In the Matter of:

SURENDRAIAH MAKAM,

COMPLAINANT,

v.

PUBLIC SERVICE ELECTRIC & GAS CO.,

RESPONDENT.

ARB CASE NO. 99-045

ALJ CASE NOS. 98-ERA-22
98-ERA-26

DATE: January 30, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard E. Yaskin, Esq., *Staffordshire Professional Center, Voorhees, New Jersey*
Edward Slavin, Esq., *Deerfield Beach, Florida*

For the Respondent:
Robert M. Rader, Esq., *Winston & Strawn, Washington, D.C.*

FINAL DECISION AND ORDER

I. INTRODUCTION

This case arises under the employee protection provisions of the Energy Reorganization Act, ("ERA"), 42 U.S.C.A. §5851 (West 1995).[1/] The relevant facts are essentially undisputed.[2/] Complainant Surendriah Makam was employed by Public Service Electric and Gas Company (PSE&G) as a Senior Engineer and served in that capacity for approximately 16 years. Makam was primarily responsible for the heating, ventilation, and air-conditioning systems within the nuclear containment dome ("containment") of PSE&G's nuclear power plant.

[1/] The ERA prohibits an employer from discriminating against or otherwise taking unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity.

[2/] The facts are set forth in greater detail in the Administrative Law Judge's Recommended Decision and Order and need not be repeated here.

The Technical Specifications for the plant provide that the average temperature within its containment shall not exceed 120E F. Prior to 1995, PSE&G determined containment temperature by using an "arithmetic method" that averaged the readings of thermocouples placed in ten different locations within the containment. However, in March 1995, PSE&G determined that this practice was inconsistent with the Technical Specifications that required the containment's temperature to be calculated by averaging the readings at only five locations.

In May 1995, PSE&G shut the plant down for repairs. During this period, PSE&G assigned Makam to identify the five most representative temperature-recording locations for thermocouples within the containment. Ultimately, PSE&G hired MPR Associates of Alexandria, Virginia ("MPR") to assist Makam with this project.

In 1996, MPR issued a report in which it not only recommended various locations for the five thermocouples, but also suggested that PSE&G use a volume-weighted method of determining containment temperature instead of an arithmetic method. Makam approved the MPR proposal even though he knew that a volume-weighted calculation could result in temperature averages in excess of 120E F during hot summer days, which in turn could result in a shutdown of the plant.

PSE&G resumed operations at the plant in the summer of 1997. Shortly after startup, the average temperature in the containment rose to almost 116.6E F, a situation that forced PSE&G to take emergency measures to avoid a shutdown of the plant. PSE&G then set out to determine the cause of this unexpectedly high average temperature. Makam's new manager, Joseph Moaba, soon identified the volume-weighted calculation as the problem and blamed Makam for not advising his superiors of the obvious risk of shutdown inherent in using this particular method. Makam was placed on a performance improvement plan (PIP), and was terminated shortly thereafter. PSE&G cited Makam's failure to make sufficient improvement in his performance as the reason for Makam's termination.

Makam appealed his termination to PSE&G's Employee Relations Review Panel ("ERRP"). When that challenge proved unsuccessful, Makam filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that PSE&G improperly terminated him for engaging in protected activity under the ERA. OSHA found no merit to Makam's complaint. Makam objected to that determination, and the matter was referred to an Administrative Law Judge ("ALJ"). After a 13-day evidentiary hearing in this case, the ALJ found that PSE&G did not violate the employee protection provisions of the ERA and, by Recommended Decision and Order ("RD&O") dated February 19, 1999, recommended that Makam's complaint be dismissed. This appeal followed.

I. JURISDICTION

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8 (2000).

II. STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions. See 5 U.S.C. §557(b). As a result, the Board is not bound by the conclusions of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co*., ALJ Case No. 95-WPC-1, ARB Case No. 97-069, slip op. at 7 (Apr. 28, 2000).

II DISCUSSION

In order to prevail in an ERA whistleblower case, the complainant must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. *See Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098 (10th Cir. 1999); 42 U.S.C.A. §5851 (b)(3)(C) and (b)(3)(D).

Makam argued before the ALJ that he raised protected safety concerns in the course of his regular duties.[3/] Complainant's Brief filed October 7, 1998 at 4. The ALJ agreed that reporting safety concerns is a protected activity, but found no evidence to suggest that Makam ever made such a report. The ALJ found that "the record in the instant case, including Complainant's own testimony, contains no evidence that he communicated a 'commitment' to utilize the more conservative MPR method, or a complaint to his supervisors or to management regarding the temperature issue prior to his termination . . . ." 1998 ERA 22 and 26 @ 10.[4/] Makam takes issue with this finding. However, we conclude that the ALJ's amply-supported finding is correct.

According to Makam, the ALJ's finding is inconsistent with the Board's decision in *Jarvis v. Battelle Pacific N.W. Laboratory*, ALJ Case No. 97-ERA-15, ARB Case No. 97-112 (Aug. 27, 1998). Specifically, Makam states:

> In Jarvis, the ALJ held that ERA protection of Jarvis' recommendations regarding risk acceptance criteria ("RAC") was dependent upon Complainant's reasonable belief that "the risk assessment methodology then in use by DOE was in

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[3/] The ERA lists six forms of whistleblower activity which are protected. Of relevance to this case is the prohibition against retaliation because an employee "[notifies] his employer of an alleged violation of [the ERA] or the Atomic Energy Act of 1954 . . . ." 42 U.S.C.A. §5851(a)(1)(A).

