



**In the Matter of:**

**CRAIG H. FRITTS,**

**ARB CASE NO. 03-073**

**COMPLAINANT,**

**ALJ CASE NO. 01-ERA-033**

**v.**

**DATE: February 28, 2005**

**INDIANA MICHIGAN POWER COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***John T. Burhans, Esq., Burhans Law Offices, St. Joseph, Michigan***

***For the Respondents:***

***Thomas A. Schmutz, Esq., Morgan, Lewis, & Bockius, LLP, Washington, D.C.***

### **FINAL DECISION AND ORDER**

Craig Fritts filed a complaint alleging that Indiana Michigan Power Company (I&M) terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003),<sup>1</sup> and its implementing regulations at 29 C.F.R. Part 24 (2004). After a seven-day hearing, a

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<sup>1</sup> The ERA 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 . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C.A. § 2011 et seq. (West 2003)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists, or participates in a proceeding under the ERA or AEA].” 42 U.S.C.A. § 5851(a)(1) (West 2003).

Department of Labor Administrative Judge (ALJ) found that Fritts had failed to prove that I&M fired him in retaliation for his whistleblower activities. Fritts appealed the ALJ's decision. For the following reasons, we affirm the ruling of the ALJ and deny the complaint.

## BACKGROUND

Because the ALJ's findings of fact are fair and include a detailed recitation of the evidence proffered on each allegation, we summarize only the main facts.

**Maintenance Rule Recovery Program** - I&M operated a nuclear power plant in Bridgman, Michigan. R. D. & O. at 5.<sup>2</sup> I&M's plant contained two nuclear reactors, each of which had been shut down since September 1997. *Id.* In January 1999, I&M began the process of restarting the reactors, and in June 2000 succeeded in starting the Unit 2 reactor. *Id.* at 6. I&M did not bring the Unit 1 reactor back on line until late December 2000. *Id.*

I&M hired Fritts in April 1999, and subsequently appointed him supervisor, *inter alia*, of the Maintenance Rule Program (MRP). *Id.* at 5-7. The Nuclear Regulatory Commission (NRC) requires each licensee to establish a maintenance rule program to track the performance of the systems, structures and components of the nuclear plant.<sup>3</sup> 10 C.F.R. § 50.65. Such a tracking and monitoring program ensures that adequate maintenance is being performed on all the plant's components, whether safety related or not. If a plant's MRP is found to be deficient, the licensee must correct the deficiencies or risk possible shutdown of the reactor. R. D. & O. at 8.

In April 2000, Fritts reviewed and approved a report stating that the plant's MRP was in compliance with the regulations; however, a few months later, the NRC found three MRP violations. *Id.* at 6, 10-11. To correct the problems the NRC found, in August 2000 I&M undertook a "recovery effort," called the Maintenance Rule Recovery Program (MRRP), and appointed Fritts to run it. *Id.* at 11-12.

**Performance Evaluation** - To evaluate its employees, I&M used a program entitled "Performance Assessment for Results" or PAR. *Id.* at 8. Under this system, supervisors rated employees on each of six standards and provided each employee with a

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<sup>2</sup> Documentary evidence will be referred to herein as "JX" for exhibits offered jointly, "CX" for exhibits offered by Complainant, and "RX" for exhibits offered by the Respondent. References to the ALJ's recommended decision are designated "R. D. & O." and those to the hearing transcript are "Tr."

<sup>3</sup> Each plant operator shall monitor the performance or condition of the plant's structures, systems or components, against established goals, in a manner sufficient to provide reasonable assurance that they are capable of fulfilling their intended functions. *See* 10 C.F.R. § 50.65(a)(1) (2004).

weighted score that placed him in one of four categories known as “Tiers.” Tier I represented the highest level of performance and Tier IV the lowest. *Id.* Personalized Action Plans were developed for each employee placed in Tier III or Tier IV, and these Action Plans required the employee to improve his performance within an allotted period of time. To meet the terms of his Action Plan, a Tier III employee was required to demonstrate “immediate, significant, and continuous” improvement in his performance. *Id.*

In August 2000, I&M evaluated Fritts’s performance under the PAR and rated him a Tier III employee. Because of his Tier III rating, I&M placed Fritts on a performance Action Plan. R. D. & O. at 11. On September 16, 2000, Fritts signed his PAR Action Plan which expressly indicated that he needed to meet the terms of the Plan within 90 days to retain his employment; that is, if he failed to make the necessary performance improvements in a timely fashion, his employment would be terminated. *Id.* at 13; JX 1 at 4-7. Randy Ebright, who supervised all of the engineering programs at the plant, including those under Fritts’s direction, supervised Fritts’s compliance with the PAR Action Plan. R. D. & O. at 11.

In an effort to have Fritts focus on the Action Plan requirements, in early September Ebright relieved Fritts of all responsibilities except supervising the Maintenance Rule Recovery Program, and on October 12, 2000, Ebright relieved Fritts of that supervisory responsibility as well. *Id.* at 13, 18. On that day, Ebright and William Lacey, the Director of Plant Engineering, met with Fritts to discuss his failure to demonstrate the required “immediate, significant, and continuous” improvement in his performance. After the meeting, Ebright informed Fritts that, although he would continue to work on the MRRP, Lenny Thornsberry would replace him as head of the program. *Id.* at 18.

