*Atchison v. Brown & Root, Inc.*, 82-ERA-9 (ALJ Dec. 3, 1982)



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**U.S. Department of Labor**
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CASE NO. 82-ERA-9

In the Matter of

CHARLES A. ATCHISON
Complainant

v.

BROWN AND ROOT, INC.
Respondent

Kenneth J. Mighell, Esq.
Cowles, Sorrells, Patterson & Thompson
1800 One Main Place
Dallas, Texas 75250
For the Complainant

Peter R. McClain, Esq.
Brown & Root, Inc.
P.O. Box 3
Houston, Texas 77001
For the Respondent

Before: ELLIN M. O'SHEA
Administrative Law Judge

RECOMMENDED DECISION
Statement of the Case

This is a proceeding under § 210 of the Energy Reorganization Act of 1974, as amended (42 U.S. C. § 5851), hereafter called the

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Act. The Act (42 U.S.C. § 5851(a)) prohibits a Nuclear Regulatory Commission (NRC) Licensee from discharging or discriminating against an employee who has commenced a proceeding to carry out the purposes of the Act. The Act is implemented by regulations designed to protect so-called "whistle-blower" employees from retaliatory or discriminatory actions by their employers (at 29 C.F.R. Part 24). An employee who believes that he or she has been discriminated against in violation of that section may file a complaint within 30 days after the violation occurs.

The complainant on April 16, 1982 filed a complaint under the Act and regulations with the Secretary of Labor. Following an investigation the Area Director of the Department's Employment Standards Administration issued a May 14, 1982 determination that complainant was a protected employee engaging in a protected activity within the Act's ambit and that discrimination prohibited by the Act was a factor in the actions of which he complained, warranting the Director's notice to respondent to abate their violation of the Act and provide specified appropriate relief to complainant, including his reinstatement and payment of back wages and expenses incurred because of his termination and unemployment.

Respondent timely appealed this determination, as a result of which by July 8, 1982 notice, this matter was scheduled for formal hearing held in Dallas, Texas on August 19, 1982, August 20, 1982 and August 21, 1982. The parties were both represented by counsel at hearing, and at counsel's joint request an opportunity to submit written briefs was afforded. The record was closed on October 6, 1982, with the receipt of briefs.

Hereby admitted into the record is complainant's counsel's September 1, 1982 letter, submitted in accord with my instructions at trial, which also encloses an identifying exhibit list of the Claimant's 26 Exhibits admitted at trial, as well as an identification list of the contents of Claimant's Exhibit 26, the Department of Labor file, Counsel's fee petition, included with his September 1, 1982 letter, is admitted.

An identifying description of the contents of respondent's three volumes of Exhibits conditionally admitted at trial, then marked and identified as Respondent's Volumes A, B, and C, was

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received with respondent's counsel's September 1, 1982 letter. It, and counsel's September 1, 1982 letter are hereby entered into the record. Given complainant's counsel's September 1, 1982 lack of objection, all of respondent's exhibits are finally

admitted into the record. Respondent's counsel's September 22, 1982 letter with his enclosed motion to correct the transcript is admitted, and this motion is granted. Complainant's counsel has not objected to this motion since service; most of the changes are minor spelling corrections, the remainder consistent with the sense of similar testimony, and the page 452 correction is in accord with this witness' omitted response.

To the extent possible, for ease and clarity in review of a voluminous and unwieldy record, this decision's references to the evidence will attempt to conform to respondent's counsel's method of reference described in footnote one of his post-trial brief.

Both parties having been afforded full opportunity to be heard and to present evidence and arguments on the issues, this recommended decision, and the findings of fact and conclusions reflected below, are based on the entire record of the proceedings, and on consideration of their briefs.

Complainant's Credibility

In reaching the following findings of fact and weighing the credibility of the witnesses' testimony, the fact that complainant lied on his application for Brown and Root employment when he stated he received an associate's degree from Tarrant County Junior College has been carefully considered. In this regard, Brown and Root was constructively aware of the complainant's false statements as to his educational achievements no later than sometime in the summer of 1980, when they received such advice in response to their apparent routine inquiry (NCR Exs. 134, 137; NCR 3199-3469.) However, no action in accordance with their standard advice to potential employee job applicants that any misrepresentation of application facts may be, a cause for dismissal was taken at any time prior to the April 12, 1982 termination at issue. Apparently this was because this filed reply (NCR Ex. 134) indicating complainant's false statements, was overlooked or unread on receipt . It is clear that neither Mr. Purdy nor Mr. Brandt was aware of any of the claimant's false representations as to his educational achievements until they came to light in connection with the July 1982 Nuclear Regulatory Commission (NRC) hearings.

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However, Brown and Root's inaction does not alter the fact of complainant's initial misrepresentation; and further, the record establishes complainant also physically altered a copy of the Tarrant County Junior College reply to Brown and Root to reflect his achievement of a degree and then used this altered form as part of his January 1982 application for TUGCO employment. These facts as to the complainant's document alteration were elicited from him in connection with post termination activities, and his testimony before the NRC (NCR 3199-3469), and were also unknown to Mr. Brandt and Mr. Purdy at his April 12, 1982 termination.

Careful consideration has been given to these misrepresentations, not under oath, including the circumstances thereof; as well as complainant's misstatements at points

under oath. (NCR 3199, at 3277: 15-18, NCR Ex. 200). While they are not, in my opinion, weighing the entire record to decide the issues before me, determinative of complainant's total lack of credibility, these serious, unbelievably explained actions, of necessity, are of considerable significance in assessing his credibility vis-a-vis respondent's witness' where their testimony conflicts.

However, complainant's credibility does not determine his establishment of a prima facia case of discharge for a protected activity; the internal Brown and Root written documents do. In reaching factual findings where attestions conflict I have looked to, and particularly weighed the other evidence surrounding the events in question to judge the actuality of the situation presented, giving weight to complainant's representations only when corroborated by other evidence of record over which he had no control, including reasonable inferences therefrom.

The findings reached below are made because the other surrounding evidence in this case persuades of the issue-determinative averments of one who misrepresented; lied; and altered a college record. My evaluation of the respondent's witnesses' testimony itself, and when analyzed with their pre April 13, 1982 records, and their pre and post april 12, 1982 statements, convinces that their proffered explanation of the non-protected reasons for complainant's termination is not reasonable nor credible and is pretexual. The question of complainant's credibility plays little, if any, part in this finding and conclusion.

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Complainant's Background with Brown and Root and His Firing

Brown and Root, the respondent, hereinafter B&R, is the constructor of the Commanche Peak Steam Electric (CPSE) Nuclear Project at Glen Rose, Texas for Texas Utilities Generating Company, herein (TUGCO). Complainant was employed by Brown and Root at the Comanche Peak Nuclear Project on February 28, 1979, and at all times since, and until his April 12, 1982 termination was Brown and Root's employee. He was hired as QA/QC[1] document specialist. As such he was responsible for insuring that all required documentation was completed and accurate in accordance with applicable procedures and standards. He held this job until the fall of 1979 when he became a Quality Assurance Engineering Specialist where as such he was involved in reviewing reports of nonconformance against the appropriate applicable standards and requirements; and which ultimately resulted in his being assigned the job title of Project Training Coordinator, writing, instructing and teaching courses to certify personnel of Brown and Root as qualified to perform a variety of inspection functions involved in documention/inspection for compliance. He also, as of 1981, was certified as an auditor and was involved in vendor audits.

