

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 08/28/03

COMMISSIONERS

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

SERVED 08/28/03

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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-03-09

MEMORANDUM AND ORDER

The Tennessee Valley Authority (TVA) seeks discretionary Commission review of the Atomic Safety and Licensing Board's Initial Decision¹ pursuant to 10 C.F.R. § 2.786(b)(4). In that decision, a majority of the three-member Board upheld the NRC Staff's finding that TVA had discriminated against a whistleblower employee, but reduced the civil monetary penalty assessed by the Staff. The third member of the Board filed a separate opinion, concurring in part and dissenting in part.² We grant TVA's Petition for Review. Also, on our own motion, we have decided to review the question whether the Board applied the proper standard in reducing the civil penalty assessed by the Staff.

BACKGROUND

This case arises out of the NRC Staff's issuance of a Notice of Violation and, later, an order imposing a \$110,000 civil monetary penalty against TVA. The Staff's order found that TVA

¹ LBP-03-10, 58 NRC ____ (June 26, 2003).

² See 58 NRC at ____ - ____, slip op. at 71-83.

had violated 10 C.F.R. § 50.7 by retaliating against an employee for having engaged in protected (*i.e.*, “whistleblowing”) activities three years earlier.³

In 1996, TVA had declined to select Mr. Gary Fiser for a competitive position. According to Mr. Fiser and the NRC staff, TVA’s decision constituted discrimination in response to certain “protected conduct” in which Mr. Fiser engaged in 1993. TVA claimed 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. TVA’s motivation in not selecting Mr. Fiser was the key issue in determining whether TVA had violated section 50.7.⁴

Following a 25-day evidentiary hearing, the Atomic Safety and Licensing Board issued an initial decision (over a dissent by Judge Young) agreeing with the NRC Staff that TVA 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.⁵

The Board, however, reduced the penalty amount by 60 percent, to \$44,000, on two grounds:

“TVA has what appeared to it as seemingly significant performance-oriented reasons that

³ 66 Fed. Reg. 27,166 (May 16, 2001).

⁴ See 10 C.F.R. § 50.7(d) (“The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee’s engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations”).

⁵ LBP-03-10, 57 NRC at ____, slip op. at 1-2.

apparently played a large part (although not the sole part) in its non-selection of Mr. Fiser for the position he was seeking”⁶ 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.”⁷

TVA now seeks Commission review of this order on the grounds that the Board made clearly erroneous factual findings, reached legal conclusions that were contrary to law and without governing precedent, and raised substantial and important questions of law, policy and discretion.⁸ TVA points to nine factual findings of discriminatory intent that TVA considers “clearly erroneous.”⁹ The thrust of TVA’s factual challenge is that the Board’s findings of discriminatory intent are based on inferences drawn from circumstantial evidence rather than direct testimony, that even the circumstantial evidence on which the Board relies does not support either an inference of discriminatory intent or the conclusion that TVA violated section 50.7, and that the record does not support the Board’s conclusion that there was a pattern of discrimination likely orchestrated by persons in authority to end Mr. Fiser’s career.¹⁰

TVA also challenges the Board’s interpretation of section 50.7. More specifically, TVA argues that the Board applied an inappropriate test in determining whether the NRC Staff had met its burden of proof regarding discrimination under section 50.7;¹¹ that the Board incorrectly

⁶ *Id.* at ____, slip op. at 2. See also *id.* at ____, slip op. at 67-68.

⁷ *Id.* at ____, slip op. at 3.

⁸ See TVA’s Petition for Review of Initial Decision in LBP-03-10, dated July 16, 2003, at 1.

⁹ See *id.* at 3-6.

¹⁰ See *id.* at 3.

¹¹ See *id.* at 6-7.

held that, in a dual-motive case, section “50.7 is violated by finding ‘any’ discriminatory motive without making a quantitative determination as to whether that motive affected or caused the decision;”¹² that the Board should instead have required “a showing, by the preponderance of the reliable evidence, that the protected activity was in fact a contributing factor in the specific adverse action at issue;”¹³ and that the Board erroneously interpreted the term “protected activities” in section 50.7 to include participation in the resolution of a *previously*-identified safety issue.¹⁴

Further, TVA sees prejudicial procedural error in the Board’s reliance on certain allegedly protected activities that had not been included in the Staff’s Notice of Violation.¹⁵ And finally, TVA argues that the Board’s decision raises substantial questions of law and policy, *viz.*, the proper legal and evidentiary standard that would support a finding of violation under section 50.7, and the Board improperly injecting itself into the discretionary domain of management and second-guessing the management’s reasonable business decisions.¹⁶

The Staff disagrees with TVA’s assertions regarding factual error and the absence of precedent. It does not, however, object to Commission review with respect to the following substantial questions: (i) the scope of protected activities, (ii) the standard for determining whether prohibited discrimination occurred, (iii) the applicability of 10 C.F.R. § 50.9 (regarding completeness and accuracy of information submitted to the Commission) to a discrimination case in which the Staff had rebutted all the licensee’s alternative explanations for its allegedly

¹² *Id.* at 7.

¹³ *Id.* at 7.

¹⁴ *See id.* at 8-9.

¹⁵ *Id.* at 8 n.7.

