



**In the Matter of:**

**TERRY W. KEENER,**

**ARB CASE NO. 04-091**

**COMPLAINANT,**

**ALJ CASE NO. 2003-ERA-12**

**v.**

**DATE: July 31, 2006**

**DUKE ENERGY CORPORATION,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Terry W. Keener, *pro se*, Gastonia, North Carolina**

***For the Respondent:***

**Donn C. Meindertsma, Esq., Matthew A. Houtsma, Esq., *Winston & Strawn LLP, Washington, District of Columbia***

**FINAL DECISION AND ORDER**

Terry W. Keener filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his former employer, Duke Energy Corporation, violated the employee protection provisions of the Energy Reorganization Act (ERA or Act) of 1974.<sup>1</sup> In his February 25, 2003 complaint, Keener claimed that his November 30, 2002 layoff was a result of having raised security concerns with a supervisor on September 5, 2001. OSHA denied Keener's complaint on May 12, 2003, and he subsequently requested a hearing before the Office of Administrative Law Judges.<sup>2</sup> On April 19, 2004, the administrative law judge (ALJ)

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<sup>1</sup> 42 U.S.C.A. § 5851 (West 2003).

<sup>2</sup> 29 C.F.R. § 24.4(d)(2), (d)(3) (2005).

issued a Recommended Decision and Order (R. D. & O.) dismissing the complaint. Keener appealed.<sup>3</sup> We concur with the ALJ's finding that Keener failed to establish that his protected activity was a contributory factor in his layoff. Accordingly, we affirm the ALJ's recommended decision and deny the complaint.

## BACKGROUND

We have carefully reviewed the record and find that it generally supports the ALJ's lengthy recitation of the facts.<sup>4</sup> Therefore, we will summarize the relevant facts of the case. Duke Energy Corporation's (DEC) business operations include three nuclear power plants in the Carolinas. The Oconee and Catawba Nuclear Stations are located in South Carolina and the McGuire Nuclear Station is located in North Carolina.<sup>5</sup> Keener worked for DEC approximately 23 years, beginning in December 1979 as a security officer.<sup>6</sup> From 1989 to 1996, he served as security manager at McGuire Nuclear Station.<sup>7</sup> In November 1996, Keener joined DEC's Nuclear General Office (NGO) in Charlotte, North Carolina, where he worked as a nuclear security specialist in the Nuclear Regulatory and Industry Affairs (NRIA) branch.<sup>8</sup> NRIA is located within the Nuclear Assessments and Issues Division (NAID), which during the relevant timeframe was headed by James J. Fisicaro.<sup>9</sup>

On September 5, 2001, Keener met with Fisicaro to discuss rumors he had recently heard regarding William Evans, the then-current security manager at McGuire Nuclear Station.<sup>10</sup> Keener reported that Evans had not submitted his shoes for x-ray

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<sup>3</sup> Because Keener is a *pro se* appellant, we construe his petition and briefs liberally. But we are also mindful of our duty to remain impartial, and thus, we must refrain from becoming an advocate for the *pro se* litigant. See *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-47, slip op. at 2 (ARB Apr. 26, 2005); *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9-10 (ARB Feb. 28, 2003).

<sup>4</sup> R. D. & O. at 4-22.

<sup>5</sup> Joint Stipulations 2.

<sup>6</sup> Hearing Transcript (TR) at 28, 50-51.

<sup>7</sup> JS-5.

<sup>8</sup> *Id.*

<sup>9</sup> JS 6; TR at 295-296.

<sup>10</sup> Complainant's Exhibit (CX)-1, at 1.

examination when passing through the personnel access portal.<sup>11</sup> Apparently, Evans had twice set off the walk-through metal detector, and a third electronic search with a hand-held device had detected the presence of metal in his shoes.<sup>12</sup> Richard “Gary” Reid, the security officer conducting the search, reportedly had instructed Evans to remove his shoes and process them through the x-ray machine.<sup>13</sup> But instead of complying with Reid’s instructions, Evans had picked up various items he previously removed from his pockets and proceeded to enter the protected area.<sup>14</sup> Keener further reported that he had heard that Evans had returned to the personnel access portal a short time later and had processed his shoes through the x-ray machine as initially instructed.<sup>15</sup>

