In the Matter of:

MICHAEL MCNEILL, **ARB CASE NO. 02-002**

COMPLAINANT, **ALJ CASE NO. 2001-ERA-3**

v. **DATE: July 29, 2005**

CRANE NUCLEAR, INC.,
AND LIBERTY TECHNOLOGIES, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John T. Burhans, Esq., ***Burhans Law Offices, St. Joseph, Michigan***

For the Respondent:
Marty Denis, Esq., ***Barlow, Kobata & Denis, Chicago, Illinois***

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Energy Reorganization Act (ERA or the Act), which makes it unlawful for a nuclear industry employer to retaliate against an employee who reports nuclear safety violations.[1] A

[1] *See* 42 U.S.C.A. § 5851(a)(1)("No 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.), refuses to engage in a practice made unlawful by the ERA or AEA,

Continued . . .

Labor Department Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) holding that Respondents Crane Nuclear, Inc., and Liberty Technologies, Inc., violated the Act by firing Complainant Michael McNeill. We reverse and deny the complaint.

BACKGROUND

In 1999, McNeill was working as a pump mechanic at the D. C. Cook nuclear power station in Bridgman, Michigan. McNeill's employer, Crane, operated under a contract with the power station's owner, American Electric Power (AEP).[2]

On Wednesday morning, February 10, 1999, McNeill and another pump mechanic, Paul Pappalardo, refused to lubricate a pump motor because they thought the written job instructions ("the work package") were incomplete. Crane project coordinator Woody Hall told Pappalardo to complete the assignment or go home. McNeill, who heard what Hall said to Pappalardo, thought that Hall was firing him and Pappalardo. McNeill and Pappalardo went directly to the Nuclear Regulatory Commission (NRC) office located at the power station to complain that Hall had fired them for invoking their right to refuse to work with deficient written instructions. Shortly after lunch, Cook security officers escorted McNeill and Pappalardo out of the station's restricted area and took McNeill and Pappalardo's unescorted access badges.

Crane field service manager Marcus Boggs reached McNeill and Pappalardo by phone before they left the Cook station. Boggs told both McNeill and Pappalardo that he, Boggs, was taking the next plane to Bridgman to investigate the situation and that they would remain on Crane's payroll while Boggs determined what had happened. Boggs arrived in Bridgman the next day, Thursday, and again called McNeill and reiterated that his employment was not terminated. By Friday, Boggs had concluded that Hall should not have tried to discipline McNeill and Pappalardo for refusing to work with the written instructions. Boggs removed Hall from the Cook project and arranged with AEP for

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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].")

[2] In 1997, Liberty Technologies, Inc., (Liberty) contracted with AEP to repair pumps. Liberty hired McNeill in 1998 to work on the pump crew at D. C. Cook. Crane later purchased Liberty, made Liberty a division of Crane, and took over Liberty's contract with AEP. Crane retained Liberty's pump crew at D. C. Cook, and Crane managers assumed management responsibility for them. Tr. 13-15, 771; RX 8. Thus, for simplicity's sake, we refer to the two companies interchangeably as "Crane."

resumption of Pappalardo and McNeill's unescorted access effective Monday, February 15.

Over the weekend and on Monday the fifteenth, Boggs personally, and through Pappalardo and McNeill's supervisors, assured the men that they still had their jobs with Crane at Cook. Pappalardo returned to work, but McNeill refused. On Wednesday, February 17, Crane terminated McNeill's employment effective February 15, 1999, for failing to return to work.

In April, McNeill filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Crane violated the ERA whistleblower protection provision because it fired him on February 10 after he refused to work with written instructions that he considered incomplete. After an investigation, OSHA determined that McNeill's complaint had no merit because it found that Crane did not fire McNeill on February 10 and because his refusal to complete the pump assignment was not safety-related. ALJ EX 1. Thereafter, McNeill invoked his right to a hearing before a Labor Department ALJ.[3] The ALJ concluded that Crane violated the ERA because it fired McNeill on February 10 after he had engaged in protected activity. The ALJ recommended that McNeill be awarded back pay, compensatory damages, and attorney fees. *McNeill v. Crane Nuclear, Inc.*, ALJ No. 2001-ERA-0003 (ALJ Oct. 4, 2001).

McNeill also filed a state common law whistleblower and breach of contract complaint in Michigan state court on April 15, 1999. RX 3. The case was removed to federal district court. The U. S. District Court, applying Michigan law, granted Crane's motion for summary judgment. *McNeill v. Crane Nuclear, Inc.*, No. 1:99-CV-417 (W.D. Mich. May 18, 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 (2004). *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 reviews the ALJ's recommended decision de novo. *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*

[3] *See* 29 C.F.R. §§ 24.4(d)(2), (3) (2004).