He had held his project training coordinator position for more than a year as of late 1981 when, as a result of a management reorganization at Brown and Root, affecting a

number of respondent's employees, he was transferred, in compliance with his specific request and desires, and apparently n the recommendation of Jim Hawkins, a prior site QA manager, to a field job as a quality control inspector on the project. Organizationally in this field position he was assigned to what is known within Brown and Root as the ASME[2] side of the project, the mechanical QC inspection staff, where he worked under the immediate supervision of Richard D. Ice, the QC ASME Mechanical Equipment Supervisor. His primary QC inspector job function responsibility from the time of his 1981 transfer to the field and during the organizational changes of his position thereafter, until he was terminated April 12, 1982, was inspection of pipe whip restraints.

As complainant's supervisor from December 1981 until late January 1982, Mr. Ice found complainant's performance as a quality control inspector excellent, (NRC Ex. 5A) and he testified he would have willingly accepted complainant back into his group, if he had any say in the matter, despite the one questioning incident reflected at TR 275-277 where complainant was concerned because the certification paper-work for the job he was being asked to perform

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was not completed. Mr. Ice's testimony as to complainant's field work performance is not dissimilar to the prior good work performance evaluations he received from earlier Brown and Root rating supervisors, albeit they assessed him in the different job titles he held prior to his transfer to the field (Exhibits within Plaintiff's Exhibits 3-15; within Plaintiff's Ex. 26).

Sometime in late January 1982 another management realignment of project site responsibilities took place which affected complainant. A decision was made to transfer several employees of the Brown and Root ASME QC inspection group, including complainant, to a non-ASME mechanical inspection group organizationally under TUGCO, in connection with a transfer of inspection of pipe whip restraints responsibilities from Brown and Root to TUGCO.

Mr. Gordon Purdy is the Brown and Root Site QA Manager at Commanche Peak, and at all times since his assignment to this position in late 1981, has organizationally been complainant's ultimate supervisor, many layers removed. As such he was the responsible Brown and Root official who made the April 12, 1982 decision to fire the complainant, and it was Mr. Purdy who personally orally advised him of this decision on April 12, 1982. It would appear that the Brown and Root management reorganization of late 1981 was connected with Purdy's transfer to the project from a corporate entity in Houston. It was Mr. Purdy who was responsible for advising Mr. Brandt, the Ebasco Services employee of TUGCO's subcontractor, of just which Brown and Root employees would be transferred to Brandt's group in connection with the 1982 transfer of pipe whip restraints inspection responsibilities from Brown and Root to TUGCO.

Mr. Brandt was the project's non-ASME Mechanical/Civil Q/QC Supervisor. When advised by Purdy that Atchison was being transferred to his group, Mr. Brandt objected. He told Purdy he did not want complainant in his group. While complainant had never previously worked for, or under Brandt; or for anyone who reported to Brandt who would have personal knowledge of complainant's work performance, or job habits, Mr. Brandt had formed an opinion, for reasons stated below, that complainant was unqualified as a, and to test welders, and spent his time as training coordinator job seeking for, and "stirring up" the project's quality control inspectors. Brandt had previously conveyed this opinion of Atchison to Purdy

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prior to complainant's 1981 transfer to the field. Purdy nevertheless advised Brandt that Atchison would be transferred to his group.

As a result of this transfer, sometime in February 1982 complainant organizationally came under the direct and immediate supervision of Randall D. Smith, the non-ASME Mechanical QC Lead Supervisor, a Brown and Root employee. Between Brandt and Smith, Smith reported to a Mr. Foote, an Ebasco employee, (not qualified as a welder) who reported to Brandt.

On April 2, 1982 Smith evaluated complainant's job performance and job habits, in connection with the promotion from QC Inspector B to QC Inspector A that Smith then recommended to Brandt, through Foote, as complainant's request, a request apparently generated by Purdy's February 12, 1982 memorandum as to salary adjustments for QC inspectors and complainant's achievement of the certification necessary to qualify for the promotion it described. (Pt Exhibit D, PX Exs. 18, 19). Complainant was outstanding to exceptional in five of the six rated items, average in only one - leadership potential. The quality as well as quantity of his work was, in Smith's judgment, outstanding. When called upon to initiate and process the paperwork to effectuate Purdy's April 12, 1982 termination decision Smith had to again rate complainant's job performance. He reiterated it was excellent. (PX Ex. 24).

According to what Smith was told by Purdy April 12, 1982 complainant was being fired because Brandt told Purdy his services were not longer required and Purdy had no place to assign Atchison on the ASME Staff. The counseling and guidance report which Purdy signed in connection with complainant's termination stated his termination was recommended because of Atchison's "lack of ability to perform assigned tasks and follow supervisory instructions" in his work performance (PX Ex. 22); an obvious reflection of Brandt's April 12, 1982 written advice to Purdy that complainant's services were not longer required by him because while Atchison was assigned the responsibility for inspection of pipe whip restraints installation he

> "has demonstrated a lack of ability in performing assigned task, *in that* (emphasis supplied) he refuses to limit his scope of responsibility to pipe whip

restraints, and insists on getting involved with other areas outside his scope." (PX. Ex. 23).

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Complainant in commenting as requested on Brown and Root's April 12, 1982 internal counseling report, above Purdy's signature that day an assumedly prior to such signature (TR 711-714), stated that his termination in fact resulted from his reporting of unsatisfactory, vendor-supplied[3] 3/ pipe whip restraints being installed on this nuclear project, an a personal conflict with Mr. Brandt and Mr. Foote over his reporting this noncompliance (PX Ex. 22).

Brown and Root's Trial Contentions As to Termination

Brandt's, Purdy's and Brown and Root's post April 12, 1982 statements as to the reasons for Atchison's firing vary from and are inconsistent with those reflected in their April 12, 1982 internal communication, the Brown and Roote termination forms that day and some of Purdy's April 12, 1982 statements to Atchison and Smith. Brandt's later statements indicate that in fact the complainant's firing resulted from a combination of Brandt's perceptions and evaluations of Atchison's job performance inadequacies and mistakes personally observed on two occasions in March 1982, one in connection with the nonconformance report reported on logged in complainant's name, #M-82-00296 (hereinafter NCR 296); and TUGO's and Brown and Root's belief that complainant's April 12, 1982 nonconformance report #M-82-00361 (hereinafter NCR #361) was an attempt to leverage or secure a promotion through the attached "pow wow" note. However, Purdy attested complainant was fired because of the circumstances attendant on his April 12, 1982 filing of NCR #361, including Purdy's belief complainant's "pow wow" note to Smith was an attempt to use a nonconformance report to secure a promotion and Purdy's unsuccessful efforts to place complainant in any other Brown and Root job after Brandt's PX Exhibit 23 advice.

## APPLICABLE LAW - ISSUE FOR DECISION

The respondent's position is that the complainant has failed to state a proper cause of action for which relief may be granted under § 210 of the Act, 42 U.S.C. 5851. This section provides:

> "Sec. 210(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his

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> compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -

(1) commenced, caused to be commanded, or is about to commence or cause to be commenced a proceeding under the Act or the Atomic Energy Act of 1954, as amended, or a proceeding or the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;
(2) testified or is about to testify in any such proceeding or;
(3) assisted or participated or is about to assist or participate in any 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."

