MIE program, which he was expected to do, but "[m]y chagrin came from the fact" that "[w]e weren't moving aggressively enough or fast enough to get them resolved." TR at 290-91. He added that there was "just excuse after excuse after excuse." TR at 287.

The record demonstrates that Jones was not meeting management's expectations in taking the steps required to produce the training modules. While Jones might have benefited from additional training or assistance, he has not shown that either the failure to provide additional training or assistance or the expectations themselves were a subterfuge for discrimination. Jones's mid-year evaluation was a warning that management thought he lacked initiative in solving the problems related to the MIE program. Thus, the evaluation was not part of a plan to "set up" Jones for the upcoming RIF.

4. Jones has not shown that Bucy and Starkey shunned him or had negative attitudes about him because of his protected activity.

Jones argues that we should find, as the ALJ did, that following the transfer of the MIE program to Bucy in February 2000, Starkey and Bucy developed negative attitudes toward Jones because of his protected activity. Therefore, Jones claims that they rated him below Craven in the May 2000 RIF selection. Complainant's Response Brief at 24. USEC denies that Bucy and Starkey were negative toward or shunned Jones. Respondent's Initial Brief at 21-23. The ALJ concluded that Bucy "actively shunned" Jones after taking over the MIE program, and that Starkey was not credible and wrongly held Jones responsible for managerial shortcomings. R. D. & O. at 23-24, 34-35.

Jones testified about three interactions that demonstrated Bucy's negative attitude toward him. First, Bucy initially helped Jones to transfer to the training department by introducing him to Starkey and Fowler. TR at 61-62. Later, when Jones asked Bucy what to do about the "below expectations" rating he received on the mid-year evaluation, Bucy advised him to take his protest to the employee concerns department. TR at 101, JX 1 at 26. But, according to Jones, when the employee concerns investigator later asked Bucy about the rating, Bucy nevertheless agreed with Starkey and Fowler that the rating should not be changed. CX 24-1. As a result, Jones felt that Bucy had "set him up." CX 24-1, 2. Bucy, however, testified that he advised Jones to take the issue to employee concerns only because they were the "people who take care of issues like that." JX 1 at 26. Furthermore, USEC's employee concerns manager noted that Bucy was correct in so advising Jones because managers are supposed to inform employees of their options. CX 24-2.

Second, Jones testified that Bucy was "not pleased" about being assigned to the MIE in February 2000 and became aloof toward him. He thought that Bucy gave the impression that Jones should not ask questions about the MIE program. TR at 114-16. Bucy admitted that he did not like having to fix problems that Fowler and Jones had created. JX 1 at 26. But Bucy also testified that his previous relationship with Jones did not change because of the transfer. JX 1 at 22. He added that he and Jones shared the same office area and talked regularly about safety and training problems, and if Jones had questions, he tried to answer them. JX 1 at 21-22. And Jones confirmed Bucy's account of their relationship when he told USEC's employee concerns manager that Bucy was giving him sufficient attention and direction. CX 24-2.

Third, Jones testified about an incident where Bucy told him to use some pages from OSHA's web site as Paducah's PIT training module. The information on the web site was general in nature, and Jones resisted Bucy's idea. He correctly pointed out that the OSHA guidance itself indicated that it should not be substituted for a specific PIT module. Bucy became loud and angry when Jones did not carry out his suggestion. TR at 115; JX1 at 16. But Bucy later admitted that Jones was right about not "personalizing" the OSHA guidance. JX 1 at 17. And Jones conceded that the exchange did not result in discipline or impede him from trying to develop the training module correctly. TR at 234-35.

Thus, though Bucy may have been unhappy about the added responsibility of supervising Jones and Craven, and argued with Jones about the OSHA guidance, his interactions with Jones do not convince us that Bucy had a negative attitude toward Jones or that he shunned him. More significantly, even if Bucy's attitude could be deemed antagonistic, Jones has not adduced sufficient facts for us to infer that this enmity existed because of his protected activity.

Finally, Jones asserts that the ALJ correctly found that Starkey, too, was negative toward Jones because Jones had engaged in protected activity. The ALJ found that Starkey's testimony about Craven being more qualified than Jones was not credible, and that Starkey was holding Jones responsible for his own managerial shortcomings. R. D. & O. at 23-24. In so doing, the ALJ treated possible inadequacies in the quality of supervision Jones received as discrimination. Bad management, however, is not actionable under the ERA whistleblower protection provision. *Accord Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 40-41 (ARB Feb. 28, 2003). The whistleblower protection provision addresses only discrimination motivated by protected conduct.

5. Jones has not established that the USEC managers rated him below Craven because of his protected activity.

Jones argues that the method and manner that USEC used to conduct the May 2000 RIF evaluation proves that it was retaliating because of his protected activity. Furthermore, he claims that since the ALJ "effectively demonstrated the disparity between Mr. Jones's IRIF ratings and his supervisors' earlier ratings and comments," the ratings his managers gave on his RIF evaluation were not deserved, thus a pretext. Complainant's Response Brief at 26-27. USEC states that its RIF evaluation methodology and the consensus judgment of three managers in selecting Jones were fair and objective. Respondent's Initial Brief at 22. The ALJ characterized USEC's explanation of the RIF process as a "false premise," a "subterfuge," and "contradictory and defective." R. D. & O. at 38-40.