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* Attorney 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"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera*, 340 U.S. at 492-497; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

ISSUES

1. Does the district court summary judgment for Crane bar McNeill's ERA whistleblower claim against Crane?

2. Did McNeill prove by a preponderance of the evidence that he engaged in protected activity?

3. Did McNeill prove by a preponderance of the evidence that Crane took adverse action against him?

DISCUSSION

1. Res Judicata

Crane argues that under the principle of res judicata, the district court's judgment against McNeill on his state common law whistleblower complaint bars his ERA whistleblower complaint in the Labor Department because he could have brought the ERA whistleblower complaint in the district court. Crane O. Br. at 43-44.

"The preclusive effects of former adjudication are referred to collectively by most commentators as the doctrine of 'res judicata.'" *Carson v. DOE*, 398 F.3d 1369, 1375 n.8 (Fed. Cir. 2005). Res judicata consists of "issue preclusion" and "claim preclusion." Issue preclusion refers to relitigation of a matter that has been litigated and decided. This is also referred to as direct or collateral estoppel. Claim preclusion refers to litigation of a matter that never has been litigated but could have been litigated in an earlier suit. *Id.*, citing *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 77 n.1 (1984). *Cf. Paynes v. Gulf States Utils. Co.*, ARB No. 98-045, ALJ No. 93-ERA-47, slip op. at 3-4 (ARB Aug. 31, 1999).

Crane invokes only claim preclusion, arguing that McNeill could have litigated his ERA whistleblower complaint in district court but since he did not do so, he may not litigate it now in the Labor Department. But the Act provides that, "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section, may, within 180 days after such violation occurs, file . . . a complaint with the Secretary of Labor. . . ." 42 U.S.C.A. § 5851(b)(1). The Secretary may then investigate the complaint and must afford the complainant an opportunity for a hearing on the record. *Id.* at § 5851(b)(2)(A). Thus, the Act does not create a private cause of action directly enforceable in federal court. Only after exhausting the statutorily prescribed administrative remedies may the complaint enter federal court, and then only on an appeal from the Secretary of Labor's final order. *Id.* at § 5851(c)(1); *Gundersen v. Nuclear Energy Servs., Inc.*, No. 92-ERA-48 (Sec'y Jan. 19, 1993). Therefore, McNeill could not have litigated his ERA whistleblower complaint along with his state common law whistleblower complaint in federal court, and the federal court's judgment does not bar the instant case.[4]

2. The Merits of McNeill's Complaint

Under the ERA, an employer may not "discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activity. 42 U.S.C.A. § 5851(a)(1). To establish that Crane violated § 5851, McNeill must prove by a preponderance of the evidence that he engaged in activity the Act protects, that Crane knew about the activity, that Crane discharged or otherwise discriminated against him, and that his protected activity was a contributing factor in the adverse action Crane took. If McNeill fails to establish any one of these elements, we must dismiss his complaint. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 7-8, (ARB Sept. 30, 2003).

[4] On January 12, 2004, Crane filed Respondent's Second Supplemental Motion to Dismiss and Supplement the Record. Crane argued that a second judgment by the U. S. District Court that issued *McNeill v. Crane Nuclear, Inc.*, No. 1:99-CV-417 (W.D. Mich. May 18, 2000), bars the instant case. Crane sought to supplement this record with a copy of the district court's second judgment and order, *McNeill v. Crane Nuclear, Inc.*, No. 1:03-CV-44 (W.D. Mich. Nov. 17, 2003). The November 17, 2003 district court order disposes of a complaint McNeill brought against Crane when Crane sought to collect costs the court had awarded it in the original litigation. This second district court action has no relevance whatever to McNeill's ERA whistleblower complaint. Accordingly, we deny Crane's motion to dismiss and supplement the record.

A. Protected activity

On February 10, Crane pump crew supervisor Tom Brown assigned a three-man crew to lubricate bearings and couplings on a pump motor in the containment building. The crew consisted of crew leader Pappalardo, McNeill, and a helper. Tr. 130.

Lubricating a pump motor is routine maintenance. Tr. 110, 113. Both Pappalardo and McNeill had performed this job innumerable times in their 30-plus years of experience, and McNeill could have performed it without guidance from anyone. Tr. 644, 653. However, because this pump was located in a nuclear power station, they had to work according to written instructions called a "work package." Tr. 136.

AEP planners created the work package. Tr. 902. Planners created work packages by determining which plant procedures applied to a particular repair and identifying any necessary permits. The planners made work packages for even routine jobs to assure that they were performed in generally the same manner every time. Tr. 73, 101-102.

Planners tried to strike a balance between providing enough detail and too much detail. Tr. 83, 106. In choosing the level of detail to include in a job order, the planner took into consideration the complexity of the job and the "skill of the craft," or level of skill a competent worker could be expected to bring to bear. "The workers work to a certain skill level. And writing every single step down isn't what both the worker wants, the planner wants, that's no[t] how they spend their productive time, writing down steps that are not valuable, value-added steps." Tr. 108. Regardless of the level of detail, AEP and Crane encouraged workers to report deficiencies in maintenance work packages. Tr. 250, 768.