Complainant asserts he was discharged by respondent April 12, 1982 because of, and following his actions to report construction deficiencies, and to give information as to quality control violations under this Act or the Atomic Energy Act or 1954, i.e., because he filed NCR #296 and NCR #361. In effect, the quality control procedure under which he was functioning when these NCRs were averredly filed by him, (10 C.F.R. Part 50, § 50.34 (a)(7), Appendix B), and in, and for, the performance of which he alleges he was fired, in my opinion in themselves constitute an action or a proceeding for the administration or enforcement of the Acts' requirements; and further, in such performance, giving rise to the averred discriminatory firing at issue, the complainant was carrying out the Acts' purpose. Thus, in my opinion, and it is so found, the complainant's activities giving rise to his April 12, 1982 firing, that is his averred filing of NCR #296 and his filing of NCR #361, were protected activities within this Act's meaning to which the protected activity provisions of § 5851 apply.

I also find from Smith's testimony that in connection with his work on NCR #296 complainant mentioned he would, as he had in the past, go the the Nuclear Regulatory Commission with his unanswered concerns about a backfit program, knowledge as to which Smith conveyed to Foote. (TR 430-433). I also infer from the total circumstances presented in this record that he voiced these concerns

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to other inspecting personnel at the worksite. Nevertheless I do not believe in the circumstances here, where the filing of NCR #296 and NCR #361 themselves constitute protected activity under the Act, that complainant's stated intent to approach the Commission, or knowledge of this statement by Brandt and/or Purdy, determines whether complainant was engaged in a protected activity when fired.

Brandt and Purdy's testimony establish complainant's firing resulted from his filing NCR #361, and the circumstances surrounding and resulting from the complainant's filing of this report, a report which in and of itself was an action to carry out the Act's purpose. The argument that the NCR itself did not precipitate and result in the complainant's firing, but that the "pow wow" note alone resulted in his firing, divorced from the NCR to which it was attached; and that the latter is an activity beyond the ambit

of the Act's protection, is totally illogical and unconvincing. Reason dictates that the "pow wow" note is meaningless absent NCR #361.

Therefore the issue to be determined here is whether Brown and Root violated the employee protection provisions of the Act, 42 U.S.C. § 5851, by discharging Atchison for complaining about and reporting the construction defects and quality control deficiencies in the nuclear plant workplace, for his averred filing of NCR #296 and his April 12, 1982 filing of NCR #361.

I am of the opinion that under the case law applicable to the issue under the Act; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274; *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089; *TRW, Inc. v. NLRB*, 654 F.2d 307 and *Consolidated Edison Company of New York, Inc. v. Donovan*, Dkt. No. 81-4215, 2nd Circuit Court of Appeals, 3/8/82; this record must be analyzed and findings made in accord with the following principles. The complainant must make a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision to terminate him. Having so established, which as indicated below I find from this record, the employer must articulate a legitimate business reason for the action taken against complainant, demonstrate that the same action would have taken place even in the absence of the protected conduct; and the complainant must then persuade by substantial evidence that the protected activity was the moving cause for the dismissal or other complained of discriminatory action under § 5851.

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With the background facts noted above, and this concept of the legal framework against which the issue before me is to be decided, all the evidence gathered and reflected in this record, including that not recited below, is analyzed to reach specific findings of fact and conclusions determinative of the issue of whether complainant was discharged for engaging in activity protected by the Act.

## FINDINGS OF FACT

### Non Conformance Reports (NCRs) Procedures

The record establishes that in September 1980, complainant advised the NCR of welding deficiencies in vendor manufactured (CB&I) pipe moment restraints which on NCR investigation resulted in their issuance of a Notice of Violation. Complainant's averment in that these defects, identified by a Brown and Root QC inspector at the CB&I vendor site, were waived for shipment to the Commanche Peak nuclear plant by Brown and Root personnel was not substantiated by the NRC's 1980 investigation. (NCR Ex. 199).

In January 1982, Atchison discussed his identification of rejectable weld defects in a number of CB&I vendor-supplied pipe whip restraints with his them supervisor, Ice. He

was advised that similar problems with such items having been identified on prior occasions, these vendor-supplied restraints were not subject to further inspection by site QC personnel, having been inspected by the vendor, the TUGCO vendor release inspection personnel, and the CPSES receiving QA inspection personnel.

Ice verbally discussed Atchison's submission of an NCR[4] Atchison had drafted regarding these restraints but told him he did not believe it would be accepted because of the previous acceptable inspections and the response Ice had received from upper level supervision to the same question he had posed on these CB&I vendor supplied pipe whip restraints. Complainant did not take the action necessary to commit this noted nonconformance to the system, i.e., secure an NCR number from the appropriate NCR Coordinator. (NCR EX 199)

The record establishes that under the procedures in effect at this project, it is the issuance of this NCR number by the NCR Coordinator which commits the NCR to the system. Once an NCR number is taken or assigned the deficiency or nonconformance logged has to be acted on to disposition, or voided by management, with a record

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maintained solely because the NCR number was or is taken or assigned. There was no way in which complainant, or any employee who took or was assigned an NCR number in similar circumstances could retract or withdraw the NCR so issued, that is issued in the sense of the number being issued.

There is a written procedure to be followed for the documentation, handling and disposition of NCRs. (Respondent's Ex. Z-2). It has been carefully considered in conjunction with the witnesses' testimony as well as the testimony of the NCR Staff Members, Taylor and Driskill, at the July 1982 NCR hearings, as to how, in practice at this project site, the NCRs were in fact handled in accord with these procedures, including the reworking and rewriting of NCR #296 to comply with Brandt's directions after this NCR was committed to the system upon NCR number issuance.

I do not find that the use of the words "issue" or "issuance" of NCRs at this project had any specialized, procedurally-directed meaning such that its use would convey to employees working within this system any impression other than that the NCR had been finally typed by the NCR coordinator, and was ready to proceed through the supervisory line of command to ultimate disposition or voiding. It is clear from this record that depending on the particular circumstances of the nonconformance item being questioned or identified, discussions of NCRs could and were had between the originator of the NCR (person in whose name NCR number logged) and his supervisor both prior to the assignment of an NCR number, as well as after the number was assigned or taken and while the draft NCR was being written.

Incident at Pressurizer Tank Room, Reactor Building 1, 2 level.

The complainant's specific responsibility was inspection of modification areas of pipe whip restraints, site modifications, or additions to, or installations of pipe whip restraints that could be vendor fabricated. The reporting by NCR of obvious defects, located outside Brown and Root's modification areas, using AWS D1.1 inspection criteria, was also within complainant's scope of job responsibility (PX. Ex. 21).

Sometime in March 1982, but prior to March 23, 1982 the complainant was performing his inspection testing, in an area where site welders had complained to him of bad vendor item welds they were seeing. He noted, about 18 inches to his right according his attestions, through paint, a number of defects he believed were

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rejectable under the standards to which he was inspect (AWS D1.1).[5] He drafted an NCR and advised Smith of his findings.

This incident provided the first occasion for Brandt to have any supervisory contact with Atchison's work activities. Brandt's concern, on viewing the problem raised by Atchison through Smith and Roote was the fact that the vendor defects Atchison visually noted were "at the closest 3 to 4 feet away from the weld he was suppose to inspect," (UEA, page 10) and the rejectable porosity Atchison noted was within acceptable limits.[6] Brandt told Foote that the porosity defects Atchison noted and mapped on his one page sketch were not unacceptable porosity defects, but as to the other welding defects noted by Atchison, Brandt could not make a judgment unless the paint was removed.

Analysis of the witnesses' attestions at trial as to what comments Brandt made following this inspection, at which Atchison was not present, referable to Atchison's work, differ. According to Brandt he casually and without emphasis and perhaps in Smith's hearing mentioned to Foote that Atchison was requiring excess preparation for his liquid penetrant testing. Atchison testified Smith conveyed to him that the vendor weld items he questioned were not nonconforming and he was outside the scope of his responsibility in his reporting these items, and this information was coming from Brandt. While it is clear Smith as a result of the Circumstances of this incident, at this time conveyed to Atchison his concern about the porosity acceptance criteria he was using, it is also clear to me on an analysis of this record that through Smith's statements to him, which I infer came from upper management involved in this incident, i.e., Brandt and/ or Foote, complainant was given to understand he was exceeding the scope of his inspector responsibilities in reporting what he believed were vendor weld defects, i.e., they were beyond his testing area, (PX. Ex. 26.14); and complainant then initiated his request for information as to his responsibilities in this regard.

I believe from the total information in the record as to the circumstances in connection with this incident that Atchison was, at some time during it, given to understand that over and above the porosity reading problems upper management found with his inspection, upper management also found that in noting vendor item defects he was exceeding the

scope of his responsibility, which message triggered his request for written clarification of his

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responsibilities in this regard (PX. Ex. 21, 21A). I also find that no information was conveyed to Atchison as to Brandt's casual comments as to his overpreparation for testing.

No further action was thereafter taken on the question of the non-porosity defects Atchison questioned about which Brandt could not make a judgment, absent paint removal.[7] Atchison apparently accepted his supervisors' judgment, advice and instructions as to this particular problem. He did not secure an NCR number for the possible deficiency, did not pursue the matter. The NCR drafted by Atchison was never logged into Respondent's NCR system until after the July 1982 NCR licensing hearings during which it was learned that Atchison's draft NCR on this problem was found at home by the non-ASME NCR Coordinator, somehow scooped into a Tupperware packet on her desk and carried home. (TR 538).

Brandt's judgment based on this incident that Atchison was no inspecting to acceptable porosity criteria and was overpreparing (polishing the welds), and his attestion that this first of two observed job performance deficiencies was the basis for complainant's firing, and not his protected activities in filling NCRs, has been viewed in the light most favorable to the respondent in determining whether he and Brown and Root had a legitimate reason for firing complainant prior to his reporting NCR #296. According to Brandt's own attestions on this point at trial and at the UEA hearing, he clearly did not. Further Brandt's testimony as to how off-handed and generalized his comments were to Foote after he descended from the scaffold in the tank room (TR 534-536) are indicative of the insignificance of his attested observations of Atchison's job performance deficiencies.

It is noted that this was the sole occasion for such job performance observation by Brandt, as Atchison's supervisor, prior to NCR #296. There were not, prior to NCR #296, "several" occasions which gave him opportunities to so observe after Atchison's assignment to his group, which unquestionably is the thrust of his written statement to the NCR. Further, if as he advised in PX. Ex. 26.15 he discussed these Atchison job deficiencies with Foote and Smith, that is not in accord with the picture presented by his testimony. However, weighing all the testimony as to what was said and conveyed between the parties and ultimately conveyed to

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Atchison, I am convinced that statements were conveyed to Atchison through Smith his supervisor indicating he was exceeding his responsibilities in noting vendor defects.

NCR Number 296

It is Brown and Root's contention that in fact this NCR originated with Brandt as a result of the defects being noted and brought to his attention by Brown and Root's Subcontract Administrator. It is their position that Atchison was merely the QC inspector assigned to perform the inspection and work necessary to document and write up this NCR. Brandt attested that during the course of his review at Atchison's work in connection with this NCR he , for the second time, noted defects in Atchison's work performance as a welding quality control inspector in that he overinspected: reported as unacceptable, porosity defects acceptable for the standards and criteria under which Atchison was to measure; and he took an unnecessary length of time to perform this inspection.

These job performance deficiencies of Atchison are posited by Brown and Root as among the reasons for Atchison's termination, in conjunction with their contention that by his "pow wow" note to Smith, Atchison was attempting to use NCR #361 to leverage a promotion, for which Purdy fired him. As noted above, none of these explanations for Atchison's April 12, 1982 termination was conveyed to Atchison or Smith when he was terminated on April 12, 1982; they are not reflected in the written termination reasons Brown and Root ]gave Atchison that day, and were first Voiced in the post April 12, 1982 NCR/DOL investigation.

Given these inconsistencies, ail of the evidence documentary and testimonial, has been carefully analyzed to reach factual determinations; and in evaluating the evidence, all of the factors by which the credibility of testimonial evidence is adjudged have been most carefully considered, weighing the complainant's attestions against the other evidence and its inferences which I find corroborative of his version of the events.

NCR #296 dated March 23, 1982 is issued in complainant's name and reflects that this nonconformance was reported by complainant. To the extent that Brandt's testimony conflicts with Atchison's attestions that Atchison was solely responsible for the initiation of the actions which resulted in the issuance of NCR #296, to report the welding defects in the four CB&I vendor-supplied pipe whip restraints in the Reactor 2 lay down area, I credit Atchison's testimony which is corroborated by the manner of reporting the first NCR

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Brandt received and reviewed; the logging in Atchison's name, the thrust of Smith's testimony, the black markings Brandt described, and the unconvincingly explained delay in NCR number issuance if the defects were actually first found and reported and directed to be committed to the NCR system by Brandt following Hutchison's call. Further, given Brandt's opinion as to Atchison's competency as a welding inspector, and the sensitive nature of the question raised by the defects of NCR #296 (TR 440), I cannot believe that

Brandt would have permitted Atchison's involvement in the defect reporting unless Atchison initiated the NCR.

The craft general foreman had brought these defects to Atchison's attention, since he would be responsible for inspecting the questionable items after installation. He asked complainant to look at the pipe whip restraints before installation because they thought a QC inspector would prefer to have the laid-down restraints inspected before they went through all the trouble of installing them and then had to take them back out again.

The Nuclear Regulatory Commission's July 7, 1982 Region IV investigation of NCR #296 resulted in a finding that the pipe whip restraints which were the subject of NCR #296 were deficient. Further the NCR's investigative report indicates that between February 10, 1982 and April 2, 1982, TUGCO's QA was experiencing increasing weld problems in the pipe whip restraints of their CB&I vendor, and with this vendor's QA/QC program. The deficiencies in these vendor-supplied pipe whip restraints, the subject matter of NCR #296, whether "the restraints arriving at the CPSES were capable of performing their intended function," would remain unresolved as of the July 7, 1982 investigative report, although evaluated not reportable under 10 C.F.R. Part 55(e), "until the NCR had an opportunity to review this program in detail." (NCR Exhibit 199).

Atchison marked the defects, consulted Smith who looked at them and a draft NCR was prepared by Atchison. Inferentially hold tags were applied (TR 426). After careful examination of the various statements, and testimony given by Atchison, Brandt and Smith as to who first noted and reported the defects reflected on NCR #296, I not only am of the opinion, and find that the defects were initially reported by Atchison, but also find that when the subject matter of Atchison's NCR #296 was brought to Brandt's attention, the initial question raised was: "(h)ow did the inspector come to identify the defects". "They were concerned about how did he find them;" and that there was some questions raised as to

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whether Atchison in so reporting was inspecting outside his area of responsibility (TR 414-415).

After Brandt and Foote looked at the reported defects, Smith was advised to get several employees to work with him in detail mapping and documention of NCR #296. The second draft NCR #296, the first with the detailed documentation, was the second occasion where Brandt, as Atchison's supervisor, had an opportunity to judge his job performance. However the record establishes that the mapping containing the excessive rejectable porosity readings was in fact the joint work effort of four inspectors. Brandt attested he nevertheless attributed all the excessive porosity readings to Atchison, based on his suspicions arising out of the 822 experience, and until trial his statements attributed the delay in getting NCR #296 finally released to Atchison. In fact, as reflected at trial, Brandt's actual concern with the excessive time involved was directed to all his

involved subordinates, although not so reflected in his statements as NCR Exhibit 5A (G), PX 26.15, or at the unemployment compensation hearing.

A subsequent reinspection of the restraints was ordered by Brandt, from which Foote directed Smith to exclude Atchison, when it was ascertained that the inspection criteria under which all believed they were operating was found not to be that applicable to these particular items. While Brandt attested at the unemployment compensation hearing that Atchison, as well as all involved including himself, should have known the appropriate inspection criteria to use, and that the delay in getting NCR #296 documented more timely was a reflection of Atchison's job performance inadequacies, testimony at trial established that in fact Atchison, checked with Smith as to the appropriate criteria to use, and Smith went to his supervisor to make sure he was right in his advice to Atchison, an action Smith wanted to make sure he was correct on "due to the nature of the nonconformance" (TR 427). Nevertheless, and despite the fact that the work assignment was the work of four employees, it is clear that until trial Brandt's statements as to Atchison's job inadequacies on NCR #296 reporting were skewered, and not fully reflective of the actual facts as they occurred.

While Smith testified that the majority of the excessive porosity readings on the mapped NCR #296 team effort report were made by Atchison[8] , he also testified that such errors by Atchison were judgment errors which in his opinion did not, even considering

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complainant's prior 822 judgment error, warrant any change in his April 2, 1982 evaluation of the quality and quantity of Atchison's job performance as good. Of the same opinion on April 12, 1982 when Purdy fired complainant, Smith was upset by a firing he believed unjustified by Brandt's problems with Atchison's job performances in the 822 and NCR #296 incidents, and on April 13, 1982 he asked Brandt if complainant was fired for reporting the CB&I pipe whip restraints detects on NCR #296, and was advised no. The two occasions where as Atchison's upper level supervisor Brandt noted problems with Atchison's job performance, the 822 incident and NCR #296, would not, by Brandt [EDITOR's NOTE: ILLEGIBLE TEXT] testimony, warrant firing an inspector for incompetency, yet inconsistently, on April 13, 1982 he told Smith Atchison was incompetent.

Brandt testified at the complainant's unemployment compensation hearing that if he fired, or recommended firing, of a QC inspector for one mistake, he would have no QC inspectors on the job site. He testified here that his perceptions of complainant's mistakes or job inadequacies based on the two March 1982 occasions he had an opportunity to examine complainant's work, the only such occasions he had prior to his advice to Purdy he would no longer use him, were not in and of themselves sufficient to warrant a recommendation to fire Atchison. Thus it is clearly established that the respondent prior to April 12, 1982 and NCR #361 had no legitimate business reason for removing

complainant from his job with Brandt's group, or for firing him, and that to do so would be treating complainant in a manner dissimilar to other comparable employees.

However,even prior to the incidents of April 12, 1982 and as of April 8, 1982, Brandt told Purdy he would no longer be needing Atchison's services, yet he did not then take action, as he could have through Brown and Root's Personnel Manager, to Terminate him. (UEA 35-36). Purdy testified Brandt, prior to April 12,1982, twice advised him in very general statements that he had problems with Atchison's job performance but Purdy, because of his high regard for Brandt's expertise, at no time asked for any details and accepted Brandt's evaluation of Atchison's poor performance at face value. Purdy, at that time, knew of the following incidents, the basis for Brandt's earlier objection to purdy's assignment of complainant to his group.

Prior to Atchison's February 1982 assignment to Brandt's group he had had one personal dealing with Atchison as training coordinator. A welder in whom Brandt was interested failed a practical examination which Brandt found incredible based on this welder's

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experience. Atchison had graded the failed applicant based on an answer key, signed and approved by Ragan a supervisor above Atchison. According to Brandt "Atchison's rationale in explaining to me why things were acceptable and rejectable per the answer key . . . gave me occasion to question his qualification as level II visual inspector . . . " although so certified by Brown and Root. Atchison conveyed this opinion to Purdy at the time. (TR 605-610). Then while functioning in a staff position for Mr. Tolson the site QA Supervisor of TUGCO, Brandt conveyed to Purdy "my observations and observations being made by other people, he was serving as Comanche Peak placement officer and was spending excessive amounts of time on the phone contacting other sites looking for jobs either for himself of other people;" and several inspection supervision personnel came to him as an ear for Mr. Tolson to tell him Atchison was creating "'a little bit of a morale problem' ". . . he was "'stirring the pot to the extent that they [sic] were trying to get them all upset and trying to find other location of employment for them'". (TR 605-606).

At the time Brandt conveyed these judgments to Purdy, Atchison was not Brandt's supervisor, had never been his supervisor, and Atchison was not under TUGCO's jurisdiction at the time. Whether Brandt conveyed to Purdy the basis on which he made these judgments as to Brandt's telephone and office conversations is unknown. The basis for Brandt's speculations as to Atchison's conversation and affect on site operating personnel, as described at trial, at a time when Atchison's supervisors were rating him well in his job performance, a job in which his communication skills strengths were noted, is so poorly founded; and his description of how he observed Atchison's activities while "passing down the hall," is so conjectural, that in conjunction with Brandt's advice

to Purdy in 1982 that he did not want Atchison in his group, it is clear that his evaluation of Atchison was significantly colored by his adverse personal feelings.

Based on this record at all times during the period in which the events are being analyzed for a determination of the issue here, i.e., prior to April 13, 1982 and as of his April 12, 1982 decision to fire Atchison, Purdy was well aware of what can only be termed, in the circumstances presented at trial and in this record, of Brandt's conjecturally and speculatively founded prejudgment of Atchison's job incompetency prior to February 1982.

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Incidents of April 12, 1982

On April 12, 1982 complainant reported another nonconformance condition at the jobsite. This condition was the subject on NCR #361. This record established that at the time complainant left this handwritten NCR with Smith for processing, through Foote to Brandt, he had secured the NCR number from the appropriate NCR Coordinator, and this number was handwritten on his NCR.

Brandt's decision to turn Atchison's promotion request down was made prior to April 8, 1982, and while he then returned the request to Foote with his decision, the decision was not conveyed to Smith or complainant prior to his termination. Instead Foote took the promotion request to Purdy to see if he could do something to change Brandt's decision, but Purdy in effect told Foote the decision was up to Brandt. None of these facts was known to complainant. However he undoubtedly knew of Brandt's attitude toward him, and his promotion request, and had on April 12, 1982 requested permission to seek other site employment, which request was granted; as well as transfer out of Brandt's jurisdiction and back to Ice's group, a request Brandt granted but conditioned on Purdy's acceptance.

It is the handwritten NCR #361 and the "pow wow" note which precipitated, and ultimately resulted in the complainant's April 12, 1982 firing, according to the testimony of both Purdy and Brandt. The position of Brown and Root at trial was that complainant was terminated because of his job quality performance inadequacies known to Brandt, as well as his April 12,1982 attempt to leverage a promotion[9] through inappropriate use of an NCR. Both these post April 12, 1982 stated reasons conflict with the statements and reasons Brandt and Purdy gave for his termination on April 12, 1982, PX 22, PX 23, the clear and plain meaning of which is that his lack of ability in performing assigned tasks and following supervisory instructions was demonstrated by his failure to limit the scope of his inspection responsibilities. To similar effect is respondent's PX 26.2 May 13, 1982 advice to the Department.

The facts as to NCR #361 are that on the day it was handwritten by complainant, the day he had the NCR number issued for it, and logged into the system, he left it on

Randall Smith's desk because Smith was off that day. Atchison was a 3x5 handwritten note, the "pow wow" note which forms the basis for respondent's contention he was using NCR #361 to leverage a promotion. This note read as follows:

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"Randy,
# TAKEN Not issued yet
Open to pow.wow. on subject
Black or white
No grey AREA'S
Chuck"
(NCR EXHIBIT 135)

Not withstanding respondent's witnesses' testimony, the record indicates that discussion between a QC inspector and his supervisor as to NCRs is not an unusual occurrence. Further once the NCR number was assigned, complainant had absolutely no control over its disposition. This record does not indicate that the complainant's NCR #361 could not be a valid concern of a QC employee, or that it was frivolous in nature (TR 422-425: 12; TR 453; TR 732-734; 742-745), although others at the site might and did differ with him. Respondent's articulation of its reasons for viewing NCR #361 as a leverage or arbitration attempt, its purported non-discriminatory reason for terminating him based on NCR #361, nowhere voices such contention; nor do they contend that the substance of NCR #361 itself was an abuse by complainant of the nonconformance process of Respondent's Exhibit Z-2. Rather Respondent ties this NCR filing to his promotion request in explaining why it was viewed as a leverage attempt.

Smith had a discussion with complainant after he reviewed NCR #361 on April 12, 1982 and told complainant he would recommend it be voided by the upper management official responsible for ultimate disposition of this, or any such NCR, Brandt. However, from his conversation with Atchison, prior to bringing NCR #361 with the attached note to Foote, Smith was of the impression that Atchison was very certain he had found a problem in the training program, as reflected in NCR #361's content.

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According to Brandt, Foote handed him NCR #361, with the "pow wow: note attached, as well as Smith's request for complainant;s promotion, which Brandt had denied the week before. His testimony indicates that his immediate reaction was a lack of understanding as to what Atchison meant by "pow wow."[10] TR 564. However, he thereafter determined in his mind that NCR #361 was an attempt to leverage a promotion, and testified that after a meeting between himself, Purdy and Tolson as to complainant's intent, they decided it was such an attempt. Purdy testified that since Brandt would no longer use Atchison, after unsuccessfully trying to place Atchison elsewhere in the Brown and Root organization, he decided to terminate him. However, when Purdy

advised Atchison of his termination in effect he told him he was being terminated because of Brandt's statements that he lacked ability to perform assigned tasks, i.e., he failed to follow instructions in not inspecting out of his area of responsibility. (PX 22, 23) He never told him that he was being fired because of the "pow wow" note, and how it was perceived by himself, Brandt and Tolson. The note and what it meant, and NCR #361 was never discussed with complainant by Purdy or Brandt.

Prima Facie Case Established

The fact of the matter here is that the complainant's prima facia case for discharge for protected activity is established solely on the overwhelming weight of the documentary and other evidence he presented, and does not depend on any question as t his credibility. Brown and Root's record establish that he was an employee rated by his supervisor as excellent in performance April 2, 1982 and April 12, 1982 and rated satisfactory in performance by prior supervisors; he engaged in a protected activity April 12, 1982 when he filed NCR #361, and was that day fired, with the explanation he lacked ability to perform assigned tasks and follow supervisory direction because he failed to limit his scope of responsibility and insisted on "getting involved in other areas outside his scope" of responsibility. Further PX 26 indicates that a protected activity he engaged in three weeks before, i.e., filing NCR #296, formed the basis for his removal from his job assignment, and his ultimate firing April 12, 1982.

Evaluation of Respondent's Case

Since there are numerous statements in this record as to the complainant's job performance deficiencies uncovered by respondent and its client post April 12, 1982, it should be clearly understood

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that in analyzing the evidence it is the facts as they existed, and were known to respondent at the time the Act was already violated, April 12, 1982, that must be necessity control the findings here.

In my opinion, having heard their testimony, Brandt and Purdy's explanation for job removal and then termination of the complainant, i.e., their April 12, 1982 interpretation of the "pow wow" note, is unbelievable. It was never verbalized as a cause of complainant's firing until investigative statements were secured in connection with the later NRC and Department of Labor investigation; is inconsistent with their April 12, 1982 statements (Px 22, Px 230), as well as Brown and Root's May 13, 1982 statement to the Department of the reasons for complainant's termination (Px 26.2).

Aside from Brandt and Purdy's inconsistent explanations over time of the reasons for complainant's job removal/termination, I find their respective attested explanations and written statements as to why and how they concluded the "pow wow" note was an

attempt by complainant to use NCR #361 to leverage a promotion (or transfer) unconvincing, unbelievable, and irrational - it just does not make sense - when considered with their total testimony, the note's verbiage, NCR #361's content and the other evidence of record.

They knew on reading NCR #361 that it was logged into the site's NCR control system. Thus its disposition and any leverage use was beyond complainant's control, or that of his immediate supervisor, to whom it was addressed. The note itself, in the context of what this record indicates as to the substance of the nonconformance reported, in my opinion does not provide any reasonable basis for the leverage conclusions of Brandt and Purdy. Their explanation of why they so believed, which took a three party meeting to arrive at, just does not ring true. Most importantly, if Purdy believed as he attested he would not have attempted to place complainant elsewhere with Brown and Root, actions contradictory of his words.

Brandt's attested interpretation of the note as a leverage or arbitration attempt is inconsistent with his stated initial reaction to the note; and I found his explanation as to how, and why, the denied promotion request was handed to him with NCR #361 and the "pow wow" note strange. Purdy's explanation of how he viewed the note, and why, indicates that in fact he did not know what it meant or intended. It is clear Purdy was told by Brandt the week before that he would no longer use Atchison; Brandt had made and conveyed that decision before NCR #361 was filed. Purdy then stated on April

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8, 1982 he had no place to put complainant, yet at hearing he testified he probably would and could have placed him April 12, 1982 had any of his four supervisory contacts made that day been positive for Atchison. Purdy and Brandt's testimony as to why they did not state on April 12, 1982 that the job removal/termination was due to the "pow wow" note indicates they knew their stated interpretation was based on suspicions, speculations and conjecture; and in Purdy's case, analyzing his explanations, cryptic and unexplained conclusions and judgments as to complainant's personality.

These witnesses' testimony, in conjunction with what the entire record reveals were the circumstances existing April 12, 1982, convinces that the "pow wow" note explanation for job removal/discharge is incredible, false and pretextual; and it is found. As to respondent's other articulated business reasons for its April 12, 1982 job removal/job termination action the following is noted.

It is clear and established from this record that had not NCR #296 been filed by Atchison, a protected activity within the Act's meaning, Brandt would not have called Purdy the week prior to April 12, 1982 and told him he would no longer use Atchison. Such action by Brandt affected Atchison's terms, conditions and privileges of employment within par. 5851's meaning. It is also clear and established by this record that Brandt would not have removed an inspector other than Atchison from his job, which

is what in effect he did by his advice to Purdy, solely for the deficiencies Brandt noted on the two occasions he had a supervisory opportunity to observe Atchison's job performance, judgment call errors from the record in total.

When Brandt advised Purdy telephonically April 8, 1982 he would no longer use Atchison his motivation was dual-faceted. First, he did not want Atchison in his group prior to Purdy's assignment; and then his opinion was confirmed following his observation of Atchison's work in connection with the 822 incident and NCR #296. However, neither of these factors was a legitimate business reason for Brandt's decision he would no longer use complainant's services. Such lack of legitimacy is established by Purdy and Brandt's testimony. Purdy assigned complainant to Brandt's group despite Brandt's opinions and statements; and, by the impact of Brandt's testimony, he would not have any similarly situated inspector who erred in technical proficiency as Atchison did after his assignment to Brandt's group.

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Thus it is found that the job performance, job deficiency errors, including inspection reading errors, observed by Smith and Brandt, which Brandt gave for his April 12, 1982 actions removing complainant from his non-ASME employment position were not legitimate business, non-discriminatory, reasons for removing or terminating complainant as of April 8, 1982 and April 12, 1982; and that prior to April 12, 1982 and NCR #361 Brandt had no legitimate business reason to remove complainant from his shop. By Brandt's own testimony, as well as Smith's, they were not a legitimate reason and I so find.

Absent a legitimate business reason for Brandt's April 8, 1982 advice to Purdy he would no longer have a need for Atchison's services, prior to April 12, 1982 neither he, Purdy nor Brown and Root had any legitimate business reason for complainant's job removal and termination. I must therefore find that on this record complainant has established that his filing of NCR #296, a protected activity, was the circumstance, occasion and vehicle for Brandt's job removal action. But for the fact that Atchison reported and filed NCR #296 his condition of employment would not have been so affected and changed.

While Purdy attested he was unaware that some of the job deficiencies related to him by Brandt occurred in connection with NCR #296, and did not know that complainant contended he filed NCR #296, Purdy was aware when he fired complainant of the conflict between Smith's evaluation of his job performance and Brandt's. He knew Foote, over Brandt's head, disagreed with Brandt's rejection of complainant's promotion. Then Smith told Purdy at the termination interview that the firing was unwarranted (PX 26.14). Purdy, as well as all Brown and Root personnel who handled the April 12, 1982 conference report of termination, were on notice by it of Atchison's contention that Brandt's PX 23 statement to Purdy was a result of Atchison's reporting unsatisfactory CB&I vendor-supplied pipe whip restraints. Further Purdy had in hand PX 23 which, by

its language, raises unasked and unanswered questions as to a written job removal justification inconsistent with what Brandt was telling him of Atchison's job deficiencies, i.e., patently unclear relationship of porosity, polishing problems to "refusal to limit his scope of responsibility to the pipe whip restraints" and "getting involved in other areas outside his scope." Notwithstanding his reliance on Brandt's statement of complainant's job performance inadequacies, these factors indicate Mr. Purdy knew or should have known that Brandt's language in Plaintiff's Exhibit 23 raised clear questions

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as to whether Brandt's action was based on complainant's engagement in protected activities.

Purdy's action under these circumstances, his unquestioning acceptance of Brandt's job removal decision, which in effect resulted in Atchison's job termination, was a knowing adoption of Brandt's protected activity violation resulting from complainant's NCR #296 filing, and Purdy, based on the job deficiency information conveyed by Brandt, had no legitimate business reason for terminating Atchison. I find this aspect of Purdy's explanation pretextual.

This record convinces that the reasons for job removal and termination which Brandt and Purdy committed to writing on April 12, 1982 were in fact the reasons for their respective actions; and that the reasons they thereafter voiced, their interpretation of the "pow wow" note and complainant's work performance deficiencies, were pretextual and not the true reasons he was removed from Brandt's group and ultimately terminated, and it is so found.

On April 12, 1982 Brandt specifically, not generically, stated that complainant's job removal and termination were due to his refusal to limit his scope of responsibilities to pipe whip restraint installation, and so defined his statement that complainant lacked the ability to perform assigned tasks and failed to follow instructions. Purdy's termination notice was based on this memorandum of Brandt, conveyed to Atchison and Smith as the partial basis for his termination decision. By this action Purdy clearly adopted Brandt's stated definitions as his definitions, the only reasonable interpretation of his actions. I see no reason to disbelieve their April 12 1982 contemporaneous written statements particularly when weighed with their later shifting interpretations of what they in fact meant by their April 12, 1982 statements (Brandt's at TR 576- 577; 599-602; 604-605) including Mr. Purdy's testimony that when he signed to "lack of ability to perform assigned tasks and follow supervisory direction" as the reason for termination he was also attributing under this generic statement, as complainant's responsibility, 150 recently uncovered coordinator deficiencies Mr. Opelski, the site NDE level III who now supervised the maintenance and control of the training files, had found.

While Purdy states these deficiencies may have been Atchison's predecessor's responsibility, Purdy attested they nevertheless reflected and demonstrated the

termination reasons he signed to the April 12, 1982, as well as Opelski's reasons for telling Purdy

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"definitely not" during Purdy's contacts to ascertain if he should keep Atchison, and if Opelski would use him. Complainant, as of April 12, 1982, had not been involved in Opelski's shop's activities for five months, during which management and personnel changes had been made, and during which procedures were being changed as part of the reorganization described at trial. Complainant, while performing the job in which these cryptically described and dated errors were uncovered, was rated well in his job performance by his Brown and Root supervisors, and Opelski on February 24, 1982 certified him, based on his three years with Brown and Root, as warranting the certification at PX 18.

Jim Ragan is the same supervisor who supported complainant's field transfer. He is presently the supervisor of Ice and Patton who had no supervisory problems with Atchison returning to their shop. Yet RAgan told Purdy he did not want complainant because he found out he was not what he thought, a B inspector. Purdy did not otherwise explain this cryptic response of Ragan which is totally inconsistent with Ice and Patton's evaluations. Ragan's NDE records unhappiness, referred to at TR 708, occurred after April 12, 1982 and whether the facts as to this reference are similar to the basis for the Opelski reference is unknown. Assumedly Ragan was the responsible upper level supervisor when these errors occurred, which have not affected his Brown and Root position.