[4/] References to the ALJ's RD&O is to the published opinion on the Department of Labor's World Wide Web site www.oalj.dol.gov. In this decision, we use the OALJ citation format set forth at www.oalj.dol.gov/cite.htm .

> violation of the ERA." Jarvis, Slip Op. at *22. The ARB reversed, holding that the ERA protects employees whom in the course of their work, "must make recommendations regarding how best to serve the interests of nuclear safety, even when they do not allege that the status quo is in violation of any specific statutory or regulatory standard." Id. (emphasis added.) . . . . Applying its standard, the ARB concluded that Jarvis' "development of a methodology to be used to assess the risks posed by radioactive waste deposited in a tank waste remediation system . . . . qualifies for protection under §211 of the ERA." Id.

Comp. Br. at 25.

Makam also maintains that the ALJ's ruling is inconsistent with *Diaz-Robainas v. Florida Power & Light, Co*., Case No. 92-ERA-10, Sec. Dec., (Jan. 19, 1996), a case in which the Secretary determined that the ERA protected an employee even though he only raised safety concerns with his supervisor.

Makam asserts that, in light of *Jarvis* and *Diaz-Robainas*, the ALJ should have considered the following activities protected:

1. Identification of the 5 most representative thermo-couples for conservatively calculating average air temperature in compliance with tech. spec. (P-115);

2. Giving direction, review and comment to MPR's report of October 1996 as well as signing the report to approve MPR's conservative volume-weighted average methodology. (R-53);

3. Assigning to himself a CRCA commitment to survey the upper containment air temperatures in order to refine MPR's methodology. (R-52 at B-269);

4. Advocating approval of the T-Mod and MPR's methodology through the Containment Building Ventilation system's final Affirmation Report and Approval in November 1996. (P-65);

5. Issuance, along with contractor Phil Lawson, of the upper containment air temperatures. (R-79);

6. Resisting Frank Soens' criticism and attempt to scrap the proposed T-Mod survey, while convincing Acting

Supervisor Meinershagen that the survey should go ahead over Soens' objection. (T-1234; *See* R-73);

7. Briefing new Manager, Joe Moaba, about how the containment temperature issue came about and "what the issues are going to be" in light of the July 8, 1997 calculation of 116.6E F above average temperature. (T-1284);

8. Leading a team of engineers to develop the July 9, 1987 calculation and "correction curve" which adhered to MPR's methodology while adjusting the average temperature down by 3E F. (R-57 & P-71);

9. Telling Moaba and Meinershagen on July 10, 1997 that MPR's method was "very conservative" and that it could be refined based on additional data obtained through the T-Mod survey. (T-1310, 1338);

10. Briefing Operations Manager, Chris Bakken, on July 10, 1997, regarding the T-Mod purpose in refining the MPR calculation. (T-2035);

11. Submitting his July 26, 1997 Action Plan to new Supervisor, Dave Dodson, for handling data logger input when retrieved from the upper containment areas. (P-54).

Comp. Br. at 26-28.

We think the *Jarvis* and *Diaz-Robainas* cases are clearly distinguishable from the case before us. In *Jarvis*, the employee expressed concern that the storage of lithium in a building that housed radioactive material posed an explosion risk with the potential for widespread radioactive contamination. Similarly, in *Diaz-Robainas*, the employee insisted that the company needed to take certain measures in order to prevent or mitigate the consequences of a nuclear accident. In contrast, in this case -- as the ALJ found -- Makam engaged in **no** activity which could be considered to be protected under the ERA.

To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). Makam never expressed to PSE&G officials a concern that the arithmetic method of calculating containment temperature was less "safe" than the volume–weighted method that he endorsed. In fact, Makam has not proved that any of his actions were motivated by a belief that PSE&G was violating any nuclear laws or regulations, ignoring safety procedures, or assuming unacceptable risks. As the ALJ found,

"it cannot be determined from Complainant's testimony which method he himself advocated, and which method, if any, he believed would constitute a safety concern if implemented." 1998 ERA 22 and 26 @ 7. Thus, we cannot conclude that any of Makam's actions implicated safety definitively and specifically.

The ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *American Nuclear Resources, supra*, citing *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Whistleblower provisions such as the ERA's are intended to promote a working environment in which employees are free from the debilitating threat of employment reprisals for asserting company violations of statutes protecting nuclear safety and the environment. They are not, however, intended to be used by employees to shield themselves from termination actions for non-discriminatory reasons. *See Trimmer, supra.* In our view, Makam has not shown any nexus between his actions and some identifiable safety concern. Consequently, Makam's conduct falls outside the scope of ERA protection, and we concur with the ALJ that the complaint should be denied.[5/]

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[5/] Makam has raised a number of other issues in this appeal. However, inasmuch as Makam has failed to establish an essential element of his case, we need not address those issues.