As part of their pre-job preparation, Pappalardo and McNeill were supposed to go to the containment building and actually look at the pump motor to establish whether the details in the work package and conditions at the pump matched. They were also supposed to confirm that safety precautions spelled out in the package had been taken (such as disconnecting the motor from electric power) and record those findings in the paperwork. Tr. 17, 137, 148, 161. If, after reviewing all the paperwork, personally inspecting the pump, and completing all required pre-job safety steps, they were clear about how to accomplish the assignment, they could begin work. If, however, they were uncertain about any aspect of the assignment, they were to seek guidance from Brown. Tr. 164, 924.

The instructions for the lubrication assignment specified the equipment that would be needed: a medium Allen pack, flashlight, 6" common screwdriver, rags and bags. CX 10 p. CR 0037. The package also specified that the job should be accomplished in a three-step sequence:

1. Lubricate pump bearings using a grease gun with Mobilith SHC 100.

2. Remove coupling cover, hand pack coupling using Mobilith SHC 100, and reinstall cover.

3. Document any additional information that would enhance the repeat of this activity.

CX 10 p. CR0032.

Pappalardo had been assigned this job five or six times before but could never do the work because the motor had been removed from the pump. Therefore, there were no bearings or couplings to lubricate. Tr. 901, 905. On February 10, however, Brown told Pappalardo that he thought the motor might have been reinstalled. Tr. 13.

Pappalardo and McNeill began to review the written instructions. Tr. 147-148. But before they read all the instructions or inspected the pump to determine whether the motor had been installed and if so, its condition, Pappalardo and McNeill decided that the instructions were deficient. Tr. 14-20, 240, 629. A proper lubricating job includes removing the old grease before hand packing new grease. Tr. 576-577. But in McNeill's view, the work package did not authorize him to remove old grease because it did not contain the words, "remove old grease." Tr. 616-618. Pappalardo thought the instructions should also specify the amount of new grease to apply. Pappalardo Deposition at 28-30. McNeill and Pappalardo believed they could be fired or even jailed for taking an action the work package did not authorize. Tr. 227, 267, 274, 278 (McNeill); Pappalardo Deposition at 30, 57-58. Pappalardo therefore told Brown that they could not do the job and the written instructions should be sent back to AEP's planning unit so it could insert the missing words. Tr. 238.[5] Brown told Pappalardo and McNeill that they could remove old grease based on the existing language, but Pappalardo and McNeill insisted they could not. Brown took the issue to Woody Hall, the Crane project coordinator. Pappalardo Deposition at 22-25.

When Hall looked over the package and saw that Pappalardo and McNeill were complaining before they had reviewed the entire package or knew whether the motor was installed and had old grease in it, he became angry. Hall had given Pappalardo and

[5] McNeill and Pappalardo were incorrect in insisting that AEP planners had to rewrite the work package. In general, AEP rules authorized supervisors to amplify or clarify written instructions orally or by writing on the instructions themselves. The question about this particular work package – whether the men could remove old grease before packing fresh grease – was the type of question that AEP rules permitted a supervisor to clarify on the spot, orally or in writing. Tr. 96, 100, 106, 115.

McNeill training one month earlier in which he had instructed them not to engage in piecemeal review of a work package. He had emphasized that the entire pre-job exercise – reviewing all parts of the work package, visiting the assignment site, and identifying all questions and problems – should be completed before workers took any concerns to the supervisor. Tr. 906-920.

The fact that Pappalardo and McNeill were insisting that they could be disciplined if they removed old grease and that the only solution was to send the package back to planning also perturbed Hall. He thought Pappalardo and McNeill were not acting in good faith. He thought the men were angry over the fact that earlier in the week he had instructed the entire crew to stop taking work packages directly to Planning whenever they had concerns but instead to go to their supervisors, who would decide whether to send the package back to planning. Tr. 221, 225, 234, 925. Hall instructed Brown to tell the men to complete the assignment "using skill of craft." Tr. 924-925. Brown passed on the message, but McNeill and Pappalardo still insisted the instructions were deficient and absolutely refused the assignment. Tr. 238.

The Legal Framework

Section 5851(a) lists six protected activities, two of which might apply here. When an employee "notifie[s] his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954," or when an employee participates "in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954," the employee is protected.[6] But the ERA does not protect activities that do not implicate the safety purposes of the Act. "To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically." *Makam v. Public Serv. Elec. & Gas Co.*, ARB No. 99-045, ALJ Nos. 98-ERA-22, 98-ERA-26, slip op. at 5 (ARB Jan. 30, 2001); *American Nuclear Res. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

The Parties' Arguments

McNeill contends that his refusal to work was protected because the pump in question was part of the containment building's safety system, and removing grease without written authorization would have violated Cook and NRC procedures. McNeill Br. at 13. The ALJ ruled that McNeill's refusal to work was safety related because the motor in question was part of the nuclear power safety system. R. D. & O. at 21-30.