As earlier noted, USEC managers had decided that, as part of the 2000 RIF, the production training division had to downsize one employee. Thus, the choice was whether to terminate Jones or Craven, the only employees in that division. TR at 279-281. Senior management had determined the criteria by which managers were to rate employees for the RIF. TR at 282-283; JX 3 at 65, 70. USEC used 13 criteria, referred to as "competencies," to evaluate employees in the training division: comfort around higher management, creativity, composure, customer focus, managing diversity, integrity and trust, interpersonal savvy, listening, motivating others, personal learning, presentation skills, priority setting, and technical learning. CX 18. Each of these competencies was defined. For example, "creativity" was defined as "[c]omes up with a lot of new and unique ideas; easily makes connections among previously unrelated notions; tends to be seen as original and value-added in brainstorming settings." CX 21(b). Trainers were also rated according to two "functional/technical" job competencies: knowledge of federal, state, and Nuclear Regulatory Commission laws and regulations;

and, knowledge and demonstrated proficiency in the systems approach to training process. CX 18.

Jones contends that USEC “blindsided” him because these criteria “were designed to monitor and evaluate an employee’s progress through a company” and worked best “when the company informs the employee of the competencies beforehand” rather than when deciding whether to terminate employment. Therefore, continues Jones, since he was never informed he would be evaluated according to these factors, the criteria were “hidden” and we should infer that the method USEC used to rate him was “subjective,” thus a pretext. Complainant’s Response Brief at 25; TR 159-161, 235-237.

But the record contains no evidence to support Jones’s argument that the purpose of the competencies was to inform employees what was expected and to train them on how to achieve the competencies. In fact, USEC specifically adopted and used the competencies in case it had to evaluate which employees to consider for an involuntary RIF. TR at 282-83. And, again, even more to the point, Jones adduced no evidence that USEC applied these competencies because of his protected activity. Therefore, we find that when USEC used the 13 defined criteria and the two functional/technical criteria, it employed a legitimate method to rate Jones and Craven.

Nor do we find evidentiary support for Jones’s contention that the manner in which USEC managers conducted the May 2000 RIF evaluations demonstrates retaliation for his protected activity. The record establishes that Starkey, Bucy, and Fowler, the managers who knew Jones and his work, “privately” and “independently” filled out the Candidate Selection Worksheet containing the trainer rating criteria. TR at 284-85. Each had the list that defined the competencies. CX 21(b). Shortly thereafter, the three managers met and agreed how they should rate Jones and Craven on each of the competencies listed on the Worksheet. TR 286. Their consensus resulted in Craven’s overall rating of 3.35 and Jones’s 1.38. CX 18. Jones characterizes the process as a “sham tribunal” but presented no evidence to rebut the manner in which the USEC managers decided to rate Craven ahead of him. Complainant’s Response Brief at 28. Therefore, we find that Starkey, Bucy, and Fowler utilized a reasonable and fair process to evaluate Jones and Craven.

Finally, to further his argument that his 1.38 overall RIF rating was unwarranted, Jones again relies upon several of the ALJ’s findings. The ALJ found that “the rating of Mr. Jones, of ‘1’ in ‘Integrity and trust,’ to have been totally at odds with his prior evaluations, in particular that of his mid-year evaluation three months earlier . . .” R. D. & O. at 38.⁷ Along the same lines, the ALJ found that the USEC managers’ consensus

⁷ Jones actually received a “2” rating for the “Integrity and Trust” competency. A “2” rating indicated “weakness” whereas a “1” meant “serious issue.” See CX 18.

ratings for the “knowledge of rules and regulations” and the “creativity” criteria “contradicted prior ratings.” *Id.* at 39.⁸

Close examination of the record, however, reveals that the low rating Jones received for the “Integrity and Trust” competency was not necessarily inconsistent with his mid-year evaluation. Prior to receiving his mid-year performance evaluation, Jones completed an “Employee Mid-Year Progress Assessment Input” form on January 12, 2000. CX 9. As previously discussed, this self-assessment form contained five performance factors, one of which is entitled “High Quality Human Resources.” One of the components of this performance factor is “Ethics Program Compliance.” Jones assessed his performance in complying with this component by writing: “No indication that ethics, honesty and integrity were in question.” *Id.*

When Fowler later wrote Jones’s mid-year evaluation in early February, he noted in the “High Quality Human Resources” performance factor section that Jones’s “integrity and honesty are ‘NEVER’ of question.” CX 10. It appears that Fowler may only have been responding to Jones’s earlier self-assessment that, with respect to complying with the company ethics program, his “ethics, honesty and integrity” were not in question. In any event, Fowler was not rating Jones on ethics, or honesty, or integrity independently, but rather was evaluating ethics program compliance.