¹⁶ *See id.* at 9-10.

discriminatory action, and (iv) the standards by which a Licensing Board should mitigate a civil penalty in a discrimination case.¹⁷ The Staff, pointing out that all but the final of these issues have already been thoroughly briefed before the Board, implies that we need only seek appellate briefs on that last issue.

The Nuclear Energy Institute (NEI) participated in the proceeding before the Board as an *amicus curiae*,¹⁸ and now seeks to file an answer in support of TVA's position.¹⁹ NEI raises many of the same issues as TVA.

DISCUSSION

Review of an initial decision such as LBP-03-10 is purely discretionary with the Commission, giving due weight to the existence of "a substantial question" regarding:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.²⁰

¹⁷ See Staff Response to TVA's Petition for Review of Initial Decision in LBP-03-10, dated July 25, 2003, at 2.

¹⁸ See LBP-03-10, 57 NRC at ___, slip op. at 9.

¹⁹ See Request of NEI for Leave to File an Answer in Support of Commission Review of Initial Decision in LBP-03-10, dated July 28, 2003; NEI's Answer in Support of TVA's Petition for Review of Initial Decision in LBP-03-10, dated July 28, 2003.

²⁰ 10 C.F.R. § 2.786(b)(4).

We grant TVA's Petition for Review on the ground that this proceeding presents "substantial questions" of first impression regarding this agency's enforcement regulations and policies. Also, we deny NEI's request for leave to file an answer to TVA's petition.²¹ However, consistent with our past practice under such circumstances, we will allow NEI, without further motion, to participate in this appellate phase of the proceeding to the extent set forth in the filing schedule below.²²

The Staff is correct to point out that many of TVA's issues have already been briefed before the Board. We believe, however, that the Initial Decision should enable the parties to focus their attention on the key issues more sharply than was possible in the trial briefs that were submitted prior to the issuance of LBP-03-10. We therefore decline to adopt the Staff's suggestion that we limit briefing to solely the issue of the standard for mitigating civil monetary penalties.

The Staff, in raising the mitigation issue, was not responding to any arguments raised in TVA's Petition for Review. The Staff was instead presenting an entirely unrelated question -- the kind of question which the Staff should have proffered in a Petition for Review of its own. By waiting to present the mitigation issue in its Answer, the Staff effectively deprived TVA of its right under our regulations to respond.²³ Despite the irregular way the Staff raised the mitigation

²¹ See *Louisiana Energy Serv. (Claiborne Enrichment Ctr.)*, CLI-97-7, 45 NRC 437, 438-39 (1997) ("Our rules contemplate *amicus curiae* briefs only after the Commission grants a petition for review, and do not provide for *amicus* briefs supporting or opposing petitions for review"). See also 10 C.F.R. § 2.715(d) (permitting the filing of *amicus curiae* briefs addressing an initial decision "[i]f [the] matter is taken up by the Commission pursuant to § 2.786").

²² See *Claiborne*, CLI-97-7, 45 NRC at 439.

²³ Compare 10 C.F.R. § 2.786(b)(3) ("Any other party to the proceeding may, within ten ... days after service of a petition for review, file an answer supporting or opposing petition review") *with id.* ("The petitioning party shall have no right to reply [to an Answer], except as permitted by the Commission").

issue, we recognize that it is significant and that the Commission has not previously addressed it. We therefore, on our own motion, add the mitigation question to the issues that the parties and NEI should address in their briefs before us.

We request that the parties and NEI file briefs discussing the issues raised in TVA's Petition for Review and the Staff's Answer. Accordingly, we establish the following filing schedule:

1. Within 30 days after service of this Order, TVA may file an initial brief no longer than 40 pages addressing the issues presented in its Petition for Review. If it chooses, NEI may simultaneously file an *amicus curiae* brief no longer than 20 pages addressing those same issues. The NRC Staff may simultaneously file an initial brief no longer than 15 pages addressing the mitigation issue which it raised in its Answer.
2. Within 30 days after service of TVA's brief or NEI's brief, whichever is later, the NRC Staff may file a single brief responding to the arguments of TVA (and, if appropriate, NEI). The Staff's responsive brief shall not exceed 40 pages unless NEI has filed an *amicus* brief. In that case, the NRC Staff's brief shall not exceed 50 pages. Also within those same 30 days, TVA may file a brief of no more than 15 pages responding to the arguments of the NRC Staff regarding the mitigation issue. NEI may file an *amicus* brief on that issue of no more than 5 pages.
3. Within 15 days after service of the Staff's responsive brief, TVA may file a reply brief no longer than 20 pages addressing the arguments presented in the NRC Staff's response brief. Also within those same 15 days, the NRC Staff may file a reply brief of no more than 5 pages addressing the arguments presented in TVA's response brief (and, if filed, NEI's *amicus* brief) on the mitigation issue.

Parties should file their briefs in a manner that ensures arrival at the Commission no later than 4:15 p.m. (Eastern Time) on the due date. Each brief longer than 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations on briefs are exclusive of pages containing a table of contents, table of cases, and of any addendum containing statutes, rules, regulations, etc.²⁴

²⁴ See *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-4, 43 NRC 51, 52 (1996).

It is so ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 28th day of August, 2003.