A second, unrelated incident involved Evans reportedly being observed sleeping at a security post.<sup>16</sup> Lastly, Keener reported he had heard that the operational instructions given by Evans were sometimes in conflict with security requirements and that because of apparent intimidation by Evans, some personnel were reluctant to inform him of the disparities.<sup>17</sup> Keener advised Fiscaro he “had no specific information that would indicate that the rumors were true or when they supposedly occurred.”<sup>18</sup> According to Keener, Fiscaro said he would follow up on the rumors and get back to Keener.<sup>19</sup>

On September 12, 2001 - a day after the terrorist attacks in Pennsylvania, New York City and Washington, D.C. - Keener sent Fiscaro an e-mail entitled “Security Rumors.”<sup>20</sup> He wanted an update from Fiscaro about their earlier conversation regarding the rumors of security violations at McGuire Nuclear Station. Within the hour, Fiscaro responded by e-mail indicating he would get back to Keener.<sup>21</sup> Keener further indicated

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; TR at 366.

<sup>14</sup> CX-1 at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

that a week passed before the two next spoke about the rumors involving Evans. On or about September 19, 2001, Keener claimed to have encountered Fiscaro in the hallway and questioned him about his follow-up of the security rumors.<sup>22</sup> According to Keener, Fiscaro told him he had spoken with McGuire safety assurance manager Bryan J. Dolan, who had looked into the matter and determined it was nothing more than rumors.<sup>23</sup>

In late October 2001, Michael T. Cash became manager of NRIA.<sup>24</sup> Keener reported to Cash, who in turn reported to Fiscaro.<sup>25</sup> Soon after joining the NGO staff, Cash, at Fiscaro's urging, reviewed NRIA's overall organizational structure and conducted an inquiry into the services provided by Keener and a colleague, William R. Cross, also a NRIA nuclear security specialist.<sup>26</sup> The process culminated in the elimination of the positions held by Keener and Cross and the creation of a new security support position within NRIA.<sup>27</sup> This newly-created position was open to other DEC employees. The two incumbents, Cross and Keener, were both considered for the new position, but Cash recommended that the position be offered to Dana L. Boies, an engineer then assigned to the Catawba Nuclear Station.<sup>28</sup> Fiscaro approved Cash's recommendation, and on October 7, 2002 Cash notified Keener and Cross that they were being laid off effective November 30, 2002.<sup>29</sup>

Keener timely filed his complaint on February 25, 2003.<sup>30</sup> OSHA denied the complaint and Keener requested a hearing.<sup>31</sup> The hearing covered a period of four days from October 14 to 17, 2003. Keener testified, as did Cash and Fiscaro.<sup>32</sup> Security

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<sup>22</sup> CX-2, at 1

<sup>23</sup> CX-2.

<sup>24</sup> JS-7.

<sup>25</sup> JS-8.

<sup>26</sup> JS-8; TR at 304, 307, 311, 424-425.

<sup>27</sup> JS-9. The process occurred over a period of months and included input and guidance from DEC's human resources department and other security-related personnel from each of the three nuclear stations.

<sup>28</sup> Respondent's Exhibit (RX)-24; JS-9; TR at 534.

<sup>29</sup> TR at 534; JS-10.

<sup>30</sup> RX-72.

<sup>31</sup> RX-73.

<sup>32</sup> TR at 27-270, 295-322, 408-672, 783-842.

officer Reid and his immediate supervisor, George L. Nichols Jr., testified about the failure by Evans to submit his shoes to x-ray examination, and Dolan testified regarding his lack of knowledge about the incident.<sup>33</sup> Additionally, Elizabeth G. Rabon, DEC's current Director of Human Resources, testified regarding her involvement in developing the new security position and the interview and selection process.<sup>34</sup> Also, DEC employees Terry W. King and Charles J. Thomas testified regarding their respective roles in the selection process for the new NRIA security position.<sup>35</sup>

Reid confirmed Keener's account of Evans' failure to submit to x-ray examination of his shoes.<sup>36</sup> He also testified that Evans returned less than an hour later to have his shoes x-rayed.<sup>37</sup> Reid could not recall the date of the incident, but estimated that it had occurred in 1999 or 2000.<sup>38</sup> Nichols, Reid's supervisor, testified that when Reid brought the matter to his attention he immediately went to Evans' office and requested that he go back and process his shoes.<sup>39</sup> Evans complied with the request and Nichols took no further action.<sup>40</sup>