When Starkey, Bucy, and Fowler prepared the RIF Candidate Selection Comparative Summary three months later, however, they did rate Jones on “Integrity and Trust.” This competency was defined: “Is widely trusted; is seen as a direct, truthful individual; can present the unvarnished truth in an appropriate and helpful manner; keeps confidences; admits mistakes; doesn’t misrepresent him/herself for personal gain.” CX 21(b).

While the mid-year report includes a component pertaining to complying with the company ethics program, it did not require that a supervisor evaluate an employee’s integrity and trust as those terms were defined for the RIF summary. The fact that Fowler favorably used the words “ethics, honesty and integrity” in February 2000 and then three months later contributed to the low consensus rating for “Integrity and Trust” thus does not establish that Fowler was necessarily inconsistent in his judgment of Jones, let alone that he was retaliating because of protected activity. And even if Fowler had actually been rating Jones for integrity and trust on the February mid-year report, and not merely been responding to Jones’s own assessment of his integrity, he was not overly impressed. Fowler gave Jones only a “meets goals/expectations” rating in the pertinent area of performance. Finally, since Jones’s RIF rating for “Integrity and Trust” represented a consensus of the three managers, we cannot find that the consensus view

⁸ Jones received a “1” rating for the “Knowledge of fed & state laws & regs (OSHA, A, DOT) & req’mnts necessary for NRC cert” competency. A “1” indicated “minimum proficiency.” He was rated “2” for “weakness” on the “Creativity” competency. *See* CX 18.

was necessarily inconsistent with Fowler's earlier "meets goals/expectations" opinion, since the former rested on the assessments and experiences of all three and was produced following an opportunity for discussion, while the latter reflected Fowler's solitary experience and view at an earlier time.

Furthermore, the record supports the "2" ("weakness") rating for "Integrity and Trust." "Integrity and Trust" means, in part, that an employee "admits mistakes." CX 21(b). Starkey was unequivocal about his experience with Jones's shortcomings in this area:

Q: Did Mr. Jones ever admit any mistakes to you, personal mistakes of his?

A: No, sir. All I heard for the most — I don't remember ever hearing that. What I kept hearing was I can't do this. I don't have this. I don't have that. Nobody will help me with this. All I heard was just excuse after excuse after excuse after excuse.

TR at 287. Therefore, Jones's "Integrity and Trust" rating did not clearly contradict his earlier mid-year evaluation.

On the other hand, we agree with the ALJ that the USEC managers rated Jones too low on the "Knowledge of rules and regulations" functional/technical competency when they gave him a "1" ("minimum proficiency"). Craven received a "3" ("exceeds expectations"), the next highest rating above a "1." The record supports the ALJ's finding that Jones was strong in this area. R. D. & O. at 39; TR at 48, 50, 171-72. Similarly, a preponderance of the evidence supports the ALJ's finding that Jones demonstrated creativity. Thus, we find USEC managers rated Jones too low on the "Creativity" competency when they gave him a "2" ("weakness"). See TR at 87, 161-163; CX 4. Craven received a "5" ("towering strength"), and deservedly so. See TR 286-289; JX 1 at 50-51.

Nevertheless, the fact that the USEC managers unjustifiably rated Jones only marginally below Craven in one of the 15 RIF criteria and three grades below Craven in another category, in which Craven excelled, does not compel us to infer that USEC discriminated because of protected activity. See *St. Mary's Honor Center*, 509 U.S. at 511, 519, 524. To prevail, Jones still must show by a preponderance of the evidence that Starkey, Bucy, and Fowler gave him a lower overall RIF score than Craven because of his protected activity. Jones did not make this showing.

CONCLUSION

We **DENY** Jones's complaint because he has not demonstrated that USEC discriminated against him and thus violated the ERA. That is, Jones did not prove by a preponderance of the evidence that his protected activity contributed to USEC's decision to RIF him, rather than Craven. This record does not support Jones's theory that his

managers set him up for termination by not training him properly, assigning Craven to the MIE program, ignoring him, and using an unfair, subjective method to evaluate him.

But even if Starkey, Bucy, and Fowler did not properly train Jones and did in fact shun him and unfairly evaluate him because they wanted Craven to run the MIE program, Jones would not prevail. He still must prove by a preponderance of the evidence that the USEC managers retaliated because of his protected activity, not because they preferred Craven. That USEC's reason for terminating Jones's employment might be unpersuasive or even "obviously contrived" does not mean that Jones succeeds here. "It is not enough . . . to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center*, 509 U.S. at 519, 524. *See also Gale v. Ocean Imaging and Ocean Resources, Inc.*, ARB No. 98-143, ALJ No. 1997-ERA-38, slip op. at 13 (ARB July 31, 2002) (We are not a "super-personnel department that reexamines an entity's business decisions," citing *Morrow v. Wal-Mart Stores, Inc.*, 152 F. 3d 559, 564 (7th Cir. 1998)).

Finally, because we have ruled against Jones, we need not decide the Complainant's Motion for a Stay of Execution, Motion to Enforce ALJ Order, and Revised Motion to Enforce ALJ Order. We also dismiss ARB No. 03-010, USEC's appeal of the recommended attorney's fee order, because it is moot.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge