UNITED STATES OF AMERICA
RAS 8343 NUCLEAR REGULATORY COMMISSION **DOCKETED 08/18/04**

COMMISSIONERS: **SERVED 08/18/04**

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

Tennessee Valley Authority	Docket Nos.	50-390-CivP; 50-327-CivP
(Watts Bar Nuclear Plant, Unit 1		50-328-CivP; 50-259-CivP
Sequoyah Nuclear Plant, Units 1 & 2		50-260-CivP; 50-296-CivP
Browns Ferry Nuclear Plant, Units 1, 2 & 3)		

CLI-04-24

MEMORANDUM AND ORDER

In LBP-03-10, a split Atomic Safety and Licensing Board upheld the NRC Staff's finding that the Tennessee Valley Authority ("TVA"), an NRC licensee, had violated 10 C.F.R. § 50.7 by discriminating against an employee, Mr. Gary L. Fiser, on account of his "whistleblowing" activities. The majority, however, reduced by 60 percent the $110,000 civil monetary penalty assessed by the Staff.[1] The third member of the Board filed a separate opinion, concurring in part and dissenting in part.[2] In CLI-03-9, we granted TVA's Petition for Review of LBP-03-10 and sought briefs from TVA, the NRC Staff and *amicus curiae* Nuclear Energy Institute ("NEI").[3] Based on our review of the appellate briefs and the record, we affirm the Board's Initial Decision in part, reverse it in part, and remand the case for further proceedings consistent with this Memorandum and Order.

[1] 57 NRC 553, 558-608 (2003). Unless otherwise indicated, we will henceforth refer to the majority's Initial Decision as the decision of "the Board."

[2] *See id.* at 609-17 ("partial dissent"), interpreting the facts differently from the majority and concluding that the Staff had not met its burden of proof to show discrimination against Mr. Fiser.

[3] 58 NRC 39 (2003).

BACKGROUND

This case arises out of the NRC Staff's issuance of a Notice of Violation[4] and, later, an order imposing a $110,000 civil monetary penalty against TVA.[5] The Staff's order found that, in 1996, TVA had violated 10 C.F.R. § 50.7 by retaliating against Mr. Fiser for having engaged in protected whistleblowing activities. The alleged retaliatory actions were TVA's refusal in the Summer of 1996 to "pre-select" Mr. Fiser as a Chemistry Program Manager for Sequoyah and TVA's subsequent selection of a candidate other than Mr. Fiser for that same position. Under section 50.7(a), protected activities include providing the Congress, the Commission or the employee's company with information about alleged violations of the Atomic Energy Act (AEA)[6] and/or the Energy Reorganization Act ("ERA").[7] Section 50.7 prohibits NRC licensees from discriminating against employees for engaging in protected activities.

To demonstrate a whistleblower violation (variously described in shorthand as harassment, retribution, retaliation, intimidation, and discrimination), section 50.7 requires the NRC Staff to show three things: (1) an employee engaged in "protected activity" while working for a licensee, for an applicant, or for a contractor or subcontractor of a licensee or applicant; (2) the employer took adverse personnel action against the employee; and (3) the employer took such action "because" of the protected activity.[8] Section 50.7(d) also provides that "[a]n employee's engagement in protected activities does not automatically render him or her

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[4] Notice of Violation and Proposed Imposition of Civil Penalty, ("Notice of Violation") dated Feb. 7, 2000.

[5] 66 Fed. Reg. 27,166 (May 16, 2001).

[6] 42 U.S.C. §§ 2201-2297(h)-13.

[7] 42 U.S.C. §§ 2000d, 2206, 5801-5879.

[8] 10 C.F.R. § 50.7(a), (d).

immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations."[9]

In July 1996, TVA management declined to select Mr. Fiser for a competitive position (Chemistry Program Manager) at its Sequoyah facility. According to the NRC Staff, TVA's decision constituted an adverse personnel action taken in response to various "protected activities" in which Mr. Fiser had engaged. TVA disagreed, claiming that its decision was instead motivated solely by business considerations associated with a massive reorganization that eliminated or modified the duties of thousands of its employees. Following a 25-day evidentiary hearing, the majority of the Board issued an Initial Decision (over a partial dissent by Judge Young) agreeing with the NRC Staff that TVA had unlawfully discriminated against Mr. Fiser:

> the Staff has demonstrated by a preponderance of the evidence that Mr. Fiser's nonselection was motivated to some degree as retaliation for engaging in protected activities -- including his having filed two complaints of discrimination before the Department of Labor ... concerning his treatment at TVA for attempting to raise nuclear safety issues (albeit in a manner not conforming to the prescribed internal procedures for raising such safety concerns), and his contacting (along with two other TVA employees) a U.S. Senator concerning TVA employees raising safety issues.... [C]opies of the letter to the U.S. Senator were also sent to NRC officials, so as to constitute a whistleblowing complaint before the NRC.[10]

The Board also agreed with the Staff that four instances where Mr. Fiser had provided technical advice to TVA likewise constituted "protected activities."[11]

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[9] 10 C.F.R. § 50.7(d).

[10] 57 NRC at 558. Strictly speaking, neither section 50.7 nor its underlying statutory provisions (Section 161 of the AEA and Section 211 of the ERA) employ the word "safety" when defining "protected activity." They refer instead to regulatory and statutory violations. The term "protected activity" therefore includes, but is not limited to, protected activities related to safety issues.

[11] *Id.* at 582-92.

The Board, however, reduced the penalty amount from $110,000 to $44,000, on two grounds: "TVA has what appeared to it as seemingly significant performance-oriented reasons that apparently played a large part (although not the sole part) in its non-selection of Mr. Fiser for the position he was seeking"[12] and "TVA appears not to have been provided adequate notice (at least at the time of the non-selection of Mr. Fiser in 1996) of NRC's interpretation of 10 C.F.R. § 50.7 as including adverse actions motivated in *any* part (not necessarily a substantial part) by an employee's engagement in protected activities."[13]

TVA sought Commission review of LBP-03-10 on the grounds that the Board had made clearly erroneous factual findings, had employed the wrong standard for assessing the causal link between Mr. Fiser's whistleblowing activities and his non-selection for the post of Chemical Program Manager, and had improperly treated as "protected" activities that either had not been included in the notice of violation or did not meet the section 50.7 definition.

In CLI-03-09,[14] we agreed to review LBP-03-10. We also raised, on our own motion, an additional question: whether the Board applied the correct legal standard when determining whether (and by how much) to mitigate the civil monetary penalty. Finally, we allowed NEI to file *amicus* briefs on the merits of this mitigation question and on TVA's issues.[15]

DISCUSSION

INTRODUCTION

A. Statutory and Regulatory Authority.

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[12] *Id.* at 558. *See also id.* at 606-07.

[13] *Id.* at 559 (emphasis added).

[14] 58 NRC 39 (2003).

[15] After TVA had submitted the last of its authorized appellate briefs, it filed a Motion for Leave to File Supplemental Authorities (Dec. 17, 2003). The Staff subsequently filed a Response objecting to TVA's filing (Dec. 31, 2003). Although we do not encourage out-of-time filings, we have reviewed both TVA's and the Staff's submittals in preparing today's order.

As outlined above, our whistleblower protection regulation, 10 C.F.R. § 50.7, prohibits employers from taking adverse action against employees because of so-called "protected activities" -- *i.e.,* providing safety-related allegations to employers, Congress, or the Commission. Section 50.7 refers to two statutes, the AEA and the ERA. Specifically, the regulation prohibits licensees from "discriminat[ing] ... against an employee for engaging in certain protected activities" as "established in section 211 of the Energy Reorganization Act ... and in general ... related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act."[16] The Commission invoked both the AEA and the ERA as authority when promulgating section 50.7.[17]

The Commission promulgated the current version of section 50.7 in 1993 "to reflect the changes in the whistleblower protection provisions brought about by [Section 2902 of] the Energy Policy Act of 1992,"[18] which amended a 1978 appropriations statute that had, in turn, added Section 210 (now Section 211) to the ERA.[19] Prior to the 1992 amendments, Section 210(a) (now 211(a)(1)) provided that:

> No employer may ... discriminate against any employee ... because the employee ... -

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[16] 10 C.F.R. § 50.7(a).

[17] *See* Final Rule, "Whistleblower Protection for Employees of NRC-Licensed Activities," 58 Fed. Reg. 52,406, 52,408 (Oct. 8, 1993).

[18] 58 Fed. Reg. at 52,406-07.

[19] Congress, when enacting this section in 1978 and adding it to the provisions of the ERA, inadvertently identified the section as Section 210, although another statutory provision (Act of Dec. 13, 1977, 91 Stat. 1482, 42 U.S.C. § 5850) had already been assigned that same section number. *See Union Elec. Co.* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 131 n.14 (1979), *aff'g* LBP-78-31, 8 NRC 366 (1978); Act of Nov. 6, 1978, Pub. L. 95-601, § 10, 1978 U.S.C.C.A.N. (92 Stat.) 2947, 2951, *codified at* 42 U.S.C. § 5851. Congress corrected this error in the EPA. *See* Act of Oct. 24, 1992, § 2902, Pub. L. No. 102-486, 1992 U.S.C.C.A.N. (106 Stat.) 3123, 3124, *codified at* 42 U.S.C. § 5851.

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act [specifically, complaints to the Department of Labor] or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;
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> (2) testified or is about to testify in any such proceeding or;
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> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.[20]

The 1992 amendments renumbered the above three provisions as (1)(D), (1)(E) and (1)(F), and also added the following three categories of protected whistleblower activity:

> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 ...;
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> (B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
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> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954.[21]

The pre-1992 version of Section 211 was silent on what has become a key question in our case -- the "causation" standard (*i.e.,* the causal link between whistleblowing activity and an adverse personnel action). The original Section 211 contained no evidentiary framework indicating who must go forward with evidence at different stages of a proceeding or indicating what standard of proof a complainant must meet. Congress addressed this problem in 1992 by

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[20] Act of Nov. 6, 1978, Pub. L. 95-601, § 10 (adding, *inter alia*, section 210(a)(1), (2), and (3) to the ERA), 1978 U.S.C.C.A.N. (92 Stat.) 2947, 2951, *codified at* 42 U.S.C. § 5851(a)(1)(D), (E), (F). *Cf.* 10 C.F.R. § 50.7(A)(1)(iii), (iv), (v).

[21] Act of Oct. 24, 1992, Pub. L. 102-486, § 2902(a), 1992 U.S.C.C.A.N. (106 Stat.) 3123, *codified at* 42 U.S.C. § 5851(a)(1)(A), (B), (C). *Cf.* 10 C.F.R. § 50.7(A)(1)(i), (ii), (iv).

adding Section 211(b)(3).[22] This provision requires a complainant in a DOL whistleblowing proceeding to show that one or more protected activities was "a contributing factor" in the adverse action.

In addition, the new Section 211 laid out an entire evidentiary framework, both identifying for each stage of the DOL enforcement and adjudication process the party with the burden of going forward with the evidence and also specifying the standard and elements of proof applicable at each stage. The first two provisions apply to the pre-adjudicatory phases and the next two apply to the DOL hearing:

> (3)(A) The Secretary shall dismiss a complaint ... and shall not conduct the investigation ..., unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation ... shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.
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> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
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> (D) Relief may not be ordered ... if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.[23]

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[22] Act of Oct. 24, 1992, Pub. L. 102-486, § 2902(d), 1992 U.S.C.C.A.N. (106 Stat.) 3124, *codified at* 42 U.S.C. § 5851(b)(3).

[23] *Id.*

Under the new Section 211, the bottom-line is that whistleblowers will prevail if they demonstrate (by preponderance of the evidence)[24] that a protected activity was a "contributing factor" to an adverse personnel action -- *unless* the employer comes back with "clear and convincing evidence" that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity.

B. Issues on Appeal

The NRC has never before adjudicated fully an enforcement case involving a civil monetary penalty for a violation of the NRC's whistleblower regulations.[25] The instant proceeding is only the second NRC whistleblower discrimination case of any kind actually to go

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[24] Section 211 does not specify a "preponderance of the evidence" standard, but both the Secretary of Labor and the courts have found that the term "demonstrated" implies a preponderance of the evidence standard. *See, e.g., Dysert v. United States Sec'y of Labor*, 105 F.3d 607, 610 (11th Cir. 1997).

[25] There have been only six whistleblower-related AEA cases ever to reach the appellate levels of this agency (*i.e.*, the Commission itself or the now-defunct Appeal Board): *St. Mary's Med. Ctr.*, CLI-97-14, 46 NRC 287 (1997); *Five Star Prod., Inc, and Construction Prod. Research, Inc.*, CLI-93-23, 38 NRC 169 (1993); *Texas Util. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-11, 37 NRC 251, 256-62 (1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 325-29 (1985), *reconsid'n denied*, CLI-85-7, 21 NRC 1104, 1109 (1985); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-890, 27 NRC 273 (1988); *Union Elec. Co.* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 131 n.14 (1979). Licensing Boards began adjudications in two other whistleblower enforcement cases, but they were settled before reaching either the Appeal Board or the Commission. *See FirstEnergy Nuclear Operating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-01-18, 53 NRC 410 (2001); *General Pub. Util. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALJ-87-6, 26 NRC 445 (1987), and ALJ-87-5, 25 NRC 973 (1987).

to adjudication on the merits,[26] and it is the first NRC adjudication to be subject to Section 211 (formerly 210) of the ERA.[27] As such, the case raises legal questions of first impression:

> (i) In civil penalty proceedings, should the Commission follow the traditional evidentiary approach for proving discrimination cases, as set out in *McDonnell Douglas Corp. v. Green*[28] and its progeny, or follow Section 211's special evidentiary framework for nuclear whistleblower claims?
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> (ii) What is the minimum degree of connection (between the whistleblowing activity and the adverse employment action) sufficient to constitute "causation" -- a necessary element of proof in a section 50.7 whistleblower case?[29]
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> (iii) What kinds of activities are protected by Section 211 and section 50.7?
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> (iv) On what basis may a licensing board mitigate a civil penalty assessed by the NRC Staff?

On appeal, TVA argues in favor of the *McDonnell-Douglas* evidentiary framework, a strict "but for" causation standard, limits on "protected activities," and broad Board authority to reduce civil penalty assessments. The parties' appellate briefs also debate the factual basis for the Licensing Board's finding of discrimination in this case. TVA insists that in making key discrimination findings, the Board had "no support in the record" and was "clearly erroneous."[30] Unsurprisingly, the NRC Staff counters that TVA's appellate brief has merely "repackaged"

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[26] The first was *Union Elec. Co.* (Callaway Plant, Units 1 and 2), LBP-78-31, 8 NRC 366 (1978), *aff'd*, ALAB-527, 9 NRC 126, 131 n.14 (1979). *Callaway*, however, did not involve a civil penalty but instead raised issues involving the Staff's right to investigate allegations of discrimination against whistleblowers.

[27] The alleged whistleblowing activities and subsequent alleged discrimination in *Callaway* occurred prior to Congress's enactment of Section 210 (now 211) in 1978 as an amendment to the ERA.

[28] 411 U.S. 792 (1973). *McDonnell Douglas* calls for a series of burden shifts between employee and employer, ultimately leading to a requirement that the employee show, by a preponderance of the evidence, that the employer's proffered reason for the personnel action is pretextual, and that the real motivation was a prohibited discriminatory animus. We discuss the *McDonnell Douglas* paradigm in more detail later in this opinion.

[29] *See* page 2, *supra*.

[30] TVA's Oct. 2 Brief at 30.

already-rejected factual claims and has not "even remotely approached" the "high standard" of a "clearly erroneous" showing.[31]

C. Standard of Review.

We ordinarily defer to our licensing boards' fact findings, so long as they are not "clearly erroneous."[32] A "clearly erroneous" finding is one that is not even "'plausible in light of the record viewed in its entirety.'"[33] As we stated in *Claiborne Enrichment Center*, "[a]lthough the Commission has the authority to reject or modify a licensing board's factual finding, it will not do so lightly."[34] "We will not overturn a hearing judge's findings simply because we might have reached a different result."[35] Our deference is particularly great where "the Board bases its findings of fact in significant part on the credibility of the witnesses."[36] Whistleblowing discrimination cases are, by their nature, peculiarly fact-intensive and dependent on witness

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[31] NRC Staff's Nov. 3 Brief at 3.

[32] *See* 10 C.F.R. § 2.786(b)(4)(ii). *See also Private Fuel Storage* (ISFSI), CLI-03-8, 58 NRC 11, 25-26 (2003) ("*PFS*") ("Although the Commission certainly has authority to make its own *de novo* findings of fact, we generally do not exercise that authority where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact;" also referring to "[o]ur standard of 'clear error'").

[33] *Kenneth G. Pierce* (Shorewood, Il), CLI-95-6, 41 NRC 381, 382 (1995), *quoting Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985).

[34] *Louisiana Energy Serv.* (Claiborne Enrichment Ctr.), CLI-98-03, 47 NRC 77, 93 (1998).

[35] *Id.,* quoting *General Pub. Util. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987).

[36] *PFS,* CLI-03-08, 58 NRC at 26.

credibility.[37] A fact-based appeal in a whistleblower case, in short, faces an uphill climb before the Commission.

As for conclusions of law, our standard of review is more searching. We review legal questions *de novo.*[38] We will reverse a licensing board's legal rulings if they are "a departure from or contrary to established law."[39]

COMMISSION DECISION

A. Evidentiary Framework for Whistleblower Enforcement Cases at the NRC.

On appeal TVA argues that the Licensing Board erred by not hewing closely to the traditional judicial approach for proving discrimination cases, evinced in such well-known Supreme Court decisions as *McDonnell Douglas Corp. v. Green*[40] and *Price Waterhouse v. Hopkins*.[41] Our touchstone in a nuclear whistleblowing case, however, is not *McDonnell Douglas* or *Price Waterhouse*, but the special evidentiary framework that Congress established in Section 211 of the ERA.

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[37] *See* Millstone Independent Review Team, "Report of Review, Millstone Units 1, 2, and 3: Allegations of Discrimination in NRC Office of Investigation Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned" at 22 (March 12, 1999) ("Report of Millstone Review Team") ("witness credibility can be a significant factor in assessing the strength or weakness of evidence upon which inferences about discrimination will be based"), available on the Commission's automated public document retrieval system ("ADAMS") at Accession Nos. ML003673904, ML003673939, and ML003674479. The Board's Initial Decision in this proceeding contains many credibility determinations. *See* 57 NRC at 572, 574, 575, 577, 582, 591-92, 592-93, 604.

[38] *See Private Fuel Storage* (ISFSI), CLI-00-13, 52 NRC 23, 29 (2000).

[39] 10 C.F.R. § 2.786(b)(4)(ii). *See generally Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant ISFSI), CLI-03-12, 58 NRC 185, 191 (2003) (applying, *inter alia*, the test of whether the Board "misappl[ied] the law").

[40] *See* note 28, *supra*.

[41] 490 U.S. 228 (1989).

McDonnell Douglas established an evidentiary scheme for litigating "pretext"-based employment discrimination cases resting on "indirect evidence." (TVA says that our case fits the *McDonnell Douglas* mold.) In such cases, an employee must show, as a *prima facie* matter, membership in a protected class, knowledge by the employer of the employee's protected status, an unfavorable personnel action, and a causal link between the employee's protected status and the unfavorable action. If the employee makes that showing, the employer at that point must come forward with a legitimate, non-discriminatory reason for the personnel action. The ultimate burden of persuasion then swings back to the employee to show, by a preponderance of the evidence, that the employer's asserted reason is a pretext, and that the real motivation was a prohibited discriminatory animus. The various *McDonnell Douglas* burden-shifting steps come with additional nuances and complexities, but we need not explore them here.[42]

A whole set of different burdens and standards applies in so-called "dual" (or "mixed") motive cases. These are cases where the employee presents evidence of an improper discriminatory motive. In such cases, as the Supreme Court said in *Price Waterhouse,* "once a plaintiff ... shows that [a prohibited consideration] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the prohibited consideration] to play such a role."[43] At one time it was thought that direct evidence of a discriminatory motive was necessary to

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[42] *See, e.g., Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

[43] 490 U.S. at 244-45 (plurality opinion).

trigger the "dual motive" approach, but the Supreme Court recently ruled that indirect or circumstantial evidence also suffices.[44]

General employment discrimination law is, in short, ever-changing and often perplexing. But we need not wade into those deep waters to decide this case. Such questions as whether our case is a "pretext" case or a "dual motive" case, whether we have before us "direct" or "circumstantial" evidence, and whether (and when) the burdens of evidence production and persuasion should shift between the parties require subtle and complex analysis. But Congress rendered such analysis unnecessary when in 1992 it enacted a special evidentiary framework for nuclear whistleblowing cases -- namely, Section 211 of the ERA. As one court has put it, Section 211 "is clear and supplies *its own free-standing evidentiary framework*," a framework that displaces "the sprawling body of general employment discrimination law."[45] Section 211 establishes a simple two-part approach: (1) employees (or, as in our case, the NRC Staff) must show that whistleblowing activity was a "contributing factor" in an unfavorable personnel action; and (2) if that showing is made, employers still may escape liability if they demonstrate, by "clear and convincing evidence," that they would have taken the same personnel action anyway, regardless of the whistleblowing activity.

Notwithstanding Section 211, the Department of Labor continues to follow the *McDonnell Douglas* approach in whistleblower discrimination cases litigated on a "pretext"

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[44] *Desert Palace v. Costa*, 539 U.S. 90 (2003). One commentator has read *Desert Palace* to obliterate the distinction between "pretext" and "dual motive" cases, hence wiping out the traditional *McDonnell Douglas* approach. *See* William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. Pa. J. Lab. & Emp. L. 199 (2003).

[45] *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (emphasis added). *Accord Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 & n.4 (10th Cir. 1999).

theory.[46] But we decline to follow DOL on that point. Nothing in Section 211's language or history suggests an exception for "pretext" cases. Authoritative judicial decisions have recognized no such exception, and indeed take the opposite approach.[47] And clarity and simplicity counsel our following Section 211's straightforward approach in NRC enforcement adjudications rather than burdening them with the byzantine doctrines of traditional employment discrimination law. In practical terms, because we see few whistleblower enforcement adjudications at the NRC, because varying evidentiary frameworks are not necessarily outcome-determinative, and because the NRC's general enforcement policy is to give deference to DOL's whistleblower determinations,[48] our disagreement with DOL on how to apply Section 211 in adjudications is unlikely to lead to inconsistent results between the agencies very often, if at all.

In the present case, although the Licensing Board referred to Section 211 and invoked its "contributing factor" causation test,[49] the Board did not follow Section 211's full evidentiary framework.[50] The Board stopped its analysis once it found that Mr. Fiser's protected activities

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[46] *See, e.g.*, *Kester v. Carolina Power & Light Co.,* ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 3 n.12 (Sept. 30, 2003).

[47] An unpublished (and non-precedential) Sixth Circuit case did disregard the Section 211 evidentiary approach and use the *McDonnell Douglas* framework for a "pretext"-based whistleblower case. *See TVA v. Sec'y of Labor*, 59 Fed. Appx. 732, 2003 WL 932433 (6th Cir. 2003) We think that the published decisions from the Eleventh Circuit (*Stone & Webster*) and the Tenth Circuit (*Trimmer*) taking the opposite position reflect a more sensible reading of Section 211.

[48] DOL issued no such determination in Mr. Fiser's action against TVA, as the parties settled the case before DOL issued a decision on the merits. *See Fiser v. TVA,* 1997 ERA-59 (ALJ Sept. 25, 1998).

[49] *See* 57 NRC at 566-67, 569, 583, 605.

[50] The Board appeared to find the *McDonnell Douglas* approach applicable, at least in part, *see* 57 NRC at 603, but the Board also referred to the Section 211 approach and at one point labeled our case a "dual-motive case." *See id.* at 565. (*McDonnell Douglas*, as noted

(continued...)

"played at least some role in the action taken against him."[51] This arguably equates to a "contributing factor" finding under Section 211. But the Board declined to take the further step of examining the record to see if it contained "clear and convincing evidence" that the employer would have taken the same action anyway. In the Board's view, that inquiry "is not applicable to the threshold issue of whether an employer has violated section 50.7 but only to the follow-on consideration of whether the employee is entitled to some relief."[52]

We disagree with the Board. Our own whistleblower protection regulation, section 50.7, while not setting out an evidentiary framework of its own, makes clear that engaging in protected activities does not immunize employees "from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations."[53] To give life to this provision, we must give employers defending whistleblower discrimination charges an opportunity to prove that "legitimate reasons" or "non-prohibited considerations" justified their actions. The most practicable way of doing this is by granting employers the same right of defense in an NRC enforcement proceeding as Section 211 gives them in a Department of Labor compensation proceeding -- *i.e.,* the right to defend against a whistleblower discrimination charge on the ground that they would have taken the same personnel action regardless of the employee's protected activities.

To be sure, the "clear and convincing" standard puts a thumb on the scale in favor of employees. "For employers this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending

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[50](...continued)
above, does not apply to "dual-motive" cases.)

[51] *Id.* at 604.

[52] *Id.* at 566.

[53] 10 C.F.R. § 50.7(d).

themselves."[54] In recommending enactment of the current version of Section 211, a House committee reported, "Recent accounts of whistleblower harassment at both NRC licensee ... and DOE nuclear facilities ... suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. These reforms are intended to address those remaining pockets of resistance."[55]

Still, Congress was careful in Section 211, as we are in today's decision, to preserve the flexibility nuclear employers require to take appropriate action against alleged whistleblowers who also are ineffective on the job or unneeded in the workplace. Employers are simply asked to *prove* that they would have made the same personnel decisions regardless of any whistleblowing activity. This tough-minded approach to employer claims of legitimate, non-discriminatory motives effectuates the policy of Congress (and the NRC) both to encourage nuclear whistleblowers to come forward with safety-related information and not to interfere unduly with employers' prerogative to manage their workers.

Preferring old-fashioned *McDonnell Douglas*-style burden shifting, TVA (supported by NEI as *amicus curiae)* resists application of the Section 211 evidentiary approach in this NRC enforcement case. The crux of their argument is that an NRC regulation -- 10 C.F.R. § 50.7 -- rather than Section 211 governs NRC whistleblower enforcement cases. They point out that after Section 211's enactment the Commission amended section 50.7 to include Section 211's expanded definition of "protected activities," but took no action to incorporate Section 211's new

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[54] *Stone & Webster Engineering Corp.*, 115 F.3d at 1572. *See also Trimmer*, 174 F.3d at 1101 (in amending Section 211 "Congress intended to make it easier for whistleblowers to prevail in their discrimination suits").

[55] H.R. Rep. No. 102-474, pt. VIII, at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2297. *See also* "Whistleblower Issues in the Nuclear Industry: Hearing before the Subcommittee on Clean Air and Nuclear Regulation, Committee on Environment and Public Works, United States Senate," 103d Cong., 1st Sess. at 1-2 (July 15, 1993) ("Statement Submitted by the United States Nuclear Regulatory Commission").

evidentiary approach. Hence, the argument goes, the Commission ought not apply the Section 211 approach here, and the Commission instead should look to traditional jurisprudence (*McDonnell Douglas* and progeny) on employment discrimination.

In effect, TVA and NEI would have the Commission turn back the clock to 1991 (prior to the 1992 amendments to the ERA), and consider this case as if Congress never enacted Section 211's "contributing factor"/ "clear and convincing" evidentiary paradigm. We decline to do so. It is true that our whistleblower regulation, section 50.7, does not adopt the Section 211 evidentiary paradigm as such, but neither does it adopt the *McDonnell Douglas* or *Price Waterhouse* paradigms. Our regulation is prohibitory, not procedural. It renders discriminatory conduct unlawful, but does not purport to prescribe evidentiary standards and approaches for use in NRC enforcement litigation. This presumably explains why the Commission promptly amended section 50.7 to incorporate Congress's more expansive view of "protected activities" (as set out in Section 211), but saw no need to incorporate in section 50.7 Congress's new evidentiary framework.

In cases where our own rules do not prescribe a particular process or evidentiary approach, we frequently have looked to analogous outside sources of law -- for example, judicial standing doctrines or federal rules of procedure and evidence.[56] Here, Section 211 -- the most recent expression of Congressional policy on nuclear whistleblower claims -- is the obvious place to look for guidance on litigating whistleblower enforcement cases at the NRC. For one thing, we long have taken the view that our section 50.7 rests in part on the authority of Congress's decision in Section 211 to protect nuclear whistleblowers from employer

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[56] *See, e.g., International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (judicial standing doctrine); *Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC 98, 102 (1993) (Federal Rules of Civil Procedure); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982) (Federal Rules of Evidence).

retaliation.[57] Moreover, Section 211 establishes a clear and straightforward evidentiary approach, eliminating some of the complexities of traditional employment discrimination litigation. The Section 211 approach, while directly governing whistleblower compensation cases at the Department of Labor, is readily adaptable to the context of NRC enforcement cases. And, as we indicated above, Section 211 represents a reasonable Congressional effort to balance employer and whistleblower interests.

Accordingly, we think it appropriate in NRC whistleblower cases for our licensing boards to ask Section 211's two questions: (1) Did the NRC Staff show, by a preponderance of the evidence, that protected activity was a "contributing factor" in an unfavorable personnel action? (2) Did the employer show, by "clear and convincing evidence," that it would have taken the same personnel action regardless of the protected activity?

Where does our conclusion leave the present case? As we read the Licensing Board decision, it (in effect) applied the "contributing factor" prong of Section 211,[58] but not the "clear and convincing" prong. Indeed, as we mentioned above, the Board expressly declined to undertake Section 211's "clear and convincing evidence" inquiry.[59] In reducing the NRC Staff's $110,000 civil penalty, however, the Board referred to "the small role that protected activities may have played in leading to the adverse action against Mr. Fiser."[60] This statement, along with a similar statement by Judge Young in her partial dissent,[61] suggests the possibility --

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[57] *See St. Mary's Med. Ctr.*, CLI-97-14, 46 NRC at 290 n.1. Section 50.7 also is grounded in the NRC's general AEA authority to protect public health and safety. *See id.*

[58] *See* 57 NRC at 604, 605.

[59] *Id.* at 566.

[60] *Id.* at at 607.

[61] "I find it equally possible ... that such actions were actually based only on performance-related factors together with inappropriate as well as possibly inept management

(continued...)

unexplored by the Board -- that there may be "clear and convincing" record evidence justifying a finding that TVA would have taken action against Mr. Fiser regardless of his whistleblowing activity. Thus we have decided to vacate the Board's decision sustaining the civil penalty against TVA and to remand the proceeding to the Board to consider whether the record contains clear and convincing evidence justifying TVA's personnel action on non-discriminatory grounds.

B. Causal Connection between Protected Activity and Unfavorable Personnel Action.

1. The Contributing Factor Test.

TVA and the NRC Staff appear to agree that Section 211's "contributing factor" causation standard applies here -- *i.e.,* to sustain a civil penalty against TVA, the NRC Staff must show, by a preponderance of the evidence, that Mr. Fiser's protected activities constituted a "contributing factor" in TVA's personnel actions.[62] But the parties decidedly do not agree on the kind of showing the "contributing factor" test entails. The Board, too, singled out, as a "most important" issue, the "degree to which protected activities must be involved to be deemed a contributing factor in the adverse action."[63]

TVA views the "contributing factor" test as requiring a showing that protected activities played a "significant," "motivating," "substantial," or "actual and true" role in the personnel action -- in short, that whistleblower discrimination be a decisive, or "but-for," reason for the personnel action.[64] The Licensing Board, on the other hand, joined by the NRC Staff, sees in the

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[61](...continued)
practices and actions, personality clashes, personal dislike and hostility, and related grounds." *Id.* at 615.

[62] *See* TVA's Oct. 2 Brief at 21-22; NRC Staff's Nov. 3 Brief at 14-15.

[63] 57 NRC at 565-66.

[64] *See* TVA's Oct. 2 Brief at 19-24.

"contributing factor" test a more lenient standard. In their view, the "contributing factor" test "permit[s] consideration of whether the employee's engagement in protected activities *in any degree* contributed toward an adverse personnel action, even though not the primary or even a substantial basis for the action*."* [65] We think the Board and the NRC Staff have the better of the argument.

Congress did not enact Section 211's "contributing factor" test in a vacuum. In laws covering whistleblowers in various industries and in the federal government, Congress has used the same "contributing factor" test as it did in Section 211.[66] Section 211, in fact, was "patterned after other whistleblower statutes affecting other industries." [67]

In using a "contributing factor" test in whistleblower protection laws, Congress "quite clearly made it easier for the plaintiff to make her case under the statute and more difficult for the defendant to avoid liability."[68] Congress was concerned that previous judicial rulings had imposed on whistleblowers an "excessively heavy burden" to show that the whistleblowing

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[65] 57 NRC at 569. *See also id.* at 566, 567. The NRC Staff, and apparently the Board as well, believe that section 50.7's (partial) grounding in the AEA requires a broad construction of the "contributing factor" test. *See id.* at 566-57; NRC Staff's Nov. 3 Brief at 14-15. As we explain in the text, however, our understanding of the "contributing factor" test rests not on the AEA, but on the most common judicial understanding of the statutory term.

[66] *See, e.g.,* the Whistleblower Prot. Act, 5 U.S.C. § 1221(e); Federal Deposit Ins. Act, *as amended by* the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1831j(a)(1) ("FIRREA," incorporating the procedures of the Whistleblower Protection Act); the Federal Aviation Admin. Authorization Act of 1994, *as amended by* the Wendell H. Ford Aviation Inv. and Reform Act for the 21st Century, 49 U.S.C. § 42,121 ("Ford Act"); the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1514A (Title VIII of the Sarbanes-Oxley Act of 2002, incorporating the procedures of the Ford Act); and the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60,129 (identical language to that in the Ford Act).

[67] *American Nuclear Res., Inc. v. United States Dept. of Labor*, 134 F.3d 1292, 1294-95 (6th Cir. 1998)

[68] *Frobose v. American Savings and Loan Ass'n*, 152 F.3d 602, 612 (7th Cir. 1998). *See also Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Rouse v. Farmers State Bank*, 866 F. Supp. 1191, 1208 (D. Iowa 1994).

activity was a "significant" or "motivating" factor in his or her employer's adverse action.[69] These court rulings, according to Congress, had, "in effect, ... gutted the protection of whistleblowers."[70]

Hence, as the Federal Circuit explained in *Marano v. Department of Justice*, Congress established a lenient "contributing factor" test, under which whistleblowers need show only that their protected activity affected the personnel action "in any way:"

> Rather than being required to prove that the whistleblowing disclosure was a "'significant" or "motivating" factor, the whistleblower under the [Whistleblower Protection Act] must evidence only that his protected disclosure played a role in, or was "a contributing factor" to, the personnel action taken:
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> > The words "a contributing factor" ... mean *any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision*. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.[71]

We are aware of no judicial decision discussing what Section 211's "contributing factor" test means. But other courts construing identical "contributing factor" language in whistleblower statutes closely similar to Section 211 have reached the same result as *Marano*.[72] We see no reason to construe Section 211 differently.

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[69] *Marano*, 2 F.3d at 1140. *See also Rouse*, 866 F. Supp. at 1208.

[70] *Marano*, 2 F.3d at 1140 (interpreting Whistleblower Protection Act). *See also Rouse*, 866 F. Supp. at 1208 (interpreting FIRREA); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Era of Employment Dissent*, 51 Admin. L. Rev. 531, 554 (1999).

[71] *Marano*, 2 F.3d at 1140 (emphasis added by the court to the internal quotation from 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S.20)).

[72] *See, e.g.*, *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 44 (1st Cir. 1999); *Frobose*, 152 F.3d at 612; *Rouse*, 866 F. Supp. at 1208. *See generally* Devine, 51 Admin. L. Rev. at 555.

Thus, contrary to TVA's view, we think that the Licensing Board here acted on a correct understanding of the "contributing factor" test when it inquired whether Mr. Fiser's protected activity contributed "in any degree" or played "at least some role" in TVA's personnel decisions.[73]

This is not to say that the "contributing factor" test is entirely toothless. An employee may not simply engage in protected activities and expect immunity from future unfavorable personnel actions. Mere employer (or supervisor) knowledge of the protected activity does not suffice as a "contributing factor;" nor does "the equivalent of adding 'a drop of water into the ocean.'"[74] The evidence, direct or indirect, must allow a reasonable person to infer that protected activities influenced the unfavorable personnel action to some degree.[75] In cases where the evidence is weak, employers should be able to avoid liability by providing "clear and convincing evidence" that they would have taken the same personnel action anyway, based on non-discriminatory grounds.

Below (in the next section), we explain why we do not find "clearly erroneous" the Board's factual finding that Mr. Fiser's whistleblowing "played at least some role" in TVA's personnel actions.[76] We are quick to add, though, that a "contributing factor" finding does not end our case. As we explained above, under Section 211 (and under analogous whistleblower

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[73] *See* 57 NRC at 569, 604.

[74] *See* Report of Millstone Review Team, at 8.

[75] The proponents of a finding of violation must demonstrate to the trier of fact (by a preponderance of the evidence) that the protected activity "was actually 'a contributing factor in the unfavorable personnel action.'" *See Stone & Webster Eng'g Corp.*, 115 F.3d at 1572, quoting 42 U.S.C. § 5851(b)(3)(C). However, we acknowledge the unsettled and conflicting understandings of what kind of causation showing the employee (or, in NRC cases, the Staff) must make to prevail by a preponderance of the evidence. Decisions by the NRC or the courts of appeals, based on the particular circumstances of such cases, may clarify further the controlling test in this area.

[76] 57 NRC at 604.

laws) employers still may avoid liability if they show, by "clear and convincing evidence," that they would have taken the same unfavorable personnel action even in the absence of whistleblowing. The Licensing Board has yet to rule on that issue in our case. But pursuant to our decision today, the Board will do so on remand.

2. The Board's Contributing Factor Finding.

On appeal, TVA argues at some length that we should strike down as "clearly erroneous" the Board's factual findings, particularly its findings that Mr. Fiser's protected activities played a causal role in TVA's personnel decisions. But TVA's fact-based arguments turn in part on its view -- which we reject today -- that the NRC Staff was required to show causation in a strict "but-for" or "substantial factor" sense.[77] TVA also takes inadequate account of how high a hurdle the "clearly erroneous" standard erects. As we set out above under the heading "Standard of Review," to overturn licensing board fact findings as clearly erroneous requires a showing that the findings are entirely implausible on the record; in other words, that no reading of the record justifies the findings. It is true, as TVA suggests,[78] that the Commission has the raw power to override its licensing boards' fact findings, "clearly erroneous" or not, but absent unusual circumstances, our usual practice is not to do so. Otherwise, the Commission would place itself in the untenable position of having to redo its licensing boards' work in nearly every case.

On appeal, TVA's brief parses the record from its point of view, and tells a story congenial to its interests. But an effort to show that "the record evidence in this case may be understood to support a view sharply different from that of the Board" does not, in and of itself,

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[77] *See, e.g.,* TVA's Nov. 24 Brief at 3 (arguing that "misapplication of law" renders inapplicable the deferential "clearly erroneous" standard of review of fact findings).

[78] *See* TVA's Nov. 24 Brief at 2-3.

establish the Board's view as clearly erroneous. [79] TVA's task is complicated by two factors: (1) the Board rested its fact findings significantly on its determinations of witness credibility, determinations we are ill-positioned to second guess; and (2) the Board's finding of discrimination is rooted not just in one or two events, but in a large collection of circumstantial evidence from which the Board draws inferences. These complications permeate TVA's challenge to the Board's fact findings.

For example, when TVA argues on appeal that TVA supervisors lacked timely knowledge of Mr. Fiser's protected activities and therefore could not have acted out of a discriminatory animus, TVA in effect is asking the Commission to take those supervisors' testimony at face value. But the Licensing Board expressly found the supervisors' testimony not credible in significant respects.[80] It is the Board's credibility finding, not TVA's reconstruction of events, to which we owe deference on appeal. And, while TVA's appellate brief takes great trouble to break down TVA's relationship with Mr. Fiser into individual episodes, and argues strongly that innocent, non-discriminatory purposes animated certain TVA actions, TVA does not really gainsay the Board's broader point: "the sum total of these many inferential adverse actions present a pattern of discrimination."[81]

The Board's findings were cumulative, resting on many incidents. The Board found that Mr. Fiser had suffered a "plethora of career-damaging situations," going "well beyond unfortunate circumstances and chance."[82] The Board also pointed to "criticisms by

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[79] *Kenneth G. Pierce*, CLI-95-6, 41 NRC at 382.

[80] *See, e.g.,* 57 NRC at 604.

[81] *Id.*

[82] *Id.*

management" of Mr. Fiser's participation in several protected activities.[83] Given these broad findings, TVA cannot impeach the Board's inference that protected activities "played at least some role" in Mr. Fiser's troubles simply by arguing that particular employment episodes recounted by the Board may have had entirely benign explanations.

To be sure, the factual basis for the Board's discrimination finding seems to us less than overwhelming -- one reason why we are asking the Board on remand to consider whether TVA's evidence amounts to a "clear and convincing" showing that TVA would have treated Mr. Fiser the same regardless of his whistleblowing activity. But our finding less than overwhelming evidence supporting the Board's view is not the same as saying that the Board was "clearly erroneous" when it found, based on the record as a whole, that Mr. Fiser's whistleblowing was a "contributing factor" in TVA's unfavorable treatment of him.

One final point warrants mention here. In the next section of today's decision, on "protected activities," we hold that the Board inappropriately viewed as "protected" some activities that either do not fit the statutory and regulatory definition of protected activities or were not properly noticed in advance of the adjudication. On remand, the Board should consider whether leaving some protected activities out of the case, as we direct below, requires any change in the Board's "contributing factor" finding.

C. "Protected Activities" that are Properly before the Licensing Board in this Proceeding

To determine which protected activities were properly before the Licensing Board, we need to address two questions: (1) whether the Board considered any "protected activities" that suffered from defective notice to TVA, and (2) whether the Board incorrectly considered as "protected" certain of Mr. Fiser's activities that did not, as a matter of law, qualify as "protected activities." Because the answer to both these questions is "yes," we conclude that the Board

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[83] *Id.*

"depart[ed] from [and ruled] contrary to established law,"[84] and we reverse those portions of LBP-03-10 that considered those non-noticed or non-protected activities. On remand, the Board should not consider those particular activities.

1. Improper Consideration of Non-Noticed Activities

a. Procedural Background

The NRC Staff in its Notice of Violation relied on only two "protected activities" to support its conclusion that TVA had violated the NRC's whistleblowing regulation by retaliating against Mr. Fiser. The first activity was actually a combination of the following: Mr. Fiser's identification of three chemistry-related nuclear safety concerns in 1991-1993 involving radiation monitor set points, his involvement in the "filter change-out scenario," and his expressions of concern during the period February 19 through early March of 1992 regarding the applicability of the NRC's requirements for conducting Post Accident Sampling System ("PASS") analyses. The second activity was his filing of a DOL complaint on September 23, 1993, based in part on these same three chemistry-related nuclear safety concerns.

By the time discovery had concluded, the Staff had supplemented its first two grounds with three additional ones. The first was Mr. Fiser's August 16, 1993 letter to Senator Sasser, with a copy to the Commission, in which he complained that TVA was discouraging employees from raising nuclear safety issues (including one involving diesel generator fuel oil storage tanks).[85] The second was his participation in the resolution of two safety issues previously identified by another employee (one in November 20-21, 1991, involving data trending, and the other on August 23, 1989, concerning diesel generator fuel oil storage tanks). And the third was his June 25, 1996 DOL complaint alleging disparate treatment by TVA.

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[84] 10 C.F.R. § 2.786(b)(4)(ii).

[85] According to TVA, the Staff first described the Sasser letter as a "protected activity" in a January 24, 2002, response to TVA interrogatories. *See* 57 NRC 575 n.22.

The Board similarly considered the following five activities to be both "protected" and relevant to the alleged violations in this adjudication.[86] The first was a set of two protected activities that occurred from 1991 to 1993, involving the identification of chemistry-related nuclear safety concerns (radiation monitor set points and the NRC's requirements for conducting PASS analyses). The second was his 1993 DOL Complaint regarding, among others, those same two activities. The third was his 1996 letter to Senator Sasser. The fourth was his involvement in addressing two nuclear safety issues from 1991 to 1993 (data trending, and diesel generator fuel oil storage tanks). And the fifth was his 1996 DOL complaint. In short, the Board considered as "protected" all of the Staff's enumerated activities except for Mr. Fiser's involvement in the "filter change-out scenario."

b. The Parties' Positions

TVA complains that the Board's Initial Decision was based in part on three "protected activities" that the Staff had not identified in the Notice of Violation -- Mr. Fiser's participation in the resolution of the two previously-identified safety issues (regarding data trending and diesel generator fuel oil storage tanks), the 1996 DOL complaint, and the letter to Senator Sasser. TVA claims that the Board's consideration of these unnoticed matters was prejudicial error.[87]

In support, TVA refers us to 10 C.F.R. § 2.205(a) which requires the Staff to "serve a written notice of violation upon the person charged" and "specify the date or dates, facts, and nature of the alleged act or omission with which the person is charged." TVA also relies on *Radiation Technology*,[88] which held that the Staff is "require[d] [to] give licensees written notice of specific violations and consider their responses in deciding whether penalties are

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[86] 57 NRC at 558, 559, 580-92, 601.

[87] *See* TVA's Oct. 2 Brief at 39-40; TVA's Nov. 24 Brief at 18-19; TVA's Reply to the Staff's Findings of Fact and Conclusions of Law, dated March 7, 2003, at 97, 128.

[88] ALAB-567, 10 NRC 533 (1979).

warranted."[89] TVA asserts that the Board ignored these procedural safeguards and fair-notice mandate, as well as TVA's procedural due process rights under the Constitution to notice and an opportunity to be heard. TVA, while acknowledging that the Board's hearing was *de novo*,[90] nonetheless maintains that the Notice of Violation still defines the charges in this proceeding and therefore prescribes the bounds of the case.

In response, the Staff asserts that it could legitimately use at the hearing the information regarding two of the three new bases (the 1996 DOL complaint and the Sasser letter)[91] because that information had been uncovered during discovery -- after the issuance of both the Notice of Violation and the Enforcement Order. The Staff also argues that TVA had, and took advantage of, numerous opportunities to address those two new bases, both in its pre-hearing filings and during the hearing. And finally the Staff maintains that, even though the Staff did present evidence of these two additional protected activities, it never changed its underlying theory of the case.[92] The Staff's is, essentially, a "no prejudice" defense.

c. Analysis

Section 234b of the AEA requires that, "[w]henever the Commission has reason to believe that a person has become subject to the imposition of a civil penalty under the provisions of this section, it shall notify such person in writing (1) setting forth the date, facts and nature of each act or omission with which the person is charged.... [and] [t]he person so

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[89] ALAB-567, 10 NRC at 537.

[90] *See Atlantic Research Corp.*, ALAB-594, 11 NRC 841, 849 (1980).

[91] The Staff does not address why its introduction of its third new set of "protected activities" (involving data trending and diesel generator fuel oil storage tanks) was permissible. We therefore consider the Staff to have abandoned that position. *See generally Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001) ("We deem waived any arguments not raised before the Board or not clearly articulated in the petition for review" (citations omitted)).

[92] NRC Staff's Nov. 3 Brief at 26-27.

notified shall be granted an opportunity to show in writing ... why such penalty should not be imposed."[93] Basic principles of fairness likewise require that the licensee in an enforcement action know the bases underlying the Staff's finding(s) of violation.