Crane argues that McNeill's refusal to work was not safety related, and therefore not protected activity, because the condition of the motor bearings and couplings – if the motor had even been reinstalled – does not definitively and specifically implicate nuclear safety. According to Crane, failing to remove old grease from the motor could affect

[6] 42 U.S.C.A. §§ 5851(a)(1)(A), (F).

nuclear safety only if an improbable string of mishaps occurred. Crane O. Br. at 5-7. Moreover, Crane asserts, McNeill never told Brown or Hall that he was concerned about safety; indeed, McNeill did not describe any safety concerns until he testified at the hearing. His sole reason for refusing to do the job was fear of being disciplined for exceeding written instructions. Crane O. Br. at 7-9.

Relying on McNeill's and other witnesses' testimony about the pump's safety function, the ALJ concluded that McNeill's refusal to work on it with a defective work package was protected activity. R. D. & O. at 49.

We find that the pump motor was an integral part of the containment building's auxiliary safety system. For that reason, complaints about its proper maintenance could qualify as protected activity. On the other hand, we also find that the only reason McNeill gave for refusing to lubricate the motor and insisting that "remove old grease" be added to the written instructions was fear of being disciplined. McNeill expressed no concern about the safe operation of the pump. Tr. 644-645, 653. Nor did McNeill show that removing the old grease based on the instructions as they were written would have violated any safety rules. Thus, McNeill's objections to the assignment were not clearly related to nuclear safety. Nevertheless, because we find that McNeill failed to establish another essential element of his complaint, we will assume without deciding that he engaged in protected activity.[7]

B. Adverse Action

As discussed above, after Brown had relayed Hall's instructions that McNeill and Pappalardo use "skill of craft" to complete the pump assignment, McNeill and Pappalardo insisted they did not know what "skill of craft" meant and refused to perform

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[7] McNeill testified he made other protected complaints about work packages that Hall also received with disfavor. Tr. 203-221. Crane objected to this testimony on the ground that it was irrelevant to McNeill's complaint about the events of February 10. Tr. 175-176. The ALJ admitted this testimony over Crane's objections. Tr. 197-201. Crane argues that the ALJ erred both in admitting the testimony and in finding that McNeill's other complaints related to nuclear safety. Crane O. Br. at 41-42; Crane Rebuttal Br. at 12.

We agree with Crane that McNeill's testimony about other complaints is too vague to support the finding that they were safety related or that Hall's responses showed discriminatory intent. Even if the ALJ erred in admitting this evidence, however, the error is de minimis. Hall himself testified he was angry with McNeill on February 10 because of McNeill's complaints about the work package. Evidence that Hall had been displeased with McNeill before for making similar complaints adds nothing to the question for decision, viz., whether Hall's instructions to go home on February 10 constituted a termination from employment.

the work. Brown then went back to Hall and reported what happened. Pappalardo Deposition at 22-25. This time, Hall told Brown to send Pappalardo in to him. Hall was at his desk inside a trailer. Tr. 927-930. Pappalardo came in alone. Tr. 929. When Pappalardo told Hall he did not know what Hall meant by "skill of craft" and that the NRC could fire him if he removed the old grease, Hall told Pappalardo to go home. "If you are not going to do it, go home." Pappalardo Deposition at 30.

Pappalardo came out of the trailer and told McNeill, who had been standing outside and out of hearing, "I think we were fired. I think he told us to do the job or go home." Pappalardo Deposition at 31. McNeill was incredulous, so Pappalardo went back in. Standing just inside the trailer door, Pappalardo asked Hall, "Woody, did you fire us?" Hall replied: "Well, if you are not going to do the job using skill of craft, I don't need you here. Go home." *Id.* at 36.

A few months earlier, Hall had "sent home" the entire Crane crew, including Pappalardo and McNeill. Tr. 931. The workers had become angry during an all-crew meeting, and Hall thought they were too upset to be reliable in their work. So he sent them home for the rest of the day. *Id.* At that time, Pappalardo and McNeill, like everyone else Hall sent home, understood that they would not be paid for the rest of the day but did not think Hall had fired them. Pappalardo Deposition at 32-34; Tr. 455, 462 (McNeill). They came to work the next day without incident. Tr. 455, 462 (McNeill). Despite this experience, McNeill took Hall's response to Pappalardo as an "affirmative response" when Pappalardo asked Hall if they had been fired. Tr. 246. Pappalardo and McNeill then marched from Hall's trailer to the NRC office on site to complain that they had been fired for objecting to a deficient work package. Tr. 247-248; Pappalardo Deposition at 36.

While McNeill and Pappalardo were on their way to the NRC office, Hall was still inside the trailer, waiting to hear from McNeill about his objections. When McNeill didn't show up, Hall left the trailer to look for him and was told that McNeill and Pappalardo had last been seen heading for the NRC. Tr. 931-932. At that point, Hall went to John Boesch, AEP's maintenance supervisor, to let him know that two Crane employees had gone to NRC about an AEP work package. Tr. 932, 934-935.