Keener claims that Fiscaro told him he had spoken with McGuire safety assurance manager Dolan regarding the rumors about Evans.<sup>41</sup> In his deposition Dolan said he did not recall any discussions with Fiscaro about Evans' alleged security breach.<sup>42</sup> Keener's then counsel called Fiscaro in his case in chief, but did not question him about the September 5, 2001 conversation or any subsequent conversations with

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<sup>33</sup> TR at 366-396. Dolan did not testify at the ALJ's hearing, but was deposed by Keener's counsel on August 27, 2003. CX-57.

<sup>34</sup> TR at 323-354; 748-772

<sup>35</sup> TR AT 673-747. From January 2000 to April 2001, Thomas was the manager in charge of NRIA and he directly supervised both Keener and Cross. TR at 675-676.

<sup>36</sup> TR at 367-370.

<sup>37</sup> *Id.* at 381.

<sup>38</sup> *Id.* at 373.

<sup>39</sup> *Id.* at 390.

<sup>40</sup> *Id.* at 390-391, 393.

<sup>41</sup> CX-2 at 1.

<sup>42</sup> CX-57 at 45-47.

Keener about the Evans rumors.<sup>43</sup> Keener's counsel also did not question Fiscaro about individuals he may have spoken with regarding Keener's September 5, 2001 complaint.<sup>44</sup>

Fiscaro testified that he initiated the process that ultimately led to Keener's layoff some 13 months later.<sup>45</sup> Fiscaro asked Cash to "look at the whole organization," including the services Keener and Cross provided.<sup>46</sup> Fiscaro also sought input from the security assurance managers at DEC's three nuclear power facilities.<sup>47</sup> Part of his concern was that there was insufficient work to keep both Keener and Cross busy.<sup>48</sup> At Fiscaro's request, the workload issue had been the subject of an earlier review by Thomas in 2000 and 2001.<sup>49</sup> Fiscaro testified that aside from initiating the fall 2001 review process, he did not define any requirements of the security position, but expected Cash to define the exact qualifications.<sup>50</sup> Fiscaro also testified that he reviewed the skills and list of accountabilities as well as the salary for the new position, but denied being involved in "every step of the process" that led to the creation of the new security position.<sup>51</sup> He explained that Cash would "periodically come in and brief" him on what he was doing, but Fiscaro "did not require [Cash] to get [his] approval on every single piece."<sup>52</sup> Although critical matters required his approval, Fiscaro testified that he

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<sup>43</sup> TR at 295-322.

<sup>44</sup> *Id.*

<sup>45</sup> TR at 304.

<sup>46</sup> *Id.* at 311. According to Fiscaro, there were three or four particular areas where the organization needed to do a better job and as a new manager it would be part of Cash's duties to figure out how to resolve the issues or fix the items. *Id.* Although Fiscaro did not provide the exact date when he first discussed with Cash the need to reevaluate, among other things, the security function in NRIA, Fiscaro testified that the discussion occurred prior to Cash's transfer to NRIA in October 2001. *Id.*

<sup>47</sup> *Id.* at 304.

<sup>48</sup> *Id.* at 313.

<sup>49</sup> *Id.* at 312-314; CX-48. Based on his review, Thomas believed there could be a "lessening of the security support function in NRIA." TR at 678. Indeed, his report stated that "the current level of security support should be 0.86 FTE." CX-48 at 2. However, Thomas' recommendations were not implemented prior to his departure from NRIA in April 2001. *Id.* at 683.

<sup>50</sup> *Id.* at 307.

<sup>51</sup> *Id.* at 317-319.