Just as "the penalty assessed by [the Staff] constitutes the upper bound of the penalty which may be imposed after [a] hearing,"[94] the grounds for the Staff's finding of a whistleblower violation must likewise form the upper bound for the grounds available to the Board when determining whether a violation has occurred. This principle regarding notice of, and opportunity to comment on, the fundamental bases for an enforcement action is analogous to our policy in licensing adjudications that "[a]n intervenor may not freely change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention."[95] It is likewise akin to our "longstanding practice" in licensing cases "requir[ing] adjudicatory boards to adhere to the terms of admitted contentions in order to give opposing parties advance notice of claims and a reasonable opportunity to rebut them."[96]

For us to determine whether the Staff has provided lawful advance notice here, we need to answer three questions: (i) what Commission document(s) establish the scope of this civil penalty proceeding, (ii) what level of specificity is required in such document(s) notifying TVA of the regulatory violation with which it is charged (*i.e.*, is it sufficient for the document to set forth merely the general theory of violation, or must the document also provide the specific factual bases for the ultimate finding of violation), and (iii) whether the document(s) in the instant

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[93] 42 U.S.C. § 2282(b). *Accord* 10 C.F.R. § 2.205(a).

[94] *See Atlantic Research*, ALAB-594, 11 NRC at 849.

[95] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002) (citation and internal quotation marks omitted).

[96] *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 227 (2002) (citations and internal quotation marks omitted).

proceeding were sufficiently detailed to provide TVA with adequate notice of the three additional grounds for the violation at issue here.

Regarding the first of these questions, it is well-established in Commission enforcement jurisprudence that the document setting the scope of an enforcement adjudication is ordinarily the enforcement order[97] (*e.g.*, an Order Imposing Civil Monetary Penalty). Our Notice of Hearing in *this* proceeding, however, makes clear that the scope of the violation issues (though not the penalty issues) was established instead by the Notice of Violation:

> The issues to be considered, as set forth in the Order Imposing Civil Monetary Penalty, are (a) whether the Licensee violated the Commission's requirements, *as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty*, dated February 7, 2001; and, if so, (b) whether, on the basis of such violation, the Order Imposing Civil Monetary Penalty should be sustained.[98]

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[97] *See*, *e.g.*, *Sequoyah Fuels Corp and Gen. Atomics* (Gore, OK Site), CLI-97-13, 46 NRC 195, 216, 222 (1997).

[98] *See* Notice of Hearing, Tennessee Valley Auth. (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), 66 Fed. Reg. 35,467, 35,468 (July 5, 2001) (emphasis added). *See also* Order Imposing Civil Monetary Penalty, 66 Fed. Reg. 27,166, 27,167 (May 16, 2001).

Although both the cursory nature of the Order Imposing Civil Monetary Penalty and its reliance on the Notice of Violation made the above-quoted reference to the Notice of Violation appropriate, we would not ordinarily consider the Notice of Violation to be the appropriate document for establishing the scope of an enforcement proceeding. Section 2.205(d) provides that the Staff shall "consider[] ... the answer" to a Notice of Violation and only then shall "issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty." Likewise, the 1971 Statement of Considerations for section 2.205 states that " a request for a hearing need not be made until after an answer to a notice of violation has been filed and an order imposing a civil penalty entered by the [Staff]." Final Rule, "Civil Penalties," 36 Fed. Reg. 16,894, 16,895 (Aug. 26, 1971). The clear import of both these statements is that the Notice of Violation should not be the Staff's final word regarding either the finding of a violation or the bases underlying that finding, but that the Staff's subsequent Enforcement Order must take into account the licensee's answer to the Notice. Although we are not in a position to know whether the Staff actually ignored TVA's answer in this proceeding, the cursory nature of the Staff's Order Imposing Civil Monetary Penalty and its incorporation of the Notice of Violation certainly give that impression. To avoid even an appearance of impropriety, we instruct the Staff not to use such an approach in the future, absent compelling circumstances.

The Staff acknowledged all of this at the hearing. In its Reply to TVA's Proposed Findings of Fact, the Staff stated that "the issues before the Board in this proceeding are limited to the [two] issues identified in th[e] notice of hearing,"[99] and that, as for "issues ... outside the scope of the hearing notice, the Board lacks the jurisdiction to consider them."[100] Indeed, Commission appellate jurisprudence has long held this kind of "scope of proceeding" issue to be *jurisdictional* in nature:

> It is well settled that NRC licensing boards and administrative law judges do not have plenary subject matter jurisdiction in adjudicatory proceedings. Agency fact finders are delegates of the Commission who may exercise jurisdiction only over those matters the Commission specifically commits to them in the various hearing notices that initiate the proceedings. Thus, the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission.[101]

We therefore move to the second threshold question -- what level of detail must the TVA Notice of Violation contain to satisfy our notice requirements? As noted above, the Staff argues for the acceptability of supplementing the bases supporting the Notice of Violation to reflect new facts that surface during discovery -- so long as the Staff does not change the underlying theory of its case.[102] We disagree with the Staff. Its proposed rule of thumb would allow the Staff virtually unfettered freedom to change the focus of an adjudication under section 50.7 or its sister regulations, subject only to the restriction that the case still involve violations of the salient

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[99] NRC Staff's Findings of Fact at 2.

[100] *Id.* at 5.

[101] *General Pub. Util. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 476 (1987) (footnotes omitted). *See also*, *e.g.*, *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985);*Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); *Public Serv. Co. of Ind.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974).

[102] Staff's Nov. 3 Brief at 26-27.

whistleblower regulation. Such a restriction is, in our view, so broad as to be virtually meaningless, would leave the scope of an enforcement proceeding uncertain throughout the entire pre-hearing phase of an adjudication, and would undermine our twin goals of fairness and efficiency in adjudicatory decisionmaking.[103] Under the Staff's proposed approach, whistleblower enforcement adjudications would constantly be subject to change: new information on protected activities or adverse actions could be brought into the case without a disciplined notice and response process.

In so ruling, however, we do not mean to suggest that the Staff is powerless in a whistleblower adjudication to update its NOV based on newly discovered facts. If the new facts support conclusions already in the NOV that a particular activity was protected, or that management was aware of the protected activity, or that management took a particular action adverse to the whistleblower, or that such action was in retribution for the protected activity at issue, then the Staff would be free to use those newly discovered facts in its arguments and briefs. We cannot, however, accept the Staff's proposed extension of this principle to include entirely new instances of protected activity, unmentioned in the NOV. As discussed above, such an approach would take the Board proceeding beyond its permissible jurisdictional boundaries. Rather, in those situations, the Staff may either issue a revised NOV[104] or initiate a new enforcement action.

Finally, we reach the third and dispositive question whether the Notice of Violation in this proceeding contained the necessary level of specificity. It is beyond dispute that the Notice of Violation contains no references to the three new bases in question. Indeed, the Staff itself

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[103] *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

[104] The Staff has amended Notices of Violation in the past. *See*, *e.g.*, *Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 and 2), 1991 WL 215290 (NRC) at n.5 (Licensing Board, March 30, 1995); *Consolidated X-Ray Serv. Corp.*, ALJ-83-2, 17 NRC 693, 698 (1983).

acknowledges as much -- describing these as "additional" protected activities[105] and conceding that these were instead "developed during discovery"[106] – a stage of the proceeding that of course *follows* the issuance of a Notice of Violation.[107] The Staff could have supplemented its Notice of Violation or its enforcement order, just as complainants regularly supplement their discrimination claims under Title VII of the Civil Rights Act.[108] However, the Staff, for whatever reason, chose not to do so.

Based on our answers to these three threshold questions, we conclude that the three new bases are, as a matter of law, beyond both the scope of this adjudication and the jurisdiction of the Board, and that the Board erred in considering them.[109] We therefore remand this issue to the Board with the instruction that it reexamine its relevant rulings in light of both our conclusion and our underlying reasoning.

2. Improper Consideration of Non-"Protected" Activities

As noted above, "protected activity" includes the acts of notifying an "employer of an alleged violation" and refusing "to engage in any practice made unlawful by this Act [the Energy Policy Act of 1992] or the Atomic Energy Act of 1954, if the employee has identified the alleged

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[105] NRC Staff's Nov. 3 Brief at 27.

[106] *Id.* at 27 n.21.

[107] The Staff issued the Notice of Violation on February 7, 2000. Discovery took place from July 19, 2001 through January 22, 2002; the Board held the evidentiary hearing intermittently from April 23, 2002 through September 13, 2002. *See* 57 NRC at 561.

[108] *See*, *e.g.*, *Medlock*, 164 F.3d at 549, referring to 42 U.S.C. §§ 2000(e) *et seq.*

[109] The Staff's argument that TVA had an opportunity at the hearing to rebut the Staff's new "protected activity" claims fails to carry the day because (1) the Staff deprived TVA of an opportunity to make its case to the NRC enforcement staff prior to hearing, as guaranteed by statute (AEA, § 234b, 42 U.S.C. § 2282(b)), and (2) the Staff's failure to include sufficient detail in its charging documents is a jurisdictional default, depriving the Board of authority to adjudicate the new claims.

illegality to the employer."[110] The intent underlying the inclusion of these (and other) examples of whistleblowing activities was to protect employees who, knowingly or otherwise, risk retribution from their employers for pointing out safety or regulatory compliance problems.

Although TVA agrees with the Board and the Staff that Mr. Fiser's 1993 DOL complaint and his letter to Senator Sasser each constitute a "protected activity,"[111] TVA disagrees with their conclusion that "protected activity" includes participation in the resolution of safety issues *previously raised by another*. TVA asserts that Mr. Fiser neither discovered, identified, raised, nor documented the four technical issues to which he referred in the 1993 DOL complaint and/or his letter to Senator Sasser, and which the Board found to qualify as "protected activities."[112] In support, TVA quotes the minority opinion to the effect that "there is no finding that [Mr. Fiser] did anything against management's wishes, other than *not* resolving an issue successfully or adequately ... or refusing to initiate a procedure that might, if *not* followed, subject TVA to a finding of a violation of procedures."[113] Therefore, according to TVA, Mr. Fiser's participation does not qualify as "protected" and the Board erred in considering it.

NEI similarly argues that "there is ... no basis in law or policy ... [to rule] that an employee's mere participation in the resolution of a safety related issue, without some

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[110] 42 U.S.C. § 5851(a)(1)(A), (B). *See also* 10 C.F.R. § 50.7(a)(1)(i), (ii).

[111] *See* 57 NRC at 580, 582.

[112] TVA's Oct. 2 Brief at 24-28. The four safety issues are radiation monitor set points (discussed in LBP-03-10, 57 NRC at 583-84), PASS analysis (*id.* at 585-87), diesel generator fuel oil storage tank issue (*id.* at 587-89), and data trending (*id.* at 589-92). As previously noted, the Board found that Mr. Fiser's involvement in a fifth safety issue -- the "filter change out scenario" -- did not constitute a "protected activity" (*id.* at 584-85).

[113] TVA's Oct. 2 Brief at 24 (emphasis in original), quoting 57 NRC at 611 (minority opinion).

additional action (*e.g.*, identifying a problem that is either related to the solution or some other safety concern prompted by participation in the resolution) is protected."[114]

The NRC Staff responds that TVA's and NEI's position reflects "an extremely narrow view of what constitutes 'protected activity' within the meaning of Section 50.7 and Section 211."[115] The Staff contends that "Section 50.7(a)(1)(iv) [*sic*, "iv" should be "v"] specifically covers 'assisting' others who engage in protected activities as well as any 'participation' in protected activities."[116]

The parties' arguments on this general issue are both factual and legal. In today's decision, we need only examine the legal question whether the Board in LBP-03-10 properly interpreted the term "protected activity." For the reasons set forth below, we conclude that the Board did not do so in its general discussion of that concept and in its analysis of one of the four technical issues. We therefore remand those two portions of LBP-03-10 and instruct the Board to revise its findings of fact and conclusions of law to make them consistent with our discussion of "protected activity."

a. General Meaning of "Protected Activity"

The Board offers scant explanation as to why it considers "protected activities" to include involvement in safety-related issues that Mr. Fiser neither discovered, identified, raised, reported nor documented.[117] The Board simply adopts the Staff's position that participation in such issues' resolution is sufficient to qualify as a "protected activity."[118] In support, the Board

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[114] NEI's Oct. 2 Brief at 17.