AEP's Access Control Unit controlled employee access to Cook's restricted area. Tr. 822-823. Around 11:00 to 11:30 a.m., Access Control learned that Pappalardo and McNeill were complaining to the NRC that their employment had been terminated. Access Control placed administrative holds on Hall, Brown, Pappalardo, and McNeill's access to the restricted area. Tr. 822, Tr. 941. Placing an administrative hold on a worker means that the owner or operator of the facility programs its security system not to accept the employee's access badge for entry to the restricted area. Tr. 823-824. Administrative holds are temporary and do not terminate the employee's access clearance. *Id.* Nuclear facilities routinely place administrative holds on employees who are involved in an "incident." Tr. 727. Unescorted access clearances and administrative holds are recorded in a personnel access data system (PADS) that all nuclear power plant facilities use. *Id.*

From the time AEP placed administrative holds on the workers' unrestricted access until they left the restricted area, AEP security personnel escorted McNeill and Pappalardo. Tr. 257. When McNeill and Pappalardo left the restricted area shortly after noon, the security guards took their unescorted access badges. Tr. 259.

McNeill and Pappalardo went from the restricted area to the AEP Employee Concerns trailer. Tr. 260. At about 12:45 p.m., while McNeill and Pappalardo were filing complaints with Employee Concerns, Crane field service manager Marcus Boggs reached them by phone. Tr. 261, 427. He was calling from Seattle, Washington. Boggs had learned about the incident from Boesch, who called Boggs on his cell phone. Boesch told Boggs that McNeill, Pappalardo and Hall had all been escorted off site, that McNeill and Pappalardo had gone to the NRC, and that McNeill and Pappalardo were at that moment in the Employee Concerns trailer. Tr. 715-718.

Both men told Boggs they did not know what was going on. Tr. 719. Boggs told them that he heard from Boesch that there had been a "termination incident." Boggs told McNeill and Pappalardo that they were not fired and were still on Crane's payroll. Boggs said that he would be taking the next plane to Michigan to find out what had happened, and that he wanted to meet with them as soon as he got to Michigan. Tr. 717-718 (Boggs); 428-432 (McNeill); Pappalardo Deposition at 39-40.

Boggs arrived in Bridgman on Thursday evening, February 11. He immediately called McNeill at home. Tr. 719. Boggs testified that he told McNeill: "[I]f he thought he was terminated, he wasn't. . . . If he felt Woody had fired him, Woody did not have that authority. And that as far as I was concerned, I overrode Woody, he was still working for Crane." Tr. 720-721. Boggs also told McNeill that he would be meeting with Access Control the next day to have McNeill's administrative hold lifted, and that Boggs would let McNeill know when to return to the Cook facility. Tr. 720.

On Friday, Boggs replaced Hall with a new project coordinator, arranged with Access Control to lift the administrative hold on Pappalardo and McNeill's unescorted access at Cook, and instructed Hall's replacement to call McNeill and tell him to report to work on Monday. Tr. 723-724, 725, 726, 729. Boggs also met with all Crane employees at D. C. Cook to reassure them that Crane would not take action against them for raising concerns about work packages and that Crane fully supported McNeill and Pappalardo. He arranged refresher training for all Crane employees at Cook about their right to make safety complaints and about Crane's policy against "retaliation, harassment or discrimination against persons raising safety or other concerns about operations or quality within AEPNG." CX 13 p. CR 0005. With the supervisors, Boggs reviewed their limits of authority and lines of communication. *Id.* Throughout this period Boggs consulted with and followed direction from Wayne Prokop, Crane's Director of Operations in Georgia. Prokop Deposition at 54-58; CX 14.

The following Wednesday, February 17, Boggs sent Boesch a memo detailing all the actions he had taken. In this memo, Boggs wrote that Hall had terminated McNeill

and Pappalardo's employment but that Crane had kept the employees on the payroll and that "the termination was rescinded." CX 13. Similarly, on February 22, Boggs wrote Prokop that Hall had terminated McNeill and Pappalardo's employment, that Boggs had kept them on the payroll while he investigated, and that after investigating, he told McNeill and Pappalardo the termination was wrongful and they should return to work. CX 14.

McNeill was aware of all of Boggs's efforts. Tr. 440. Boggs, Brown, and Hall's replacement called him on Friday, Saturday, Sunday and Monday to tell him Crane was standing behind him, that Hall had been replaced, and McNeill should report to work. Tr. 272, 298, 427-428, 449. Boggs and Brown also called Pappalardo and told him to report for work. Pappalardo Deposition at 41-45.