<sup>52</sup> *Id.* at 318-319.

expected Cash to go through the process, do the necessary reviews and then “periodically provide [him] feedback.”<sup>53</sup>

Cash’s testimony confirmed that he spearheaded the position review process. He characterized Fiscaro’s involvement in designing the new security support function as “minimal.”<sup>54</sup> While Cash had “one or two update meetings” with Fiscaro at critical points in the process, Cash directed the day-to-day activities that ultimately led to Cross and Keener being laid off.<sup>55</sup> Cash assumed his position in NRIA in late October, but he first spoke with Fiscaro about the position on September 10, 2001.<sup>56</sup> Cash testified that he and Fiscaro had a series of initial discussions in fall 2001 about work functions within NRIA and it was during one of these discussions that Fiscaro asked Cash “to review the functions being performed in the organization” and to provide any new ideas he might have on how things might be better.<sup>57</sup> With respect to the security arena, Cash testified that Fiscaro wanted him to take a look at the level of resource commitment as well as the products and services provided.<sup>58</sup> Cash further testified that any time he came to a job he would look broadly at what type of work was being performed and whether it made sense to the company.<sup>59</sup>

According to Cash, Keener and Cross performed what appeared to be very similar job functions and they had essentially taken the workload and split it between themselves.<sup>60</sup> Cash testified that Fiscaro did not direct him to reduce the number of available positions and did not instruct him to remove Keener from any security responsibilities.<sup>61</sup> Cash explained that he developed the new security position as the result of a confluence of outside events and input from security personnel at DEC’s nuclear facilities.<sup>62</sup> He also testified about the significant impact that the events of

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<sup>53</sup> *Id.* at 318.

<sup>54</sup> *Id.* at 510.

<sup>55</sup> *Id.*; CX-49.

<sup>56</sup> TR at 426.

<sup>57</sup> *Id.* at 424-425.

<sup>58</sup> *Id.* at 425.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 424.

<sup>61</sup> *Id.* at 426, 432.

<sup>62</sup> *Id.* at 437-443, 465.

September 11, 2001 had on security issues and particularly on questions of structural integrity regarding nuclear power facilities.<sup>63</sup> Because of these factors, Cash felt the need to meld both security and engineering skills into the NRIA security support position.

With respect to the candidate review process, Cash testified that he conducted an independent assessment of the candidates that did not include Fiscaro's participation.<sup>64</sup> Cash, with two other DEC employees, conducted panel interviews and unanimously agreed that Boies was the best candidate to fill the new position.<sup>65</sup> In Cash's opinion, Keener did "poorly" in comparison to the candidate selected for the position.<sup>66</sup> Fiscaro approved the selection of Boies based on Cash's recommendation.<sup>67</sup> On October 7, 2002, Cash notified both Cross and Keener that Boies had been selected for the new position and they were being laid off effective November 30, 2002.<sup>68</sup>

Cash testified that throughout the position review and candidate selection process he was unaware that Keener had spoken with Fiscaro in September 2001 about rumors concerning McGuire security.<sup>69</sup> Rabon, King and Thomas, who were involved at various stages in the 13-month-long process, also testified that they were unaware of Keener's September 5, 2001 conversation with Fiscaro.<sup>70</sup>

On April 19, 2004, the ALJ issued a Recommended Decision and Order dismissing the complaint because Keener failed to establish that protected activity was a contributory factor in his layoff. Keener filed a timely appeal with the Administrative Review Board (ARB or Board) on April 28, 2004. The issue to be resolved is whether protected activity was a contributing factor in DEC's October 7, 2002 decision to lay off Keener.

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<sup>63</sup> *Id.* at 444, 448-449.

<sup>64</sup> *Id.* at 509-510.

<sup>65</sup> *Id.* at 534.

<sup>66</sup> *Id.* at 524.

<sup>67</sup> *Id.* at 534.

<sup>68</sup> JS-10; RX-46.

<sup>69</sup> TR at 535, 560.

<sup>70</sup> *Id.* at 697, 725, 737, 761.



## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board.<sup>71</sup> As the Secretary's designee, the Board acts with all the powers the Secretary would possess in rendering a decision under the ERA's whistleblower protection provision.<sup>72</sup> Because of the advisory nature of the ALJ's recommended decision, the Board is not bound by the ALJ's findings of fact and conclusions of law. Therefore, the Board exercises *de novo* review with respect to the instant appeal.<sup>73</sup> In performing its review, the Board generally defers to the ALJ's determinations with respect to the credibility of witnesses when such determinations rest explicitly on the evaluation of the demeanor of the witness.<sup>74</sup>