[115] NRC Staff's Nov. 3 Brief at 9.

[116] *Id.*

[117] *See* 57 NRC at 580-81. *See also* TVA's Oct. 2 Brief at 24.

[118] *See* 57 NRC at 580-81, 584.

cites only one case -- a decision by the Secretary of Labor (*Zinn v. University of Mo.*[119]) which, according to the Board, "makes it clear that protected activities are not limited to those initially raised, documented, or identified by the complainant."[120]

We believe that the Board has misread *Zinn*. The University of Missouri (Dr. Zinn's employer) set up a Shipping Task Force to conduct a "global review of shipping procedures [of radioactive materials from] ... the [University's research] reactor in order to pursue ... remedial steps to prevent .. shipping errors in the future."[121] Dr. Zinn was a member of that Task Force. During the course of the Task Force's consideration of the shipping procedures, he insisted that the "'global review' should address not only the previously raised issue of accuracy in addressing shipments *but also another issue* related to the amount of radioactivity in each shipment leaving the reactor, *viz.*, the accurate description of the targets submitted for irradiation, including any trace elements."[122] *Zinn* was thus not a case involving merely someone working solely to resolve a previously raised issue. Rather, it concerned Dr. Zinn and another University employee, both of whom were raising a *new* safety issue, albeit in the context of an effort to resolve a previously raised one.

More specifically, though it is true that the two complainants in *Zinn* did not discover, identify, report or document the original safety issue, they did attend meetings at which one or both of them engaged in activities described as "express[ing] concern,"[123] "rais[ing] safety

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[119] Case Nos. 93-ERA-34, 93-ERA-36, 1996 WL 171417 (Sec'y Jan. 18, 1996).

[120] 57 NRC at 580-81.

[121] 1996 WL 171417 at *1.

[122] *Id.* at *2 (emphasis added).

[123] *Id.* at *8.

concerns,"[124] "rais[ing] objections,"[125] and "pursu[ing] th[e] subject" of the new safety issue.[126] The complainants also pursued the safety issues outside of the meetings.[127] The *Zinn* decision thus makes clear that the complainants were actively opposing the management and that their actions thus fell squarely within the Congressional intent to protect employees who were risking the disapproval and wrath of their employers for pointing out safety problems.[128]

We read the *Zinn* decision to support the proposition that an employee is participating in a "protected activity" when he raises safety-related issues, even if the context in which he or she does so is the resolution (rather than the raising) of another safety issue. This interpretation is consistent with the rule of statutory construction that remedial legislation (such as whistleblower and anti-discrimination statutes) should be broadly interpreted in order to accomplish its goals.[129] We believe that, if an employee on a safety issue resolution committee believes that the committee's responses to the safety problem are misdirected or ineffective, the employee's statements to that effect would constitute a "protected activity" even though

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[124] *Id.* at *12 n.10.

[125] *Id.*

[126] *Id.*

[127] *Id.* at *4, *7, *10, *12 n.10.

[128] *See generally Trimmer*, 174 F.3d at 1104 ("Whistleblower provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment" (citation and internal quotation marks omitted)). Whistleblower protection does not, however, require employees to predict that whistleblowing will subject them to their employers' wrath. For instance, a quality assurance inspector whose job entails pursuing safety issues is entitled to whistleblower protection even though he might not know that his employer would take umbrage at his safety-related reports. Any other result would undermine the Commission's goal of preventing a "chilling effect" on whistleblowers' fellow employees -- something that could occur regardless of the whistleblower's lack of prescience.

[129] *See*, *e.g.*, *Kundrat v. District of Columbia*, 106 F. Supp.2d 1, 4 (D.D.C. 2000) ("Title VII is a remedial statute which is generally broadly construed").

made in the context of an attempt to resolve the same safety problem. Likewise, if an employee, while resolving a previously-reported safety issue discovered by another, finds additional previously-undiscovered safety problems, the employee's reporting the new problems would constitute "protected activity."[130]

We do not, however, go so far down this path as the Staff would lead us. We are unconvinced by the NRC Staff's interpretation of section 50.7(a)(1)(v) as including actions of an employee whose *sole* whistleblower-related conduct consists of helping to find a remedy for safety problems discovered by others. The Staff considers such remedial activities as constituting the "assist[ance]" of others engaged in protected activities as well as "participation" in protected activities.[131] The Staff ignores the fact that subsection 50.7(a)(1)(v) refers *only* to the specific activities enumerated in subsections 50.7(a)(1)(i)-(iv). Consequently, to the extent that Mr. Fiser was involved in *exclusively* remedial activities, then those would not fall within the bounds of "protected activity." Such purely remedial activities are hardly the kind that would be taken "against the explicit or implicit directives or wishes of the employer."[132]

In short, we conclude that the mere involvement -- without more -- in the resolution of a safety or regulatory compliance issue raised by another person does not constitute "protected activity;" but we also conclude, conversely, that an employee's involvement in the resolution of such an issue does not deprive an employee of the protections that section 50.7 offers for otherwise protected activities. We move now to an examination of Mr. Fiser's involvement in each technical issue, where we find that -- despite the Board's overly general interpretation of

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[130] *Cf. Zinn*, *supra*.

[131] NRC Staff's Nov. 3 Brief at 9.

[132] 57 NRC at 610 (minority opinion).

the phrase "protected activity" -- all but one of the four technical actions on which the Board relies are indeed "protected activities" as we interpret that term above.

b. The Board's Application of the "Protected Activity" Concept to Four Technical Actions

1. Regarding the first technical issue, the Board found that the "radiation monitor set points ... issue was first identified to TVA by [the] NRC through an IE bulletin in 1982, prior to [the beginning of] Mr. Fiser's employment by TVA ... in 1987."[133] Consequently, the Board concluded that "Mr. Fiser did not initially raise the issue before TVA. Nor did he sign the corrective action document ... that closed the issue."[134] The Board further found, however, that Mr. Fiser "suspected that the issue had not been resolved properly" and therefore "participated in the discussion of salient parts of the issue that eventually led TVA to undertake corrective action."[135] In Mr. Fiser's own words, he "started the questioning process about the way the issue was resolved,"[136] and "started the initial investigation" in 1988 into the question whether the safety issue had been properly resolved.[137] As a legal matter, this re-raising of the safety issue strikes us, as it did the Board, as "protected activity." Mr. Fiser was risking the disapproval of TVA management by raising this matter.

TVA complains, *inter alia*, that Mr. Fiser failed to prepare the proper administrative document on the safety issue, and argues that we should therefore not consider this activity as "protected." Although this is perhaps germane to how well he performed certain administrative aspects of his job, it is irrelevant to whether he engaged in a "protected activity." We are not

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[133] *Id.* at 583.

[134] *Id.* at 584.

[135] *Id.*

[136] *Id.* at 583, quoting Tr. 1136.

[137] 57 NRC at 583, quoting Tr. 2644.

concerned with whether an employee procedurally crosses every "t" and dots every "i" when reporting safety problems to management. We are instead concerned with whether the employee gave management at least some form of notice of the safety or regulatory compliance problem. Indeed, such a hypertechnical approach would contravene more than twenty years of judicial interpretation of Section 211 as covering "informal complaints."[138]

2. The second technical issue listed in the 1993 DOL complaint (and also identified in Mr. Fiser's letter to Senator Sasser) is a dispute over whether the Sequoyah plant personnel were able to conduct PASS analyses in the three hours allotted by the NRC. The Board accepted TVA's argument that Mr. Fiser did not identify or raise the PASS issue and that he was in fact in an entirely unrelated office at the time the Sequoyah Plant's Nuclear Safety Review Board raised this issue.[139]

The Licensing Board inferred from the record, however, that Mr. Fiser (and a colleague Mr. William F. Jocher) had disagreed with the site's vice-president (Mr. Jack Wilson) in 1992 regarding the applicability of the PASS requirement, that Mr. Jocher had subsequently contacted the NRC to confirm that applicability, that Messrs. Fiser and Jocher had later discussed the PASS testing program and had begun preparing appropriate questions, and that TVA management had then transferred Mr. Fiser to the position of Acting Corporate Chemistry Manager before Mr. Jocher had administered the tests.[140] The Board then concluded that,

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[138] *See Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931-32 (11th Cir. 1995), and cited cases.

[139] 57 NRC at 585-86.

[140] *Id.* at 586. *See also id.* at 571-74.

"under these circumstances, Mr. Fiser was involved and participated to some extent in resolving the PASS question and thus was entitled to be treated as participating in a protected activity."[141]

Based on the Board's factual descriptions and findings (particularly the one regarding Mr. Fiser's disagreement with Mr. Wilson regarding the applicability of an NRC requirement), this conclusion strikes us as reasonable and supported by the record. We therefore agree with the Board's conclusion of law that this activity was "protected."

3. The third safety problem (also cited in Mr. Fiser's letter to Senator Sasser but not included in his 1993 DOL complaint) related to the emergency diesel generator seven-day fuel oil storage tank recirculation system at the Sequoyah facility. Mr. Fiser wrote to the Senator that problems with the procedure for taking samples from this system "rendered the emergency diesel generators inoperable and placed both units at Sequoyah in a Limiting Condition of Operation."[142] TVA objects that Mr. Fiser did not identify, raise or document this issue and that the Board therefore should not have considered it.[143]

The Board found that "Mr. Fiser did not technically initiate this issue, nor did he sign the [1989 Significant Corrective Action Report] that documented it."[144] But the Board also found that Mr. Fiser "obviously participated in its resolution" and that Dr. Wilson C. McArthur became aware of the matter in 1993 when investigating several issues raised in Mr. Fiser's letter to

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[141] *Id.* at 586.

[142] *Id.* at 587, quoting the Staff's Proposed Findings of Fact ¶ 2.94. *See also* NRC Staff's Nov. 3 Brief at 11. The Limiting Condition of Operation required the plant's management to complete the required sampling within 24 hours or shut down the plant. 57 NRC at 587, quoting the Staff's Proposed Findings of Fact ¶ 2.94.

[143] 57 NRC at 587.

[144] *Id.* at 589. *See also id.* at 610-11 ("another person [than Mr. Fiser] actually pointed the way to the source of the problem and directed Mr. Fiser how to go about resolving it") (minority opinion).

Senator Sasser.[145] From these last two findings, the Board concluded as a matter of law that "we are treating this issue as a protected activity in which Mr. Fiser was involved."[146]

Earlier in this Order (pp. 25-33), we excluded this third activity (along with the fourth one, *infra*) from consideration due to the Staff's failure to include it in the Notice of Violation. But as the two issues have been fully litigated before both the Board and us, we will consider them for purposes of offering guidance for future cases.

As we discussed above, the Board's reliance on Mr. Fiser's mere involvement in the *resolution* of the safety issues contravenes our practice of limiting whistleblower protection to employees who are raising or identifying safety or regulatory compliance issues. We see no indication here that Mr. Fiser, while involved in the issue's resolution, was raising new safety or regulatory compliance concerns -- particularly those that would suggest he was "acting to [his] own possible detriment *against* the explicit or implicit directives or wishes of the employer, to address safety matters that might not otherwise be addressed."[147] Were mere involvement to qualify as protected activity, then any employee who had participated in the resolution of any nuclear issue and who disagreed with a subsequent personnel action could initiate a section 50.7 claim without having engaged in whistleblowing activity. Moreover, the second factor on which the Board relies (Dr. McArthur's awareness of the matter) is, as a matter of logic, simply unrelated to the question whether Mr. Fiser's actions constituted "protected activity." We

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[145] *Id.* at 589. Dr. McArthur was the selecting official responsible for filling the positions of PWR and BWR Chemistry Program Manager that Mr. Fiser was ultimately not offered. The assignment of that position to someone else constituted one of the "adverse actions" that later became one of the Staff's grounds for the instant proceeding. *See id.* at 596. *See also id.* at 599.

[146] *Id.* at 589.