Nonetheless, McNeill steadfastly refused to return. Tr. 435, 270, 298, 435, 442, 446-447, 449. Instead of meeting with Boggs or entering into a full discussion with Boggs on the phone, McNeill told him he had hired a lawyer and Boggs should talk to his lawyer. Tr. 433, 436, 442, 446-447, 721-722. McNeill testified that he did not return because he was furious with Brown for not standing up for him, he was afraid someone might try to make him do something illegal, and he would not have been allowed into the restricted area without his access badge. Tr. 353, 434, 655. Pappalardo, on the other hand, agreed to return to work. Pappalardo Deposition at 41-45. When he did, he completed some forms, and Access Control lifted his administrative hold and returned his access badge. *Id.* at 70.

On February 17, Prokop terminated McNeill's employment for failure to report to work on February 15. Prokop Deposition at 87; Tr. 732; CX 24.[8] On the same day,

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[8] The ALJ found that Crane gave inconsistent reasons for terminating McNeill's employment, citing two unemployment compensation notices that Ms. Fregeolle, Crane's Director of Human Resources in Georgia, issued. R. D. & O. at 33. On March 3, 1999, she issued a separation notice form that gave as the reason for termination, "lack of work." On March 24, 1999, she issued a corrected notice that gave as the reason for termination, "employee failed to return to work as directed." CX 23.

The ALJ plainly regarded the inconsistency as evidence against Crane. But he did not discuss the evidence showing how the inconsistency came about. That evidence precludes an inference adverse to Crane. The Human Resources Director issued the first notice as a matter of routine along with a batch of others, simply assuming the reason for termination and not knowing anything about the McNeill case. When she received notice that McNeill had filed an unemployment claim in Washington State reporting that he had been discharged, she asked Prokop about the matter. When she learned that Prokop had terminated McNeill's employment, she issued the corrected notice. Fregeolle Deposition at 13-14.

Crane notified Cook Access Control that the company had laid off McNeill and Hall effective February 10, and therefore Cook could revoke their unescorted access to the plant. RX 50; Tr. 827-832. Access Control then revoked McNeill and Hall's unescorted access to Cook and entered this information into PADS. Tr. 829-834; RX 51.

The Parties' Arguments

A complainant seeking relief under § 5851 must prove that his employer took an "unfavorable personnel action" against him in retaliation for his involvement in protected safety activity. *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995). A "personnel action" pertains to the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C.A. § 5851(a)(1).[9] *See Griffith v. Wackenhut Corp.*, ARB No. 98-057, ALJ No. 97-ERA-52, slip op. at 9-10 (ARB Feb. 29, 2000). An unfavorable or adverse personnel action means a tangible adverse employment action such as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *See Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 20 (ARB Feb. 28, 2003). As we have already indicated, to prevail, McNeill must prove by a preponderance of the evidence that Crane took a tangible adverse action against him. *See Kester*, slip op. at 8.

McNeill argues that Crane took adverse action by firing him on February 10. McNeill Br. at 3, 14-15. We construe McNeill's argument to be that Hall in effect said, "McNeill is fired," by saying "go home" in response to Pappalardo's question, "Woody, did you fire us?" McNeill Br. at 15. McNeill further argues that Crane admitted that Hall fired McNeill. On this point McNeill relies heavily on Boggs's February 17 memo to Boesch (CX 13), in which Boggs wrote that Hall "terminated" McNeill and that the termination was wrongful. *Id.* at 18, 38-39. McNeill also argues that when another nuclear power plant sought to confirm McNeill's claim that Crane fired him on February 10, Boggs confirmed McNeill's account. *Id.* at 15, citing CX 25. Finally, McNeill argues that his employment was terminated because within one or two hours of Hall's statement, AEP Access Control put an administrative hold on McNeill's access to the restricted area at Cook, and the security guards took his security badge. McNeill Br. at 17.

Crane argues that McNeill did not prove by a preponderance of the evidence that Hall fired him on February 10. Crane disputes the proposition that telling Pappalardo to go home was the equivalent of saying, "You and McNeill are fired." Crane O. Br. at 15.

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[9] Subsection 5851(b)(3)(C) uses the term "unfavorable personnel action." We have used the comparable term "adverse action" as convenient shorthand for the larger formulation expressed in § 5851(a)(1) – "discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment."

In any event, Crane argues, Hall could not fire McNeill because Hall had no authority to fire anyone. Crane R. Br. at 5. Crane cites Hall, Boggs, and Prokop's testimony that only Prokop had firing authority, and even Prokop had to consult with Human Resources to fire someone. *Id.* Crane also relies on the undisputed evidence that it kept McNeill in pay status until Monday, February 15, when McNeill told Boggs for the third time that he would not come back to work. *Id.*

Finally, Crane contends that Boggs's February 17 memo to Boesch (CX 13) should have been excluded from evidence under Federal Rule of Evidence 407 and OALJ Rule of Evidence 18.407. Crane O. Br. at 37. Rule 407 provides for exclusion of "subsequent remedial measures as proof of culpability."[10] Crane contends that Boggs's memo was intended to describe remedial measures Crane was taking in the wake of the incident.