Sanders told Purdy the complainant was "not really qualified to be a quality engineer," the job in which Brown and root had placed, certified and permitted him to perform. Why he so stated is also unknown from the cryptic quotation of this supervisor's response.

The responses Purdy attested to just do not reasonably, believably, credibly explain why Purdy was unable to place an employee rated as complainant was rated throughout his Brown and Root employment and who, according to what is in this record, had no reason to believe that his supervisors had any problem with his job performance or work habits until the 822 incident. (TR 742-743). In this light, Mr. Leigh's answer as attested by Purdy is the most unbelievable of all. He had no prior supervisory contact with complainant but advised that based on brief communications with Atchison, he did not feel he could effectively supervise his activities.

In determining whether Purdy's articulation of his inability to place Atchison in other Brown and Root components, after Brandt's

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effective removal, was in fact a legitimate business reason for Purdy's decision to terminate him, the following is noted. Purdy attested he could have, and would probably have retained complainant if any of the four supervisors' responses were positive. New hires were brought on in late April and May. Evaluating the credibility of his explanation as to why he did not place Atchison on April 12, 1982, and fired him on the basis he could not place him after Brandt removed him, the whole story does not make sense, given the complainant's past satisfactory to good and even excellent job evaluations, and his job history as related by his rating supervisors. To explain these ratings by a Brown and Root need to misrepresent because of pay problems, is unconvincing.

The evidence respondent presents in no way indicates complainant in job performance and work habits was a marginal employee, a problem to management for any reason prior to the 822 incident. If as Mr. Hoech related, complainant in his job performance caused "continual interruptions" and "warnings" were given, if much duplication of effort and turmoil was caused by complainant's job performance problems, what respondent has articulated and evidenced here, in response to complainant's case, does not so indicate.

I am therefore of the opinion, and find that Purdy's articulation of a lack of ability to place complainant after Brandt's removal as the reason for his decision to terminate was pretextual.

Weighing Brandt and Purdy's testimony with the facts found above as to the circumstances of complainant's filing NCR #296, I not only disbelieve and find pretextual respondent's proferred legitimate business reasons for complainant's termination, i.e., their interpretation of the "pow wow" note, complainant's job deficiencies and their inability to place him after Brandt's removal, I am also convinced of the following. The weight of the evidence supports a finding that as of his April 12, 1982 job removal by Brandt and job termination by Purdy, respondent had no legitimate business reason for his removal and termination, and that he was removed by Brandt and terminated by Purdy solely because he filed NCR #296 and NCR #361, protected conduct within the Act's meaning; but for this conduct complainant, as of April 12, 1982, would not have been removed from his non-ASME job in Brandt's group, and terminated by Purdy. It is further found these protected activities were the sole basis for Brandt and Purdy's conclusion complainant was unable to perform his assigned tasks, and did not follow

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supervisory instructions and the motivating basis for Brandt and Purdy's evaluation and administrative response, Brandt to remove and Purdy to fire. It is so found.

I find and conclude that Brown and Root terminated complainant because he engaged in protected activities within the Act's meaning, and that respondent violated the Act and regulations in so acting.

REMEDIES

Reinstatement - Back Pay

Respondent urges that the remedies of the Act, par. 5851(b)(2)(B), specifically reinstatement and back pay liability beyond mid-June 1982 should not be ordered because by this date Brandt and Purdy knew of Atchison's fraudulent representations and falsifications.

The complainant's lies, misrepresentations and document alterations are a most serious concern. However this record indicates that Brown and Root took no action based on NCR Ex. 134, and from the total evidence of record as to how this document was altered I can only infer that the unaltered response, as dispatched by the college in July or August 1980, was in Brown and Root's personnel records by that date and was thereafter not acted upon. If complainant had any control over this inaction, such is not clear from the record.

Whether in fact Brown and Root would have taken action to terminate complainant based on his application lies is not established here for several reasons. BRown and Root's statement on PX 2 as to dismissal for misrepresentation is conditional, as is Mr. Purdy's response at TR 682: 23-24. Mr. Purdy's testimony as to personnel practices in this regard at the site since his November 1982 assignment is not enlightening as to personnel practices as of mid-1980; and the record indicates there were changes in personnel practices after October 1981, e.g., the counseling and warning procedures prior to dismissal were changed.

Under these circumstances I do not believe that there is an appropriate basis for finding that respondent should not place complainant in the same position he was prior to the April 12, 1982 discriminatory firing, with reinstatement and back pay to reinstatement. This finding and complainant's reinstatement do not in any way preclude future action by respondent based on complainant's

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actions and conduct not protected by the Act.

Attorney Fees

I have considered respondent's objection to complainant's counsel's fee request listing of services rendered complainant in connection with the NRC hearings. I do not agree that these services, or complainant's participation, was not reason related to the subject matter at issue. Therefore, for other than 30 hours of services listed for potential appellate work, I find the 87.6 hours counsel lists, as well as his billing rate, reasonable in the circumstances here. Accordingly a fee of $7,875.00 is awarded.

In accordance with the above findings of fact and resulting conclusions the following recommended ORDER is issued.

## RECOMMENDED ORDER

Respondent, Brown and Root, shall take the following affirmative action to abate the violation:

1. Reinstate complainant to his position and pay at the Comanche Peak Project exactly as it existed as if April 12, 1982.
2. Pay complainant all wages and benefits that he has lost since his termination on April 12, 1982 to the date he is reinstated.
3. Pay to complainant's counsel, Kenneth J. Mighell, Esquire, all expenses incurred for his legal services in connection with this action, $7,875.00
4. Remove all reference to complainant's Arpil 12, 1982 termination from his personnel files.

ELLIN M. O'SHEA
Administrative Law Judge

Dated: DEC 3 1982
San Francisco, California

EMO:ma

**[ENDNOTES]**

[1] Quality Assurance/Quality Control. Hereinafter Quality Control will be referred to as QC, as in QC inspector.

[2] American Society of Mechanical Engineers

[3] Vendor referred to was CB&I, Chicago Bridge and Iron.

[4] Nonconformance Report (Exhibit R-Z.2).

[5] American Welding Standards.

[6] Brandt's testimony as to the specifics, however, at TR 535: 3-7 raises a question as to whether in fact "porosity" is what was noted by Atchison. Note the conditional statement as to porosity at TR 535: 21-23. Brandt did not have the draft NCR at that examination; he had only the one-page sketch to work from.

[7] Counsel's October 4, 1982 representation at page 9 of his brief as to Brandt's post August 17, 1982 determination, in connection with NCR M-82-01236, that Atchison also accepted rejectable defects, is not in evidence.

[8] He also testified that he did not know who made all the excessive porosity readings; and Brandt testified he had problems accepting the rejectable porosity readings of the 25 year veteran inspector involved in the NCR #296 mapping. (UEA, pg 8-11).

[9] Post-trial, leverage of a transfer now also appears to be argued.

[10] Any conference or gathering. The American Heritage New College Dictionary.