[147] *Id.* at 610 (minority opinion) (emphasis in original). *See also id.* at 611 (minority opinion).

therefore, if we had not already excluded this issue, we would have reversed the Board's decision insofar as it relied on this activity when finding TVA in violation of section 50.7.

4. The final activity on which the Board relies involved data trending and apparently occurred between November 10, 1991, and early March of 1992.[148] According to the Board, "[d]ata trending involved the production of histogram plots for different contaminants, and different chemical control analysis on various plant systems."[149] In 1991, the plant's Nuclear Safety Review Board identified a safety-related problem -- the computers that generated trend plots were inoperable.[150] The Nuclear Safety Review Board instructed Mr. Fiser to draft a procedure requiring the Chemistry program to generate all the trend plots daily, including weekends and holidays.[151] Mr. Fiser declined for three reasons:

> First, and most important, he explained that if the computer were to break again, then, if the trending were required by a procedure, the Chemistry program would be in violation of the procedure and potentially subject to enforcement action by NRC as a result.... Second, Mr. Fiser explained that incorporating the trending into a procedure would require tremendous overtime by the chemistry technicians who performed the trending, overtime for which Mr. Fiser lacked approval.... Finally, Mr. Fiser expressed concern about a potential procedural violation emanating from the proposed trending procedure because Sequoyah had recently had problems with procedural violations, for which a corrective action document would have to be prepared and NRC eventually informed.[152]

The Board concluded that Mr. Fiser had declined to follow the Nuclear Safety Review Board's instructions

> for what he regarded as safety-related reasons, i.e., the likely regulatory infractions that could result from such a procedure. For these reasons, although

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[148] *Id.* at 589-92. The Board does not provide the exact date(s) or date range in which Mr. Fiser engaged in this "protected activity." *See also id.* at 614 (minority opinion).

[149] *Id.* at 589.

[150] *Id.* at 589.

[151] *Id.* at 589-90.

[152] *Id.* at 590.

> Mr. Fiser did not raise this issue (the [Nuclear Safety Review Board] did so), we consider Mr. Fiser's involvement in the data trending issue as another protected activity in which he was involved.[153]

We agree with the Board's conclusion. For purposes of ensuring regulatory compliance,[154] Mr. Fiser was telling TVA management what it did not want to hear regarding a potential "violation of a procedure" that would "potentially [be] subject to enforcement action."[155] This is one of the situations to which section 50.7 is intended to apply.

Our conclusion is not altered by the possibility that Mr. Fiser's refusal to follow instructions may have been based, in NEI's words, merely "on a concern about some hypothetical regulatory infraction"[156] or a "fear of agency enforcement action for failure to properly perform at some point in the future."[157] Mr. Fiser was concerned about a possible violation that could lead to NRC enforcement action. Section 50.7(a)(1)(ii) protects any refusal "to engage in any practice made unlawful ... if the employee has identified the *alleged* illegality to the employer" (emphasis added). Our regulation's use of the adjective "alleged" to modify "illegality" indicates that an employee need not be correct in his or her legal assessment, but need only have a reasonable belief that the assessment is correct.[158] As former Chairman Ivan Selin stated regarding this question,

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[153] *Id.* at 591.

[154] In order to fall under the protection of Section 211 and section 50.7, an employee's activity regarding such regulatory compliance need not be directly related to safety. *See* note 10, *supra*.

[155] *Id.* at 590.

[156] NEI's Oct. 2 Brief at 18. *See also* TVA's Nov. 24 Brief at 15 (referring to Mr. Fiser's "hypothetical concern that he ... might ... cause a violation").

[157] NEI's Oct. 2 Brief at 19 n.8.

[158] *See*, *e.g.*, *Stone & Webster*, 115 F.3d at 1575.

> "[a]lthough ... concerns are ... raised [by allegers] where ..., albeit in good faith, the alleger was technically wrong, it is nonetheless, important that employees, regardless of the merits of their concerns, feel free to raise their safety concerns."[159]

> "[P]eople who come forward with dumb ideas ... should be protected also."[160]

Our refusal in a whistleblower proceeding to look into the merits of an employee's safety concerns is also analogous to our approach toward management personnel decisions in whistleblower cases: we do not look behind those decisions, even if they strike us as ill-advised, so long as they do not have the effect of intentionally discriminating based on an employee's whistleblower activity.[161] Finally, our position is consistent with the practice of both the NRC Staff[162] and DOL.[163]

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[159] Statement Submitted by the United States Nuclear Regulatory Commission at 209. *Cf.* Discrimination Task Group Report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," at 7 (April 2002), paraphrasing then-Chairman Ivan Selin to the effect that "the significance of the technical complaint, in particular, was probably not an appropriate factor in determining whether to investigate a complaint." (The Task Group Report was released to the public on Oct. 4, 2002 and is available on ADAMS at Accession No. ML022120514.)

[160] Task Group Report at 7, quoting then-Chairman Ivan Selin. Our use of these quotations should not be construed to suggest that we consider Mr. Fiser's concerns to be either "dumb" or "technically wrong." We need not and do not take a position on the merits of those concerns.

[161] *Cf. American Nuclear Resources*, 134 F.3d at 1296 ("an employer may fire an employee for any reason at all, so long as the reason does not violate a Congressional statute").

[162] *See*, *e.g.*, Letter to Honolulu Medical Group from L.J. Callan, NRC Regional Administrator, at 2 (Jan 23, 1997), *attached to Honolulu Med. Group* (Honolulu, Haw.), EA-95-006, Notice of Violation (Jan. 23, 1997), both documents available on the NRC website:

> [Licensee] stated that "the NRC should exercise discretion in this case *because the complaints raised by [alleger] Smith were never substantiated* (emphasis added)." Whether a complaint is substantiated makes no difference with respect to the protections afforded employees under the law. Employees are protected against retaliation even if their perceptions of noncompliance or safety problems are not validated.

(continued...)

5. For the reasons set forth above, we reverse the Board's general ruling that involvement in the resolution of a safety issue, without more, qualifies as a "protected activity." We also affirm the Board's rulings that the first (radiation monitor set points) and second (PASS) technical actions are "protected activities." Had we not previously ruled that the fourth action (data trending) was not properly noticed and therefore beyond the scope of this proceeding, we would have affirmed the Board's ruling that the activity qualified as "protected." And, had we not previously ruled that the third (diesel generator) issue was also not properly noticed, we would have reversed the Board's ruling that the issue qualified as "protected."

3. Conclusion

On remand, the Board should consider only the following three activities as being "protected:" Mr. Fiser's September 23, 1993 DOL Complaint, his identification of chemistry related nuclear safety concerns in 1991-1993 involving radiation monitor set points, and his expressions of concern in February 19 through early March of 1992 regarding the applicability of the NRC's requirements for conducting PASS analyses. To the extent the Board considers temporal proximity as evidence on the "contributing factor" question,[164] it should compare the dates of these three activities (1991-93) with the dates of the two adverse personnel actions at

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[162](...continued)
See also Letter to Crane Nuclear, Inc., from J. E. Dyer, Regional Administrator, at 1 (Jan. 17, 2002), *attached to Crane Nuclear, Inc.* (Kennesaw, GA), EA-01-073, Notice of Violation (Jan. 17, 2002), both documents available on the NRC website.

[163] *See Keene v. Houston Lighting & Power Co.*, ARB No. 96-004, ALJ No. 95-ERA-4, at 7 (ARB Feb. 19, 1997); *Seater v. Southern Cal. Edison Co.*, ARB No. 96-013, ALJ No. 95-ERA-13, at 4-5 (ARB Sept. 27, 1996). *See also General Elec. Co.* (Wilmington, NC Facility), DD-89-1, 29 NRC 325, 332 n.10 (1989).

[164] The Board briefly discussed temporal proximity in its Initial Decision. *See* 57 NRC at 567-68, 603.

issue here (the Summer of 1996).[165] The Board should then consider whether the proximity of these dates either does or does not support a finding of causation.

D. Mitigation of Monetary Penalty

We recognize that our rulings so far in this order may ultimately render moot any question of mitigation of civil penalties. That depends on how, on remand, the Board rules on the "contributing factor" and "clear and convincing evidence" prongs of the Section 211 evidentiary framework. But we did seek appeal briefs on the appropriate standard for a Licensing Board to apply when determining whether to mitigate the amount of a civil monetary penalty in a whistleblower enforcement adjudication.[166] Because the issue has been fully briefed and is a legal issue of first impression at the NRC, we choose to address it now, for the possible benefit of not only the *TVA* Board on remand but also other boards in future cases.

Mitigation determinations are inherently fact-based, and the Licensing Board is responsible in the first instance for factfinding.[167] Therefore, if the Board on remand concludes again that TVA has violated section 50.7, we instruct the Board to reconsider the mitigation section of LBP-03-10 in light of our rulings and guidance below.

The Commission has the "discretion to [impose] a civil penalty as prescribed by [AEA] Section 234 as a sanction for [a] violation" "[s]o long as [i] a violation has been established, [ii] ... penalties may positively affect the conduct of the licensee or other similarly situated persons in accord with the policies in the Atomic Energy Act, and [iii] civil penalties are not grossly

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[165] *I.e.*, (1) TVA's refusal to "pre-select" Mr. Fiser as PWR or BWR Chemistry Program Manager for Sequoyah, and (2) the subsequent selection of candidates other than Mr. Fiser for those positions.

[166] CLI-03-09, 58 NRC at 43, 44.

[167] *See*, *e.g.*, *Commonwealth Edison Co. (Zion Station, Units 1 and 2) & Northern Ind. Pub. Serv. Co.* (Bailly Generating Station, Nuclear-1), CLI-74-35, 8 AEC 374 (1974); *Public Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 296 (1990).

disproportionate to the gravity of the offense."[168] Under such circumstances, a Board may take into account mitigating factors when determining whether to reduce a penalty amount.[169]

As noted above, the Board in LBP-03-10 based its mitigation ruling "large[ly]" on the conclusions that TVA appeared to base its decision on "seemingly significant performance-based reasons"[170] and that TVA appeared not to have received adequate notice in 1996 of what the Board considered the NRC Staff's new interpretation of section 50.7 as including adverse actions motivated in *any* part by an employee's engagement in protected activities (rather than solely those adverse actions that were premised "in significant portion" on protected activities).[171] In CLI-03-09, we asked the parties to address the question of what standard the Board should have applied when determining whether to mitigate the amount of a civil monetary penalty.

1. Appropriate Standard for Mitigating a Civil Monetary Penalty

The NRC Staff answers our question by asserting that the correct standard is "whether the Staff ... abused its discretion in applying the Commission's [enforcement] policy," *i.e.*, whether the Staff either failed to follow that policy "without adequate justification" or imposed a penalty that "is clearly unreasonable given the circumstances of the case."[172] Along a somewhat similar vein, the Staff also argues that the Commission's Enforcement Policy deprives the Board of authority to substitute its judgment for that of the Staff regarding the appropriate penalty

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[168] *Atlantic Research*, CLI-80-7, 11 NRC at 421.

[169] *See Atlantic Research*, ALAB-594, 11 NRC at 845-46. *See also* 10 C.F.R. § 2.205(f) ("If a hearing is held, an order will be issued after the hearing by the presiding officer or the Commission dismissing the proceeding or imposing, *mitigating* or remitting the civil penalty" (emphasis added)).

[170] 57 NRC at 558. *See also id.* at 606-07.

[171] *Id.* at 559, 607.

[172] NRC Staff's Oct. 2 Brief at 8.

amount. The Staff asserts that the Board's approach to mitigation is analogous to the tort concept of comparative negligence -- a doctrine under which the court may reduce the damages to reflect a plaintiff's share of responsibility for an accident. The Staff then argues that such an approach improperly allows boards to hold licensees only partially responsible for regulatory violations.