## DISCUSSION

Under the ERA's employee protection provision, it is unlawful for an employer to "discharge . . . or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" notified his employer of an alleged violation of the ERA, refused to engage in any practice unlawful under the ERA, or otherwise participated in a proceeding or any other action to carry out the purposes of the ERA.<sup>75</sup>

To prevail under § 5851, an employee must establish by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer subjected him to an unfavorable personnel action; (3) the employer was aware of the protected activity; and (4) the protected activity was a contributing factor in the employer's decision to take adverse action.<sup>76</sup> However, relief may not be granted under the Act if the employer

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<sup>71</sup> 29 C.F.R. § 24.8; *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>72</sup> *See* 5 U.S.C.A. § 557(b) (West 1996); *Hibler v. Exelon Generation Co.*, ARB No. 05-035, ALJ No. 2003-ERA-9, slip op. at 18 (ARB Mar. 30, 2006).

<sup>73</sup> *Hibler*, slip op. at 18-19 at n. 149; *Shirani v. ComEd/Exelon Corp.*, ARB 03-100, ALJ 2002-ERA-28, slip op. at 2 (ARB Sept. 30, 2005).

<sup>74</sup> *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 9 (ARB July 31, 2001); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51, slip op. at 12; n. 14 (ARB June 29, 2006).

<sup>75</sup> 42 U.S.C.A. § 5851(a). The regulations implementing the ERA's whistleblower protection provision are found at 29 C.F.R. Part 24.

<sup>76</sup> *Hibler*, slip op. at 19; *Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-7, slip op. at 3 (ARB July 30, 2004).

demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence” of the protected activity.<sup>77</sup>

### **I. Keener’s Alleged Protected Activity**

The ALJ found that only one of the three issues Keener raised with Fisicaro on September 5, 2001 constituted protected activity. According to the ALJ, Keener’s report of Evans’ rumored failure to submit his shoes to x-ray examination was protected under the Act.<sup>78</sup> The ALJ concluded that other incidents involving Evans’ alleged sleeping on the job, his occasional issuance of faulty operational instructions and intimidation of subordinates were “too general” to warrant protected status.<sup>79</sup> On appeal, the parties continue to disagree whether Keener’s September 5, 2001 conversation constituted protected activity.<sup>80</sup> We need not determine whether, or how much of, that conversation was protected activity because we deny Keener’s complaint on other grounds.

### **II. Adverse Action & DEC’s Knowledge**

Neither party contests the ALJ’s findings that DEC’s October 7, 2002 notice to Keener of his forthcoming layoff was an adverse action, and that DEC, through Fisicaro, had knowledge of Keener’s protected activity.<sup>81</sup> We therefore proceed to discuss whether Keener’s protected activity contributed to his layoff.

### **III. Did Keener’s Protected Activity Contribute to His Layoff?**

Keener bears the burden of establishing by a preponderance of the evidence that protected activity was a contributing factor in DEC’s decision to take adverse action.<sup>82</sup> A complainant may satisfy his burden of proof by demonstrating the employer’s motivation through circumstantial evidence of discriminatory intent.<sup>83</sup> In his submissions to the Board, Keener focused on Fisicaro’s actions, and in some instances his failure to act, as

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<sup>77</sup> 42 U.S.C.A. § 5851(b)(3)(D).

<sup>78</sup> R. D. & O. at 23.

<sup>79</sup> *Id.*

<sup>80</sup> Complainant’s Rebuttal Brief at 3; Respondent’s Brief at 28, n.16.

<sup>81</sup> R. D. & O. at 23-25.

<sup>82</sup> 29 C.F.R. 24.7(b). *Hibler*, slip op. at 19; *Hasan*, slip op. at 3.

<sup>83</sup> *Desert Palace v. Costa*, 539 U.s. 90, 99-100(2003). *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

circumstantial evidence that the November 2002 layoff was retaliatory.<sup>84</sup> Keener first argues that the timing of Fiscaro's request to review the NRIA security position and Fiscaro's questionable explanation for initiating the review are indicative of retaliatory intent. Keener also points to Fiscaro's delayed response and the limited feedback he provided regarding the investigation of Evans' rumored security lapses. Additionally, Keener argues that the lack of any investigation and Fiscaro's false statement that he had followed up on Keener's concerns is further evidence of retaliatory intent. Lastly, Keener argues that Fiscaro's retaliatory intent is evident by the decision to withhold approval of Keener's annual performance appraisal until after another individual was identified for the new security position.