**Termination** - After repeated problems with both Fritts’s work performance and with his continued failure to meet the terms of his Action Plan, Ebright met with members of management and with Human Resources personnel to discuss his desire to terminate Fritts’s employment. On October 26, 2000, he got the approvals he needed to begin the termination process. R. D. & O. at 19.

On November 30, 2000, Fritts “rolled out” the maintenance rule database and made it available for use by the systems engineers. *Id.* at 21-22. In his e-mail to management and those who worked on the database, Fritts described the data collection effort as a “monumental task completed WITH QUALITY.” *Id.* at 21; JX1 at 90 (emphasis in original). Fritts admitted that he had received complaints from the database users about the quality of the product. R. D. & O. at 22; Tr. at 483. On December 5, the supervisor of the systems engineers expressed in an e-mail to Ebright his frustration with the database. Specifically, he complained that the database was released 10 days late causing a difficulty with the engineering staff’s deadlines, and that, although Fritts had assured them the database was fully useable, it was not. *Id.* at 22. Fritts admitted during the hearing that he knew of the problems with the database when he “rolled” it out on November 30, 2000. Tr. at 722-725. Indeed, he testified that he had been aware of the

quality issues for several months but never informed management of his concerns. *Id.* at 720-725.

On December 5, 2000, Fritts told Ebright and Lacey that he needed to take the database out of commission to correct some problems, and on December 6, Fritts recalled the database. R. D. & O. at 22-23. On December 8, 2000, Ebright terminated Fritts's employment. *Id.* at 23.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Administrative Review Board (ARB) authority to review an ALJ's recommended decision in cases arising under the ERA. *See* 29 C.F.R. § 24.8 (2004).

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 a de novo review of the 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).

### **DISCUSSION**

To prevail, Fritts must prove by a preponderance of the evidence that he engaged in activity protected under the ERA, that I&M knew about the activity and took adverse action against him, and that his protected activity contributed to the adverse action. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 7-8 (ARB Sept. 30, 2003). As noted, the ERA whistleblower provisions protect an employee who notifies an employer about an alleged violation of the ERA. 42 U.S.C.A. § 5851(a)(1). The ERA does not protect every incidental inquiry or superficial suggestion that may possibly implicate a safety concern, but will protect workers who assert violations of statutes and regulations protecting nuclear safety. *See Makam v. Pub. Serv. Elec. & Gas Co.*, ARB No. 99-045, ALJ Nos. 98-ERA-22, 98-ERA-26, slip op. at 6 (ARB Jan. 26, 2001), citing *Am. Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

The ALJ found that certain aspects of the MRP implicated nuclear safety and that some of Fritts's actions regarding this Program were protected. R. D & O. at 32-35. Specifically, the ALJ found protected activity in Fritts's concurrence in the filed Condition Report because that Report addressed problems with the Spent Fuel Pit Cooling/Cleanup system. *Id.* at 12, 32-33; Tr. at 496; CX at 8. The spent fuel pool cooling system was provided to remove fuel assembly decay heat and prevent high temperature conditions in the spent fuel pool that could potentially reduce the effectiveness of the pool as a barrier to fission product release. JX 24 at 7. The ALJ also found that, because the quality of the finished Maintenance Rule Program implicated nuclear safety, Fritts engaged in protected activity when he voiced to his supervisors his concerns about the Program's completion schedule and resource allocation. R. D. & O.

at 33-34. In addition, the ALJ also found that I&M knew about the protected activity, and that the termination of Fritts's employment constituted an adverse action. *Id.* at 35-36. The record supports these findings.

After a detailed analysis, the ALJ rejected Fritts's claim that his protected activity was a contributing factor in the Company's decision to terminate his employment. Fritts argued that he had proved discrimination by showing: (1) the close temporal proximity of the protected activity and the termination; (2) I&M's deviation from established termination procedures; (3) the different treatment for Fritts compared to other Tier III employees; and (4) the hostility his supervisors exhibited toward him. *Id.* at 36-42.

The record supports the ALJ's conclusion that I&M did not discriminate. Because the ALJ's analysis is well-reasoned and thorough, we need only summarize his findings and conclusions.<sup>4</sup>

1. Fritts argued that the temporal proximity of his December 6 recall of the maintenance rule database to the December 8 employment termination indicated that one caused the other. On its face, this argument is appealing; however, a further look at the facts defeats the claim.

Fritts's December 6 recall of the maintenance rule database was not protected activity. As the ALJ correctly found, Fritts failed to show that his database recall would lead to a violation of nuclear laws or regulations or that the recall would put safety at risk. R. D. & O. at 35. Thus, because Fritts's actions on December 5 and 6 with regard to the recall did not implicate safety, they were not protected. Accordingly, Fritts cannot show that a "temporal nexus" existed between a protected activity and the adverse action.