We disagree with the Staff's concept that the litmus test for Board mitigation is "abuse of discretion" -- a very high level of deference to the Staff. The Staff's position is inconsistent with the nature of civil penalty adjudications. They are *de novo* proceedings, not limited proceedings for review of NRC Staff decisions. This is clear from our agency's appellate precedent. In *Atlantic Research*, for example, the Appeal Board ruled that licensing boards have plenary power to mitigate civil penalties:

> [T]he adjudicatory hearing in a civil penalty proceeding is essentially a trial *de novo*. Subject only to observance of the principle that the penalty which may be imposed by the [Director of the Office of Inspection and Enforcement] constitutes the upper bound of the penalty which may be imposed after that hearing, the Administrative Law Judge (and this Board and the Commission on review) may substitute their own judgment for that of the Director. Stated otherwise, if deemed to be warranted in the totality of circumstances, the adjudicator is entirely free to mitigate or remit the assessed penalty.[173]

The Staff's argument that the Commission's adoption of an Enforcement Policy implicitly deprives the Board of its authority to substitute its own judgment for that of the Staff regarding civil penalty amounts in whistleblower cases contravenes the general authority bestowed on the Board in 10 C.F.R. § 2.205(f) -- which carves out no exception for whistleblower cases. Section

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[173] *Atlantic Research*, ALAB-594, 11 NRC at 849. *See also Radiation Technology*, ALAB-567, 10 NRC at 536 ("It is the presiding officer at th[e] hearing, not the Director [of Inspections and Enforcement], who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties warranted"). Since 1982, presiding officers have been required to act in conformity with our Enforcement Policy Statements. But those Policy Statements establish substantive parameters for civil penalties and other enforcement actions. They do not abrogate licensing board's mitigation power nor convert the boards' role into a reviewer of Staff action.

2.205(f) instead applies by its own terms to *all* civil penalty cases, and authorizes the Licensing Board to issue "an order ... mitigating ... the civil penalty,"[174] consistent with Commission enforcement policy and precedent. In addition, the Staff's proposed exemption would deny a licensee the full hearing to which it is entitled on *all* aspects of the proposed enforcement action, and would undermine the *de novo* character of the Board's review. Finally as to the proposed exemption, the Staff itself acknowledges in this proceeding the authority of the Board to mitigate civil penalties, presumably under section 2.205.[175]

We similarly disagree with the Staff's related assertion that the current Enforcement Policy prohibits the Board from substituting its own judgment for that of the Staff. The Enforcement Policy is directed, in part, to the actions that the Staff takes under the authority delegated by the Commission. But the fact that the Staff initially applies the Commission's Enforcement Policy does not thereby confer upon the Staff exclusive discretion to determine the amount of a civil monetary penalty. The Policy applies just as much to the Board in its review of Staff enforcement actions as it does to the Staff itself.[176]

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[174] *See also Atlantic Research*, ALAB-594, 11 NRC at 845-46.

[175] NRC Staff's Nov. 21 Brief at 1.

[176] The Board, like all subsidiary offices within the NRC, implements Commission policy. *See Hurley Med. Ctr.* (One Hurley Plaza, Flint, MI), ALJ-87-2, 25 NRC 219, 238 (1987). NUREG-1600 (Rev. 1), "Revision of NRC [Enforcement] Policy Statement: General Statement of Policy and Procedure for NRC Enforcement Actions," 63 Fed. Reg. 26,630, 26,632-33 (May 13, 1998) says expressly that "[t]he following statement of policy and procedure explains the *enforcement policy* and procedures of the ... Commission ... and the NRC Staff ... in initiating enforcement actions, and *of the presiding officers and the Commission in reviewing these actions.*" (Emphasis added). Regarding the second italicized phrase in NUREG-1600, each Commission enforcement policy statement contained the same or similar language from the document's inception in October of 1980 until November of 1999, when the phrase was inadvertently deleted. *See* 64 Fed. Reg. 64,142, 64,145 (Nov. 9, 1999). *See also* NUREG-1600, *General Statement of Policy and Procedures for NRC Enforcement Actions*, Oct. 31, 2002 (updating NUREG-1600 (May 1, 2000) and containing no reference to the Board), available on the NRC's website. No change in meaning was intended, as is evident from the text of 10 C.F.R. § 2.205, which continues to contemplate de novo civil penalty adjudications

(continued...)

Finally, we cannot accept the Staff's "comparative negligence" argument. The Board was within its discretion to consider the totality of circumstances in assessing the final penalty. The Commission's Enforcement Policy provides detailed guidance on civil penalty assessment including appropriate circumstances that warrant increasing or decreasing the penalty. Although the Board's mitigating factors are not among those specifically addressed, the Enforcement Policy contains a separate provision on the "exercise of discretion .... to ensure that the proposed civil penalty reflects all relevant circumstances of the particular case." Section VI.C.d.

For these reasons, we conclude both that the Board need not apply an "abuse of discretion" standard when reviewing a civil monetary penalty amount, and that the Board instead has *de novo* authority to mitigate that amount, consistent with our Enforcement Policy.

2. The Board's Incomplete Consideration of Mitigating Circumstances

The Board in LBP-03-10 based its mitigation ruling on two factors. The more important factor in the Board's view was the conclusion that TVA appeared to base its decision on "seemingly significant performance-based reasons."[177] The other factor was that TVA appeared not to have received adequate notice in 1996 of the NRC Staff's new interpretation of section 50.7 as including adverse actions motivated in *any* part by an employee's engagement in protected activities (rather than solely those adverse actions that were premised "in significant portion" on protected activities).[178]

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[176](...continued)
before licensing boards. *See also Consolidated X-Ray Serv. Corp.*, ALJ-83-2, 17 NRC 693, 705 (1983). By contrast, the Appeal Board in *Atlantic Research* quite properly did not feel bound by the NRC Staff's Inspection and Enforcement Manual, as that document reflected only *Staff* policy and did not have the Commission's *imprimatur*. *Atlantic Research*, ALAB-594, 11 NRC at 851.

[177] 57 NRC at 558. *See also id.* at 606-07.

[178] *Id.* at 559, 607.

We find the Licensing Board's overall mitigation approach to be largely consistent with our own order remanding the *Atlantic Research* proceeding to the Appeal Board to "consider whether *the circumstances of th[at] case* would justify mitigation of the amount of the penalty."[179] Although the *TVA* Board did consider some relevant circumstances, we conclude that it failed to take two into account.[180] Specifically, the Board did not consider the statement in section VII.B.5 of the Enforcement Policy that mitigation "discretion would *normally not* be exercised [i] in cases in which the licensee does not appropriately address the overall work environment ... or [ii] in cases that involve ... allegations of discrimination caused by a manager above the first-line supervisor."[181]

First, we note that the Board affirmatively found that TVA fostered a hostile work environment for whistleblowers.[182] Although the Board stated that it "considered all the evidence submitted by the parties and the entire record of this proceeding"[183] when reaching its mitigation

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[179] *Atlantic Research*, CLI-80-7, 11 NRC at 425. *See also Radiation Oncology Ctr. at Marlton* (Marlton, NJ), LBP-95-25, 42 NRC 237, 239 (1995); *Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 321 (1991); *Reich Geo-Physical, Inc.* (1019 Arlington Drive, Billings, Montana), ALJ-85-1, 22 NRC 941, 965 (1985); *Consolidated X-Ray Serv. Corp.*, ALJ-83-2, 17 NRC 693, 707-08 (1983).

[180] The Enforcement Policy requires that "*all* relevant circumstances" be considered. *General Statement of Policy and Procedures for NRC Enforcement Actions* 22 (§ VI.C.2), 28 (§ VI.C.2.d), 30 (§ VII) (Oct. 31, 2002) (updating NUREG-1600 (May 1, 2000)) (emphasis added), available on the NRC's website. *See also* NRC Enforcement Manual §§ 6.1, 6.3.6.a, available on the NRC's website.

[181] *General Statement of Policy and Procedures for NRC Enforcement Actions* 35 (§ VII.B.5) (Oct. 31, 2002).

[182] 57 NRC at 581-82.

[183] *Id.* at 607.

ruling, the Board did not specifically discuss whether or how TVA's hostile work environment affected that determination.[184] This was error.

Second, both LBP-03-10 and the record indicate that management above first-line supervisors were involved in the adverse personnel actions.[185] The Board referred to this factor in LBP-03-10[186] but did not address section VII.B.5 of the Enforcement Policy regarding the involvement of management above the level of first-line supervisor.[187] Nor did the Board specifically explain what circumstances justified its taking a tack different from the "normal" approach described above. This too was error.

The Board, to the extent it finds it necessary to revisit the mitigation issue, should address these two issues. It should also address the Staff's appellate argument (together with TVA's and NEI's responses) regarding TVA's performance-based reasons for taking adverse action against Mr. Fiser.[188] If the Board finds the Staff's reasoning unconvincing, then the Board should cite the specific portions of the record supportive of its conclusion that TVA had performance-based reasons for taking the adverse action; it should address whether TVA failed to present such reasons to this agency pursuant to section 50.9; and it should discuss whether (and, if so, why) such failure would render those reasons inappropriate for consideration in this section 50.7 proceeding.

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[184] *Id.* at 605-07.

[185] *Id.* at 577, 579, 600, 605 (citing Tr. 301 (Leuhman)).

[186] *Id.* at 566-67.

[187] For instance, both Dr. Wilson C. McArthur and Mr. Thomas McGrath were, at one point or another, Mr. Fiser's second-line supervisors. *See id.* at 577, 579.

[188] *See*, particularly, NRC Staff's Oct. 2 Brief at 3-5; NRC Staff's Nov. 3 Brief at 19-20; TVA's Nov. 4 Brief at 8-9 and nn.7-8; NRC Staff's Nov. 21 Brief at 3-4. Given our conclusion that the Board used an incomplete standard when determining whether to mitigate the penalty amount, it would be premature for us now to consider the Staff's arguments.

Finally, the Board may also take into consideration the Staff's assertion that, prior to the hearing, it had already applied the Commission's Enforcement Policy by combining all violations into one, and that it had thereby already "effectively mitigat[ed] the penalty before imposition" by reducing the penalty from $176,000 to the statutory maximum of $110,000 for a single violation.[189]

3. Other Matter

We need to address one final Staff argument regarding mitigation. The Staff argues on appeal that its evidence of a *per se* violation of Section 211 supports its conclusion that the Board should not have lowered the penalty amount. According to the Staff, immediately prior to the TVA Selection Review Board's determination that Mr. Sam L. Harvey rather than Mr. Fiser would be appointed a Chemistry Program Manager at the Sequoyah plant, Mr. Charles Kent (Sequoyah's Plant Manager and a member of the Selection Review Board) told at least one other Board member that Mr. Fiser was a whistleblower and had filed a DOL complaint. This "improper mention of an individual's protected activities" was, according to the Staff, a *per se* violation of Section 211.[190]

Our difficulty with this argument is that the Staff failed to refer to the "*per se* violation" in the NOV. As we discuss at length above, such inclusion is required in order to provide the licensee sufficient notice of the enforcement charges against it. Moreover, the Staff's reliance upon Mr. Kent's remark as an independent violation introduces not just a new allegation of violation but an entirely new enforcement theory. It is "well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change."[191]

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[189] NRC Staff's Oct. 2 Brief at 8.

[190] NRC Staff's Oct. 2 Brief at 7.

[191] *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 (continued...)

CONCLUSION

We *affirm* the Board's order in part, *reverse* it in part, and *remand* the proceeding for further Board action consistent with this Memorandum and Order. In particular, on remand the Board should take the following steps:

1. The Board should determine whether eliminating certain protected activities from consideration, as outlined in Part C of this Order, requires modification or retraction of the Board's finding that protected activities were a "contributing factor" in TVA's unfavorable personnel actions regarding Mr. Fiser (*see* Part B of this Order).

2. If the "contributing factor" finding stands, the Board should determine, as outlined in Part A of this Order, whether TVA has shown, by "clear and convincing evidence" that it would have taken the same actions regarding Mr. Fiser regardless of his protected activities.

3. If the Board finds against TVA on both the "contributing factor" and "clear and convincing evidence" issues, it should reconsider the question whether and to what extent the civil penalty should be mitigated, as outlined in Part D of this Order.

It is so ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of August, 2004.

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[191](...continued)
NRC 347, 354 (1975), quoting *Rodale Press, Inc. v. Federal Trade Comm'n*, 407 F.2d 1252, 1256 (D.C. Cir. 1968).