A. *Temporal Proximity*

Retaliatory motive "may be inferred when an adverse action closely follows protected activity."<sup>85</sup> Thus, the Board considers the proximity of the adverse action to the time the employer learned of the protected activity.<sup>86</sup> But when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action.<sup>87</sup>

Keener notes that Fiscaro initiated the NRIA security support position review within six weeks after he reported the rumors about Evans.<sup>88</sup> Because there was a high degree of temporal proximity between the initiation of the position review and his report to Fiscaro, Keener appears to argue that he established retaliatory intent.<sup>89</sup> The ALJ addressed this argument and surmised that an inference of causation could be raised based on the close proximity between Keener's complaint and Fiscaro's initiation of the

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<sup>84</sup> Complainant's Brief at 26; Complainant's Rebuttal Brief at 8.

<sup>85</sup> *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 10 (ARB Sep. 30, 2003).

<sup>86</sup> *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1, slip op. at 8 (ARB July 31, 2001). An inference of causation becomes less likely as the elapsed time becomes longer. *See Evans v. Washington Public Power Supply Sys.*, ARB No. 96-065, ALJ No. 1995-ERA-52, slip op. at 2 (ARB July 30, 1996) (the Board held that a lapse of approximately one year was too much to justify an inference of causal relationship between the protected activity and the adverse action).

<sup>87</sup> *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 6-7 (ARB Apr. 28, 2006); *Tracanna*, slip op. at 8.

<sup>88</sup> Complainant's Brief at 21.

<sup>89</sup> *Id.* at 21-23.

position review that ultimately led to Keener's layoff.<sup>90</sup> The ALJ found, however, that there were two intervening events that severed the causal connection between the protected activity and the November 30, 2002 layoff.<sup>91</sup> The ALJ identified the terrorist acts of September 11, 2001 and Cash's October 2001 appointment as head of NRIA as intervening events that severed any causal connection between Keener's protected activity and his termination.<sup>92</sup> Keener disagrees with the ALJ's finding that these particular intervening events impacted DEC's decision to terminate his employment.<sup>93</sup>

While we agree that the circumstances do not warrant a finding of causal relationship based on temporal proximity, we disagree with the ALJ's analysis. Fiscaro's fall 2001 initiation of the position review process was not an adverse action because it was not "materially adverse" to Keener's terms and conditions of employment.<sup>94</sup> The NRIA security position review was innocuous in and of itself. Regardless of Fiscaro's motives for initiating the position review, there is no reasonable basis in the record upon which to conclude that this initial step would inevitably have resulted in the creation of a new security position, the elimination of Keener's and Cross' positions, and Keener's non-selection for the new position. Because Fiscaro's initiation of the position review was not an adverse action, we need not consider whether the reasons Fiscaro offered for the position review were a pretext for discrimination. Therefore, Keener's argument that Fiscaro's reasons were such a pretext is inapposite. In any case, the position review occurred more than 180 days prior to Keener's complaint, and is therefore time-barred.<sup>95</sup> (Keener does not allege, nor does the record demonstrate that there was a hostile work environment.)<sup>96</sup>

The October 7, 2002 notification of Keener's non-selection, and consequent layoff, is the only adverse action on which we can focus. As noted, temporal proximity focuses on the gap between the date of the protected activity and the date of the adverse action. Here there is a 13-month lapse between the two relevant dates, which in the circumstances of this case does not by itself warrant a finding of causal relationship. In addition to the two intervening events found by the ALJ, there were at least three other

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<sup>90</sup> R.D. & O at 33.

<sup>91</sup> R. D. & O. at 33-34.

<sup>92</sup> *Id.*

<sup>93</sup> Complainant's Brief at 28-29; Complainant's Rebuttal Brief at 8-9.

<sup>94</sup> *See Burlington N. & S. F. R. Co. v. White*, 548 U.S. \_\_\_, slip op. at 13 (2006), 126 S.Ct. 2405, 2415..

<sup>95</sup> 29 C.F.R. § 24.3(b)(2).