2. Fritts argued that the December 8 termination was a "snap" decision made because of his database recall. In other words, Ebright and Lacey retaliated for the recall by terminating Fritts's employment without following normal procedures. R. D. & O. at 37. This argument also must fail.

The Company decided to terminate Fritts's employment nearly two months before December 8. Fritts's performance throughout the Fall 2000 was unacceptable. During this period, Ebright, Lacey and Thornsberry each documented in writing his difficulty with Fritts's work, with his poor communication skills and with his lack of

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<sup>4</sup> The ALJ also correctly concluded that, even if Fritts had succeeded in showing that his protected activity contributed to the termination of his employment, I&M would still have avoided liability because it proved "by clear and convincing evidence that it would have terminated Fritts due to poor performance." R. D. & O. at 42. An employer can avoid liability if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See* 42 U.S.C.A. § 5851(b)(3)(D).

professionalism. *Id.* at 13-17, 36-37. Each of these officials also testified to various situations in which Fritts performed badly. *Id.*

Moreover, the termination process followed I&M procedures. The unrefuted testimony is that on October 26, 2000, Ebright met with Lacey and another management official to discuss Fritts's performance. R. D. & O. at 38. Ebright made clear to these officials that, in addition to his poor work performance, Fritts was not meeting the terms of his PAR Action Plan. At that meeting, the officials agreed to terminate Fritts's employment, and after speaking with the Human Resources Manager, Ebright began to gather the documents needed to support the termination. *Id.* On November 11, 2000, nearly a month before Fritts recalled the database, Ebright drafted a letter firing Fritts. *Id.*; RX1. As the record clearly indicates, Ebright decided to terminate Fritts's employment, not on impulse, but as the culmination of a well-documented plan weeks in the making.

3. Fritts also maintained that he was treated less well than other similarly situated Tier III employees because of his protected activity. This, he argued, was further evidence that I&M discriminated against him. R. D. & O. at 39-40. According to Fritts, Bob Kalinowski, who also had a Tier III rating, was treated better because Kalinowski was not fired but only demoted. *Id.* at 39. Fritts's reliance on Kalinowski as a comparator is badly misplaced. The record shows that Kalinowski was demoted prior to receiving his Tier III rating and that he successfully completed his PAR Action Plan so termination was not warranted. *Id.*; JX 144.

Dominic So, on the other hand, was unsuccessful in completing his PAR Action Plan. Rather than firing him, however, I&M transferred him to another department after the initial 90-day Action Plan period. R. D. & O. at 39-40. Thus, So and Fritts were treated differently; but, contrary to Fritts's claim, the difference was not due to his protected activity. *Id.* When Vice President Michael Rencheck was presented with So's termination package for signature, he remembered that So had been successful in a previous assignment so he refused to concur in the termination and suggested reassignment to the job at which So had formerly been successful. *Id.* However, when presented with Fritts's termination package, Rencheck concurred because he had personally observed Fritts's work and had found it seriously wanting. Rencheck's previous interaction with Fritts had been so troubling that Rencheck had written a memorandum admonishing Fritts for misrepresenting facts and for unprofessional conduct. *Id.* at 10-11; JX 1 at 8.

4. Finally, to show that his protected activity contributed to his termination, Fritts insisted that the Unit 1 restart was contingent on the completion of the Maintenance Rule Recovery Project. R. D. & O. at 41. Thus, argued Fritts, his supervisors became hostile toward him because his requests for additional time to complete the MRRP threatened the scheduled Unit 1 restart. His quest for quality caused delays in the MRRP completion, and unless I&M fired him, the Unit 1 restart might be delayed. *Id.* Such delay would create huge financial penalties for the Company because the cost of the shutdown was, according to Fritts, approximately \$2 million per day. *Id.* at 6.

Although Fritts consistently argued that the restart was contingent on the MRRP completion, he offered nothing more than his own testimony in support of the argument. No other witness corroborated Fritts's position nor was there any documentary evidence on the point.<sup>5</sup> In fact, the witnesses who testified on the subject not only failed to support Fritts, they affirmatively testified that the restart of Unit 1 was in no way contingent on the completion of the MRRP.<sup>6</sup> Thus, the record fails to support Fritts's position on this point.

### CONCLUSION

The ALJ analyzed all the evidence and correctly applied relevant law. We have examined the record and conclude that it fully supports the ALJ's finding that Fritts failed to establish by a preponderance of the evidence that I&M violated the ERA when it terminated his employment. Thus, we **AFFIRM** the ALJ's finding and **DENY** the complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

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<sup>5</sup> In his Brief, Fritts cited the testimony of Eric Ballon as supporting his position that the NRC conditioned the restart on the MRRP completion. Compl. Brief at 9. But, on cross examination, Ballon clearly stated that he did not believe one was conditioned on the other "because the unit restarted prior to the full completion of the recovery effort." Tr. at 225.

<sup>6</sup> The witnesses who testified that the reactor restart was not contingent on the MRRP completion were Messrs. Dixon (Tr. at 328-329), Gebbie (Tr. at 927), Ebright (Tr. at 1172-1174), Lacey (Tr. at 1451), and Thornsberry (Tr. at 1599-1600).