The ALJ determined that Hall fired McNeill. He regarded Hall's words to Pappalardo as the equivalent of a termination notice. And he viewed Boggs's (CX 13) memo to Boesch as not only impeaching Boggs, Hall, and Prokop's testimony that Hall lacked termination authority, but also as proving that McNeill's employment had, in fact, been terminated. R. D. & O. at 31-32, 53-54.

Hall's Words

McNeill did not prove that Hall, by what he said to Pappalardo, terminated McNeill's employment. Hall's actual words to Pappalardo do not support a finding that Hall fired McNeill, since "go home" is not the equivalent of "you're fired," especially given the earlier "go home" incident. Furthermore, Hall did not speak to McNeill. Thus, even if Hall had authority to fire McNeill, his statement would not be evidence that he exercised it against McNeill.

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[10] Rule 407 provides as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Boggs's Memo (CX 13)

We reject Crane's argument that Boggs's memo to Boesch should have been excluded on the ground that it concerned subsequent remedial measures. The memo was, at least in part, used in an attempt to impeach Boggs, Hall and Prokop's testimony that Hall lacked firing authority. Tr. 1036-1037. Since evidence of subsequent remedial measures used for impeachment is an express exception to Rule 407, the ALJ properly admitted CX 13.

As for the content of the memo, Boggs testified that when he wrote to Boesch, his goal was to show AEP that Crane was a responsible employer who did not retaliate against workers who complained about work packages and that Crane had taken all necessary steps to assure that nothing like this incident would recur. Tr. 750. He used the word "terminate" because that was the word everybody at the Cook station – Boesch, McNeill, Employee Concerns – was using. "I wasn't going to introduce any new phrase or terminology into trying to describe the incident." Tr. 745. Boggs also testified that he had not consulted a lawyer and had no idea that referring to the incident as a termination could have legal significance. Tr. 746.

The ALJ attached great weight to CX 13. He found that it rendered Boggs's testimony implausible. "Respondents' denial under oath of the obvious literal meaning of those words relating to the fact of termination can only be described as willful, premeditated and incredible, and I so find and conclude." R. D. & O. at 53-54. He also found that it constituted irrefutable evidence that McNeill had been fired. "CX 13 establishes beyond doubt that Complainant was terminated for refusing to work on a job order activity that required additional steps." *Id.* at 32.

But we find that Boggs's memo and similar documents are not inconsistent with testimony that Hall lacked authority to fire McNeill. In his memo to Boesch, Boggs was clearly intent on damage control. Tr. 744. Boggs plainly wanted to distance Crane the company from Hall the individual and show AEP that it could trust Crane not to repeat Hall's mistake. Whether Hall merely told Pappalardo and McNeill to "go home" or actually fired them was irrelevant to Boggs's purpose, since Boesch and Employee Concerns had made it clear that employee complaints about work packages were not grounds for discipline of any kind. Tr. 741-742, 750, 773; CX 13.

Given the context, Boggs's use of the word "termination" is not a sound reason for discounting Boggs, Hall, and Prokop's consistent and plausible testimony that Crane employees could not be fired without Prokop's clearance and input from Human Resources. Indeed, that testimony is corroborated by documentary evidence showing that Liberty hired McNeill from its corporate offices in Charleston, South Carolina, RX 8, and Crane hired and then fired him from its corporate offices in Kennesaw, Georgia. CX 23, CX 24, CX 29; RX 18. Moreover, the fact that both men remained in pay status and both testified that Boggs – Hall's superior – told them early and often that they were not fired supports the Boggs-Hall-Prokop testimony that Hall had no power to fire McNeill or Pappalardo.

The Administrative Hold-Access Badge Argument

McNeill's argument that the administrative hold and confiscation of his access badge are evidence that Crane fired him is misplaced. First, as Pappalardo's return to work at Cook demonstrated, Boggs had arranged with Access Control to lift the administrative holds and return the access badges when McNeill and Pappalardo returned and filled out the necessary paperwork. McNeill testified that no one told him that he was cleared to return to the restricted area. Tr. 656. But Boggs testified that he did give McNeill this information. Tr. 786-788. Given the extent of Boggs's efforts to undo the damage Hall had done to Crane, McNeill, and Pappalardo, and McNeill's admittedly hostile attitude toward Boggs, we find Boggs's testimony more plausible than McNeill's. Thus, the real reason McNeill's hold was not lifted and his badge returned on Monday was McNeill's decision not to go to the plant.[11]

In addition, McNeill's argument confuses the relationship between his employment status and his unrestricted access. AEP controlled McNeill's access to the restricted area. Crane controlled McNeill's employment relationship with Crane. Tr. 844. To be sure, AEP would terminate a worker's access to its restricted area based on information that the restricted area contractor no longer employed the worker. This is, in fact, what AEP did when Crane notified Access Control that it had terminated McNeill's employment at Cook for failure to return to work on February 15. Tr. 826, RX 60; RX 51. But AEP's administrative hold did not sever McNeill's employment relationship with Crane. Tr. 844-845. Only Crane or McNeill could sever that relationship.