<sup>96</sup> *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-118 (2004).

significant intervening events - Cash's decision to alter the number of positions in NRIA and the nature of the NRIA function, Cash's subsequent decision to make the single position a new position (and thus open to all employees), and the panel's unanimous selection of Boies as the recommended candidate for the new NRIA position. Thus, because of the lapse of time and a number of independent intervening events, Keener has not established causal relationship based on temporal proximity.<sup>97</sup>

*B. Fiscaro's Involvement*

[Keener does not dispute] that DEC terminated Keener and Cook's employment because Fiscaro approved the selection of Boies for the new security position.<sup>98</sup> Keener argued below that he should have been selected instead of Boies. However, the three-member panel that interviewed both Keener and Boies unanimously agreed that Boies was better suited for the new security position. As noted previously, Keener's arguments on appeal focus primarily on Fiscaro's motivation for initiating the NRIA security position review, which ultimately led to Keener's layoff. According to Keener, absent Fiscaro's initiation of the position review, he would not have been terminated. He also argues that every action taken by Cash was a direct result of Fiscaro's directions to review the NRIA security support function.<sup>99</sup>

Even if Fiscaro had retaliatory animus in initiating the security support function review – a question we need not decide – Keener does not argue, nor does the record support, that Fiscaro at all influenced the decision to restructure NRIA. Cash testified that Fiscaro's role was "minimal."<sup>100</sup> And as Keener appears to concede, there is no evidence that protected activity contributed to Cash's decision to restructure NRIA. The record also does not support a finding that Fiscaro was either responsible for or otherwise influenced the designation of the one remaining NRIA security position as a new position, thus opening the job to all interested DEC applicants.<sup>101</sup> Also significant is the absence of evidence indicating that Fiscaro influenced the panel's decision to recommend Boies for the new NRIA security support position.

Although Fiscaro was aware of Keener's protected activity, there is no indication from the record that he shared this information, and particularly Keener's identity as the

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<sup>97</sup> *Tracanna*, slip op. at 8; *Evans*, slip op. at 2.

<sup>98</sup> TR at 534; RX-46.

<sup>99</sup> Complainant's Brief at 26-28; Complainant's Rebuttal Brief at 9 nn. 15-16.

<sup>100</sup> TR at 510.

<sup>101</sup> Thus, Keener's argument that he was more qualified than Cross is unavailing. Keener appears to concede that he was not more qualified than Boies.

source of the rumors about Evans, with anyone,<sup>102</sup> including those who selected Boies. The ALJ found that Cash, King, Thomas and Rabon, who were variously involved in the process of creating the new position and selecting Boies, “credibly testified” they were unaware of the alleged safety violations Keener reported to Fiscaro.<sup>103</sup> Keener has not presented any probative evidence that contradicts or otherwise calls into question the reliability of the testimony provided by Cash, King, Thomas and Rabon concerning their respective knowledge of any protected activity. Cash, King and Thomas, who ranked Boies as the best candidate for the new position, also testified they were not influenced by Fiscaro or anybody in the selection process and Keener adduced no evidence to the contrary.<sup>104</sup> Therefore, we leave the administrative law judge’s credibility findings undisturbed and conclude that Cash, King, Thomas and Rabon were unaware of Keener’s protected activity; there is no basis upon which to conclude that any of their actions were improperly motivated by protected activity. Moreover, while Fiscaro initiated the NRIA security support function review, Keener presents no evidence to make us doubt the administrative law judge’s finding that there was no evidence that Fiscaro influenced the subsequent decision-making process that ultimately resulted in Boies, selection and the displacement of Keener and Cross. Fiscaro’s mere approval of the panel’s selection, without more, does not constitute sufficient influence to prove retaliatory animus under these circumstances.

#### **CONCLUSION**

Keener has not established that protected activity was a contributing factor in DEC’s decision to lay him off. Accordingly, we affirm the April 19, 2004 Recommended Decision and Order and **DENY** Keener’s complaint.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**A. LOUISE OLIVER**  
**Administrative Appeals Judge**

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<sup>102</sup> According to Keener, Fiscaro told him that when he spoke with McGuire safety assurance manager Dolan about the rumors he did not mention Keener’s name. CX-2.

<sup>103</sup> R. D. & O. at 23.

<sup>104</sup> *Id.* at 532, 694, 734, 736.