In sum, we find that McNeill did not prove by a preponderance of the evidence that Crane terminated his employment because neither Hall's words to Pappalardo, nor Boggs's use of the word "termination," nor the administrative hold and confiscation of McNeill's access badge evidence termination.[12]

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[11] McNeill claims that as a result of Hall's actions his job prospects at nuclear facilities have been handicapped; henceforward he must report that his unrestricted access clearance was denied at Cook. McNeill Br. at 28. But the record does not support this claim. McNeill's clearance was not denied; the administrative hold had no effect on his clearance status. Tr. 823. Moreover, when McNeill reported to a prospective employer that Crane fired him for complaining about a work package, the prospective employer made inquiries and then hired him. Tr. 359-362; RX 44.

[12] On June 6, 2003, Crane filed Respondent's First Supplemental Motion to Dismiss and Supplement the Record. Crane moved to supplement the record in the instant administrative law proceeding with a status report McNeill had filed in U. S. District Court in Docket No. 1:03-CV-44. *See* note 4, *supra*. Crane asserted that in the status report McNeill made threats against Crane, its counsel, and its managers and requested that we dismiss the

Continued . . .

The Griffith Case

In *Griffith v. Wackenhut*, ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000), the NRC notified Wackenhut, a nuclear power plant security contractor, that its staff had committed a security breach. Wackenhut sent an investigative team to the power plant to evaluate the situation. The investigators found additional security violations and at first decided to suspend without pay the employees who were involved. By the second week of their investigation, however, the inspectors concluded that the security breaches were systemic and due partly to management failures. At that point, the inspectors rescinded most of the suspensions.

Marianne Griffith was involved in one of the security breaches that the investigators evaluated. Wackenhut suspended her for three days without pay and also decided to issue a written reprimand. But on the first day back from her three-day suspension, Griffith's supervisor told her that the suspension was being rescinded, her lost pay would be restored, and all records of the discipline would be expunged from her personnel file. *Id.*, slip op. at 7.

Griffith filed an ERA whistleblower complaint alleging that Wackenhut had suspended her because she reported a security breach. Wackenhut defended, in part, on the ground that it had unilaterally, immediately, and completely rescinded the suspension and made Griffin whole. *Id.*, slip op. at 2. The Board concluded that Griffith had failed to establish a necessary element of her case; namely, that the disciplinary action Wackenhut took against her adversely affected her compensation, terms, conditions or privileges of employment. The Board found that though the suspension and threatened reprimand caused Griffith three days of anxiety about her employment status, she did not suffer financial harm or a negative effect on her employment or earning capacity because the Wackenhut officials had so quickly and thoroughly corrected the situation when they realized that they had erred in imposing discipline. Therefore, the Board dismissed Griffith's complaint because the suspension and reprimand were not "adverse." *Id.*, slip op. at 10-11.

The circumstances of this case are comparable to those in *Griffith.* On Wednesday, February 10, Hall told Pappalardo to go home at about 10:00 a.m. By 1:00 p.m., Boggs was on the phone with McNeill, telling him that he was not fired. By close of business on Friday, Boggs had cleared the way for McNeill to report to work on Monday. McNeill lost no pay, and Boggs's actions made clear to everyone that Crane supported McNeill's right to object to a work package. Unlike Marianne Griffith, who

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proceedings as a sanction against McNeill. In the alternative, Crane asserts, we should take McNeill's threats into consideration in deciding what relief McNeill might be entitled to in this ERA whistleblower case. Having determined that the complaint in this case must be dismissed on its merits, we deny Crane's motion as moot.

waited three days to learn that her suspension without pay was rescinded, McNeill knew within hours that Boggs had rescinded Hall's action.

It might be argued that from 1:00 p.m. on Wednesday, McNeill faced the possibility that Boggs might conclude, after his investigation, that McNeill had been wrong to refuse the work package and recommend that Prokop ratify Hall's decision to fire McNeill. But that possibility ceased to exist, at the very latest, on Friday afternoon, when Boggs sent word to McNeill to come to work on Monday as usual. We find that this second interval of uncertainty did not adversely affect McNeill.

Therefore, even if we agreed with the ALJ that Hall had authority to and did "terminate" McNeill's employment on the 10th, that action did not cause any significant change in McNeill's employment status. Like Griffith, McNeill suffered, at most, only temporary unhappiness because Boggs immediately and thoroughly aborted any adverse consequences when he recognized Hall's error. Thus, since Hall's act was not adverse, McNeill cannot prevail.

CONCLUSION

Though McNeill may have engaged in protected activity when he refused to lubricate the pump motor, he did not prove by a preponderance of the evidence a necessary element of his case; namely that Crane, through Hall, terminated his employment. And even if Hall had the authority to and did "terminate" McNeill's employment, this action was not adverse. As a result, we **DENY** McNeill's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge