

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 January 2006

CASE NO.: 2004-ERA-1

In the Matter of:

GARY JOE PIERCE
Complainant

v.

UNITED STATES ENRICHMENT CORP.
Respondent

Appearances:

John Frith Stewart, Esq.
Everett C. Hoffman, Esq.
For the Complainant

Charles C. Thebaud, Esq.
Shahram Ghassemian, Esq.
For the Respondent

Before: GERALD M. TIERNEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above-captioned case arises under the Energy Reorganization Act of 1974 (“ERA” or “the Act”), as amended, 42 U.S.C. § 5851 *et seq.*, and its implementing regulations at 29 C.F.R. Part 24. The ERA protects employees of Nuclear Regulatory Commission licensees and their contractors and subcontractors from employment discrimination for engaging in protected activity.

PROCEDURAL HISTORY

Mr. Pierce (“Complainant”) filed five complaints with the United States Department of Labor (“DOL”), dated November 25, 2002, December 12, 2002, December 22, 2002, January 16, 2003 and May 16, 2003. The five complaints were consolidated for the hearing held in Paducah, Kentucky. On September 30, 2003, the Occupational Safety and Health Administration found that the complaints had no merit. By letter, dated October 3, 2003, Mr. Pierce objected to the DOL findings and requested a formal hearing before an administrative law judge. I was assigned the case on October 9, 2003. The hearing before the undersigned commenced on September 14, 2004, and continued intermittently for 34 days, concluding on June 1, 2005. At the hearing,

Complainant's Exhibits ("CX") 1-197 and Respondent's Exhibits ("RX") 1-295 were received into evidence.¹ In addition to the exhibits, twenty-six witnesses testified at the hearing generating over 5,500 pages of hearing transcript. Complainant and Respondent also submitted post-hearing briefs to the undersigned on July 26, 2005. The undersigned also received reply briefs from both parties on August 12, 2005. After reviewing the voluminous record, I find the facts to be as stated below.

USEC Paducah Gaseous Diffusion Plant

Respondent, United States Enrichment Corporation ("USEC"), is the enrichment company for uranium that is purchased in large quantities. Respondent is subject to the ERA. 42 U.S.C. § 5851(a)(2). The Paducah plant ("Plant") was formerly a government operated plant, regulated by the Department of Energy ("DOE") until March 1997, and is currently a private corporation with public shareholders, regulated by the Nuclear Regulatory Commission ("NRC"). The DOE continues to own the Plant, while USEC leases and operates the Plant. TR 63. The NRC had inspectors on site for at least two years prior to assuming official control of plant oversight. This provided the Plant an opportunity to learn how the NRC functions and its expectations for procedural compliance. TR 2733.

Regulation under the NRC is considerably stricter than regulation under the DOE; the former contains more procedures than the latter. Mr. Labarraque, the NS&Q Manager, testified that "[t]he NRC is very... meticulous on making sure that you follow your own process, your own procedures, and that you always take the safe action... when anything deviates from the normal." TR 2734. Mr. Labarraque explained that the "NRC regulatory agency... is really significant[ly] different from being under DOE." TR 2716. He noted that the DOE was more liberal in rule interpretation than the NRC. He stated "[w]ith the NRC, it's either black or white. Either you're in compliance or you're not in compliance." TR 2735.

Mr. Labarraque testified that the NRC has quite detail-oriented documentation requirements, and evaluates plant operation by the quality of the paperwork it receives. TR 2735. He explained that USEC's transition from DOE regulation to NRC regulation was not easy and "in some respects it's still not over." Mr. Labarraque described the transition process as long and difficult.

ISSUES

- I. Whether Gary Pierce engaged in protected activity under the ERA, 42 U.S.C. § 5851 *et seq.*
- II. Whether USEC had knowledge of Gary Pierce's protected activity.
- III. Whether Gary Pierce was subject to an adverse employment action.
- IV. Whether Gary Pierce has demonstrated by a preponderance of the evidence that his protected activity was a contributing factor in the Respondent's decision to take adverse action against him.

¹ The following exhibits were not admitted: RX 252; CX 12, 31, 41, 42, 72, 76, 84, 92, 94, 130, 131, 158, 185 and 196.

- a. Whether Gary Pierce received a rating of “needs improvement” on his fiscal year 2002 performance evaluation because he engaged in protected activity.
 - b. Whether Gary Pierce received a written reminder for sleeping during a safety meeting because he engaged in protected activity.
 - c. Whether Gary Pierce was placed on administrative leave in November 2002 because he engaged in protected activity.
 - d. Whether Gary Pierce was placed on decision-making leave because he engaged in protected activity.
 - e. Whether Gary Pierce was placed on a Performance Improvement Plan because he engaged in protected activity.
 - f. Whether Gary Pierce was terminated because he engaged in protected activity.
 - g. Whether Gary Pierce was declined employment with Seminole Systems because he engaged in protected activity.
- V. Whether USEC has demonstrated by clear and convincing evidence that it would have subjected Gary Pierce to the same adverse employment actions absent his protected activity.

SUMMARY OF THE EVIDENCE

Respondent terminated Mr. Pierce’s employment on January 16, 2003. Mr. Pierce was employed by the USEC Paducah Gaseous Diffusion Plant for more than twenty-six years.

In his twenty-six years with USEC, Mr. Pierce performed duties as a Machinist Trainee, Machinist second class, Planner/Estimator in the Maintenance Division, Work Coordinator, Machine Shop Supervisor, Maintenance Division Quality Assurance Specialist, Quality Assurance Department Manager, Quality Control Department Manager and Building Supervisor. At the time of termination, Mr. Pierce was the Quality Control (“QC”) Group Manager at the Plant. The QC Group inspects material and work performed at the Plant so as to ensure its compliance with code requirements and nuclear regulatory commission regulations. The QC Group must have safety of the Plant as its first priority when performing its duties.

The QC and Quality Assurance (“QA”) Divisions combined in July, 2000 to form the Nuclear Safety and Quality (“NS&Q”) Division. Mr. Jorge Labarraque managed the NS&Q Group, and was Mr. Pierce’s direct supervisor. Mr. Labarraque was hired by USEC in 1995, specifically to provide the necessary oversight to assure that the Plant was operating in accordance with NRC regulations and expectations. TR 2716. The NRC was on site for at least two years prior to assuming official control of oversight. TR 2733.

Twenty-nine salaried employees were laid off by USEC in 2000. Mr. Pierce’s wife, Nancey Pierce, was one of the twenty-nine employees laid off. Mrs. Pierce’s last date of

employment was July 14, 2000. The lay offs also resulted in the QC Group losing one inspector, one inspection supervisor, and a procedure writer. Mr. Labarraque had no part in the lay off of Mrs. Pierce or the other twenty-eight employees.

Nancey Pierce

Nancey Pierce, Mr. Pierce's spouse, filed allegations against USEC before the NRC in 2000. Additionally, in January 2001, Mrs. Pierce filed a complaint under the ERA with the DOL. Mrs. Pierce was laid off by USEC in an Involuntary Reduction in Force. On August 24, 2000, Mr. Pierce's attorney sent a letter on his behalf to USEC informing them that Mr. Pierce would be assisting his spouse in her claims against USEC. CX 108. The claims between Nancey Pierce and USEC have been settled. None of the issues decided in this case affect her claims or her settlement.

Prior to the hearing, Complainant filed a motion to introduce evidence of Mrs. Pierce's protected activity. At the hearing on January 13, 2005, the undersigned denied the motion based on Mrs. Pierce's settlement agreement with USEC. TR 1882. On April 6, 2005, Complainant filed a motion for reconsideration. After reviewing the parties' briefs, the confidential settlement, and the prior ruling, the undersigned held that the January 13, 2005 ruling stands. TR 5464. In his post-hearing brief, Complainant again requests reconsideration of the January 13 ruling. Again, the Complainant's motion to introduce evidence of Mrs. Pierce's protected activity is denied.

The Error Free Clock

On July 18, 2000, Mr. Labarraque issued a memorandum initiating the use of an error free clock in the NS&Q Department. CX 123. The error free clock was a horizontal graph that displayed elapsed time between errors. The clock "ticked" and was reset each time an error occurred in the NS&Q Department. Mr. Labarraque's July 18, 2000 memorandum stated that the goal of the clock was to achieve an elapsed time between errors exceeding thirty days. Mr. Labarraque stated that he "set this goal arbitrarily to start out with, and will probably make some adjustments as we build up a more detailed event history." CX 123. Situations that require filing an Assessment and Tracking Report ("ATR") and an error clock reset include: Level I and II errors, personal injuries, LOTO violations, industrial safety violations, security violations, personal contaminations, unexcused missed trainings, procedure non-compliance, inadequate classification of issues of non-compliance in NS&Q documents, document report errors, and regulator findings/violations in same area, monitored by NS&Q. CX 123. The error free clock started on August 1, 2000. The first error tick occurred on September 8, 2000.

Mr. Pierce received a "below expectations" rating in his fiscal year 2000-2001 mid-year performance review in the category "Accident Free/Error Free Plant," due to personnel errors that resulted in three error clock resets. The error clock was reset on September 8, 2000, because a QC inspector failed to spot excessive reinforcement on a weld. The clock was again reset on October 27, 2000 for an ATR initiated by Mr. Labarraque. Mr. Pierce felt that the error free clock was being reset for small documentation errors. He stated that it was being applied to errors not listed in Mr. Labarraque's memorandum regarding error clock resets.

Mr. Brown, a QC inspector, testified that after Mr. Pierce was terminated, he did not recall hearing anything further about the error free clock. He further stated that the QC Department no longer had Wednesday meetings. Mr. Estes, Mr. Pierce's replacement, testified that the error free clock is still being utilized.

Performance Planning and Review System ("PPR")

Prior to being transferred to NS&Q, Mr. Pierce received positive performance reviews. In 1995, he had one "below expectations" rating, but his overall rating for that year was "effective performance." Mr. Pierce received numerous "exceeds expectations" and "meets expectations" ratings prior to the transfer to NS&Q. CX 50.

On February 13, 2001, Mr. Pierce received two "below expectations" ratings on his mid-year performance review. Mr. Pierce received a below expectations rating in the "accident free/error free" category and the "other" category. CX 50-Q; RX 45. Mr. Labarraque noted three NS&Q error clock resets as justification for the "below expectations" rating. RX 45. As justification for the "below expectations" rating in the "other" category, Mr. Labarraque noted his displeasure with Mr. Pierce's Synergy Survey action plan and Mr. Pierce's negative attitude. Mr. Pierce testified that he felt that the "below expectations" ratings were unjustified and that the ratings were not based on the established goals within his performance plan. TR 262. In response to this performance evaluation, Mr. Pierce's attorney sent a letter, dated March 14, 2001, to the associate general counsel for USEC, stating that the February 13, 2001 evaluation of Mr. Pierce was in retaliation for his support of Nancey Pierce's efforts to seek re-employment for wrongful termination. CX 126; RX 60. Mr. Labarraque testified that he had no knowledge of Mrs. Pierce's legal actions against USEC at the time of the performance review. TR 2939.

Thereafter, on April 23, 2001, Mr. Pierce stated that Mr. Labarraque informed him that Mr. Thompson, director of Human Resources, stated that a Performance Improvement Plan and Commitment ("PIPC") needed to be implemented due to the "below expectations" ratings. TR 265. Mr. Labarraque and Mr. Thompson testified that Mr. Thompson did not participate in the implementation of the April 2001 PIPC. TR 2938; TR 5323. Mr. Pierce communicated to Mr. Labarraque that he did not think a PIPC was proper, as it was based on the mid-year review. Barbara Burrage of Human Resources informed Mr. Labarraque that a PIPC was not "required" for a mid-year review, explaining that a PIPC could be administered any time during the review year. Ms. Burrage stated that the PIPC program was revamped and there was some ambiguity in the implementation of mid-year review PIPCs. TR 5022. Mr. Labarraque did not implement a PIPC for the mid-year review.

In response to these actions, on April 30, 2001, Mr. Pierce informed the Employee Concerns Department of the situation. TR 267. Mr. Ron Wetherell is Manager of the Employee Concerns Department. Mr. Wetherell was named as an individual defendant in Mrs. Pierce's state lawsuits against USEC. Due to his involvement in Mrs. Pierce's lawsuits, Mr. Bill Reep was assigned to investigate Mr. Pierce's concerns. Mr. Reep found no evidence of retaliation. CX 127.

Employees held a negative view of the Employee Concerns Department. Mr. Alderson, a former QC supervisor, stated the Plant Manager was notified immediately of employee statements. TR 2028. Mr. Buchanan, a retired QC inspector, testified that he would never take a

complaint to the Employee Concerns Department because he “would be smarter than that. That’s a ticket out of the Plant.” TR 1809. Mr. Gough, another retired QC inspector, also had a negative opinion of the Employee Concerns Department. He termed it a “joke.” TR 1899.

In his fiscal year 2001 year-end performance evaluation, Mr. Pierce received an overall rating of “meets expectations.” In his mid-year PPR for the fiscal year 2002, Mr. Pierce received two “below expectations” ratings. RX 132. No PIPC was issued based on this performance review. In his year-end fiscal year 2002 performance evaluation, Mr. Pierce received an overall rating of “needs improvement.” RX 132. Based upon this review, on October 7, 2002, Mr. Pierce was placed on a PIPC.

The PIPC noted three areas of necessary improvement: (1) error reduction and procedure compliance; (2) management oversight; and (3) corrective action effectiveness. RX 154. The Human Resources Department approved the PIPC.

Performance Issues

In the spring of 2000, prior to the QC Group entering NS&Q, the QC Group was subject to an employee survey, known as the Synergy Survey. RX 19. The survey was to evaluate employee perceptions of the Plant. The QC Group had the lowest on-site scores. In October 2000, Mr. Labarraque asked Mr. Pierce to develop an action plan regarding the low QC score on the Synergy Survey. RX 21. On October 4, 2001, Mr. Pierce submitted his action plan to Mr. Labarraque. RX 238. According to Mr. Labarraque, Mr. Pierce did not provide an adequate plan. TR 2809. Mr. Labarraque met with the employees under Mr. Pierce’s control and formed his own plan. Thereafter, Mr. Pierce submitted a memorandum to Howard Pulley, Plant Manager, questioning the results of the Synergy Survey. Mr. Pierce stated that by USEC choosing the employees interviewed for the survey, a bias may have occurred. CX 105.

At the time the QC Group was transferred to NS&Q, Mr. Labarraque requested that Mr. Pierce explore the possibility of developing an on-call schedule to formalize QC Group after hours support. The QC Group’s on-call program involved Mr. Pierce and Mr. Alderson, a former QC supervisor, alternating being on-call and attempting to locate an available inspector when necessary. Due to the potential legal difficulties with on-call wages for inspectors, Mr. Pierce advised Mr. Labarraque that an on-call program should be analyzed by the Human Resources Department. RX 34. Mr. Pierce contacted Gwen Blanton, of Human Resources, for her advice, as she was exploring a Plant-wide on-call program. TR 1575. CX 79-A. Ms. Blanton informed Mr. Pierce that she would discuss the issue with Bill Thompson, Human Resources Director, and get back to him on their findings. Mr. Pierce was not contacted by Human Resources and nothing further happened with the on-call program. Mr. Labarraque argued that Mr. Pierce was not making an adequate attempt to implement the on-call program.

At 11:45 p.m. on August 22, 2002, the Plant attempted to reach either Mr. Pierce or Mr. Alderson to get an inspector to the Plant to support a maintenance crew. TR 417. RX 140. By memorandum, dated August 23, 2002, Mr. Labarraque informed Mr. Pierce of an issue regarding a lack of QC support. CX 79. Mr. Pierce explained to Mr. Labarraque that his home phone was disconnected and that he didn’t see a number on his beeper when it sounded. TR 418. In the memorandum, Mr. Labarraque informed Mr. Pierce that such incidents would not be tolerated. CX 79; RX 141.

The Plant held daily meetings at 2:00 p.m. and 3:45 p.m. Mr. Pierce testified that he made a judgment call on whether or not it was necessary for him to attend the 3:45 p.m. meeting. TR 1704. Mr. Labarraque testified that he expected Mr. Pierce to attend every 3:45 p.m. meeting and on November 21, 2002, he informed Mr. Pierce that he was to attend the meetings. RX 179. Since Mr. Pierce's termination, the meetings have been consolidated into one afternoon meeting.

Mr. Pierce stated that Larry Jackson, the Operations Functional Area Manager, attended the 3:45 p.m. meeting, and noted that, at times, Mr. Jackson would become highly emotional. He explained that Mr. Jackson would threaten to fire people and use foul language. TR 1706. Mr. Pierce further explained that employees, Billy Vaughan, John Massey, Doug Harrall, Mike Cash, and Jim Wittman, had occasionally become upset and used foul language in meetings. TR 1706-1709.

On August 7, 2002, Mr. Labarraque informed Mr. Pierce, in writing, that he must notify someone when he is off-site and designate someone else to be in charge. RX 136.

Assessment and Tracking Report ("ATR")

On October 27, 2000, Mr. Labarraque initiated an ATR identified as ATRC-00-5421. CX 59; RX 27. Mr. Labarraque flagged this ATR as a Significant Condition Adverse to Quality ("SCAQ"). Mr. Labarraque noted an adverse trend in the performance of QC Group activities due to three significant events in the preceding three to four months, identifying the root of this trend as inattention to detail. RX 25. This ATR addressed the following three events: (1) approval of a weld that did not meet code requirements; (2) work performed by an unqualified welder; and (3) failure to find an existing crack in an inspected break hub. QC discovered the unqualified welder situation and remedied the paperwork problem. On cross-examination, Mr. Pierce testified that he thought by designating this ATR as a SCAQ, Mr. Labarraque was "picking on" him. TR 1022. Completion of the ATR required Mr. Pierce to resolve all errors dealing with inattention to detail. Mr. Pierce was unable to eliminate every possible error dealing with inattention to detail and, thus, unable to close-out the October 27, 2000 ATR. TR 495. This ATR was filed eight days after Mr. Pierce spoke at an NRC meeting regarding a safety conscious work environment. Mr. Labarraque also spoke at the NRC meeting.

Quality Records

Mr. Labarraque assigned Linda Adams the duty of assisting the QC Group in preparing and sending documents to the records repository room. She reported directly to Mr. Labarraque. Mr. Pierce argued that a document was not a quality record until it was received in the records repository room. RX 230; TR 211. He defined a quality record as a "document that ... would prove that an item met its requirements for being acceptable to use at the Plant." TR 211. Mr. Pierce testified that a document must be completed and authenticated before it becomes a quality record. TR 214. Mr. Pierce based this definition on the Uranium Enrichment Facilities Record Management Program. This document states that if a document is not complete and authenticated, then it is not a quality record. RX 230, Page 20. Mr. Alderson concurred with Mr. Pierce that a record becomes a quality record when it has been signed and completed by the inspector. TR 1988.

In January of 2002, Mr. Labarraque assigned Ms. Adams the task of tracking documentation errors dating back to July 1, 2001, in an effort to reduce human error. Any errors found required an ATR to be written, listing the badge number of the person preparing the document. TR 408. Mr. Pierce testified that the inspectors “felt embarrassed” by having their badge numbers indicated on the ATRs and believed that it was an unnecessary step. TR 1111. Mr. Alderson testified that the QC Group had a problem with Ms. Adams writing the ATRs. TR 1993. Mr. Alderson explained that there was never a clear understanding of why the ATRs were being written. Mr. Alderson testified that the Group believed that there was a motive behind why Mr. Labarraque was having Ms. Adams write ATRs.

Mr. Alderson expressed frustration with the ATRs during his testimony: “this answering ATRs took a lot of our time. It took a lot of my time, because I was having to review them in the mornings. And like I said earlier, we have to, if you have an ATR, you had to answer it by a certain date. And you had to fill out...the forms on the ATRs to answer them, or to put in a completion date when you’re going to have this done. It just took a lot of our time, lot of our wasted time, wasted time and effort that I felt had no return of investment on what we were doing, none at all.” TR 1998.

Mr. Buchanan testified that the primary problem Ms. Adams found was missing signatures and dates on paperwork. TR 1793. In trying to explain his concern with the ATR writing system, Mr. Buchanan stated, “If an ATR was written because I didn’t sign my name, I guess they were trying to – I don’t know if they were keeping a score, if they was going to fire me after I’d got to 10 or what, I don’t know. But the ATR system was designed to eliminate the problem.” TR 1797. Mr. Buchanan testified that he was a little humiliated and embarrassed when his badge number was identified on an ATR.

Mr. Gough testified that he and the other inspectors did not feel that the ATRs were justified, and that they were being treated differently than the QA section. TR 1896.

Organization Meetings

On October 19, 2000, Mr. Pierce attended a NRC Discrimination Task Force Group meeting with his wife and their attorney. Mr. Pierce spoke at this meeting regarding assuring a safety conscious work environment and the need to avoid a chilling effect. Mr. Labarraque also attended this meeting and criticized the NRC investigation process. CX 55. Mr. Pierce spoke at another NRC meeting, also attended by Mr. Labarraque, on July 12, 2001. CX 56.

On March 1, 2002, Mr. Pierce attended a staff meeting. Paul Beane, a lead auditor in NS&Q, also attended the meeting. Mr. Beane testified that Mr. Pierce became aggressive during the meeting and leaned over the table in an intimidating manner. TR 5086; RX 103.

On March 11, 2002, Mr. Pierce became confrontational in a meeting with Mr. Labarraque. Mr. Pierce became upset and spoke loudly regarding Ms. Linda Adams writing ATRs. TR 3103.

On Tuesday, July 16, 2002, a monthly safety meeting was held for the NS&Q. Mr. Labarraque accused Mr. Pierce of willfully violating company policies and procedures by sleeping during the safety meeting. TR 339. On direct examination, Mr. Pierce testified that he

“may have dozed off” during the meeting. TR 340. On cross-examination, Mr. Pierce admitted that he did not recall seeing the end of the office safety film presented during the meeting. TR 1195. When asked by the Respondent’s counsel, “[a]nd that was because you were asleep during the film. Right?”, Mr. Pierce responded, “I could have been. I don’t – I don’t remember, yes, but I probably was.” Mr. Pierce stated that Mr. Labarraque had an unobstructed view of him in his seat. TR 1195. Mr. Labarraque testified that Mr. Pierce sat towards the back of the room for the safety meeting. Mr. Labarraque stated that he noticed Mr. Pierce slouch down in his seat and then he noticed him close his eyes. Mr. Labarraque had no doubt that Mr. Pierce was sleeping. TR 3138. Mr. Pierce insisted that he did not feel drowsy when he entered the meeting. Mr. Pierce admitted that he slouched down in his chair during the meeting. He further explained, however, that a woman in front of him had to look around someone to see the presentation. When Mr. Pierce noticed that, he stated that he slouched down in his seat because he is a tall man and did not want to block the view of anyone behind him. TR 1195.

Mr. Pierce explained that he spent twelve hours the previous weekend painting his car and breathing in paint fumes. He also stated that he takes medication for migraines and a heart condition. Mr. Pierce stated that these two instances could have caused drowsiness. TR 341. Mr. Pierce stated that Mr. Labarraque knew he had a heart attack, but he never discussed his medications with Mr. Labarraque. Mr. Pierce notified the Medical Department of USEC of the medications he takes for his condition. TR 342. On cross-examination, Mr. Pierce testified that, to his knowledge, the medications he was taking had not made him drowsy. TR 1203. On July 18, 2002, Mr. Pierce received a written reminder that he had willfully violated company policies and procedures by sleeping in a safety meeting. CX 109. The written reminder was in effect until January 18, 2003. Mr. Pierce was terminated on January 16, 2003. His termination letter stated that he was under a written reminder for unprofessional behavior. TR 346.

Mr. Pierce stated that he would not have willfully let himself fall asleep. TR 346. Mr. Pierce questioned Steven Jones, Human Resources Generalist, regarding the use of the term “willful.” Mr. Pierce testified that Mr. Jones accused him of “wordsmithing,” and became angry with him over the telephone. TR 457. Mr. Jones stated that Mr. Pierce did not deny sleeping during the meeting. TR 5029. After this confrontation, Mr. Pierce contacted the Employee Concerns Department. Mr. Reep investigated appropriate discipline for sleeping in a safety meeting. By memorandum dated October 9, 2002, he concluded that nothing was found in the review of the documentation or the interviews conducted that would warrant a modification to the written reminder. CX 119. Mr. Pierce stated that he disagreed with Mr. Reep’s findings. He didn’t think he was being treated fairly and thought that the discipline was extreme for the incident. TR 594. Mr. Pierce felt that an oral reminder would have been sufficient discipline for the offense. TR 1220. Mr. Pierce stated that he has seen people accidentally dozing off during meetings.

NS&Q had a communication meeting at 7:00 a.m. on July 31, 2002. Mr. Labarraque stated that inspectors were not properly documenting inspection reports. CX 39. Mr. Labarraque informed the QC Group that all documents must designate “N/A” where not applicable to QC procedure, and a justification must be provided where “N/A” was designated. Mr. Labarraque explained that he was uncomfortable with official QC forms retaining blanks upon which data could be entered at a later date. TR 2886. Mr. Pierce testified that the inspectors disagreed with the necessity of documenting an “N/A” designation on inspection reports. CX 39. He stated that

the NQA-1 quality assurance program document notes that it is not necessary to impute an “N/A” designation, let alone provide a justification for the designation. TR 205; TR 299.

At 12:00 p.m. on July 31, 2002, a second meeting was held by the procedure writer to determine how to best incorporate Mr. Labarraque’s “N/A” requirement. Mr. Pierce attested that Mr. Labarraque became upset with the inspectors’ defiance of his order and stormed out of the meeting. CX 39; TR 374. Mr. Labarraque stated that he would not tolerate any errors on receipt inspection reports. According to Mr. Pierce, Mr. Labarraque stated that anyone improperly recording an “N/A” would “pay the price.” CX 39. Mr. Buchanan testified that he remembered Mr. Labarraque “losing his cool” during the meeting. He concurred that Mr. Labarraque stormed out of the meeting. TR 1821. Mr. Gough testified that Mr. Labarraque told the inspectors that if they didn’t do it his way, he would find someone who will, and also stated that Mr. Labarraque stormed out of the meeting. TR 1902. In an August 1, 2002 memo to file, Mr. Labarraque noted that he would apologize for the July 31, 2002 meeting incident. CX 39. No one recalls Mr. Labarraque apologizing for the incident. Mr. Pierce informed the Employee Concerns Department that Mr. Labarraque stormed out of a meeting and caused a chilling effect among the inspectors. Mr. Reep documented the inspectors’ concerns. CX 22. Mr. Pierce testified that Mr. Reep concluded that Mr. Pierce was not conveying the proper support of Mr. Labarraque’s initiatives to the inspectors. The inspectors felt that Mr. Labarraque put more of an emphasis on paperwork than inspections.

On August 7, 2002, Mr. Pierce and Mark McClure, Mechanical Maintenance Manager, attended a meeting. The meeting involved the transfer of technicium contaminated cylinders. QC inspectors were required to inspect each cylinder. Mr. Pierce became loud and aggressive with Mr. McClure and abruptly left the meeting. TR 4692. Mr. Pierce later apologized to Mr. McClure.

Mr. Pierce testified that he did not feel that differing viewpoints were tolerated or encouraged at the Plant. He stated, “I did not feel like there was a safety conscious work environment at the Plant because I didn’t feel like management really wanted to hear differing viewpoints.” TR 585.

The 337A South Crane Inspection

On September 26, 2002, Mr. Lewis Moffatt, building supervisor, generated an ATR. Mr. Pierce affirmed that, on October 18, 2002, he ordered the inspectors to generate an ATR regarding the 337A Crane. TR 466.

Mr. Daniel Brown is the QC Group inspector involved in the 337A South Crane incident. TR 2106. Mr. Brown explained that the crane carried fourteen ton cylinders of UF6 (uranium hexafluoride) over autoclaves, which hold cylinders to heat and feed the cascade. Mr. Brown described the 337A South Crane as a safety crane. Mr. Brown stated that if a crane dropped a UF6 cylinder and caused it to rupture, then the Plant would probably have to shut down to investigate. A per use inspection is performed every shift and QC does a monthly and annual inspection of the crane. The NRC requires the Plant to perform technical surveillance requirements (TSR) on safety-related equipment. Mr. Brown and Mr. Beal are responsible for inspecting approximately 100 overhead cranes.

A crane operator told Mr. Brown that the crane had been “acting funny.” He told Mr. Brown that it looked like the load on the crane was slipping downward. In response, Mr. Brown and Mr. Beal went to check the crane. Mr. Brown and Mr. Beal did not find anything unusual. The operator did not point out to Mr. Brown and Mr. Beal that the dripping occurred during a power loss. According to Mr. Brown, a few days later, an engineer determined that the crane had a limit switch problem. Mr. Brown and Mr. Beal communicated this problem to Mr. Pierce. At that time, Mr. Pierce told them to write an ATR reporting the problem. Mr. Brown did not feel comfortable writing an ATR based on what someone else’s assessment of the problem. TR 2142.

Mr. Brown, Mr. Beal, Mr. Pittman and Staci Marinelli, a civil design engineer at the Plant, attended a meeting to determine how to proceed. According to Mr. Brown, the ultimate decision of the Group was to test the crane. On October 18, 2002, a test was performed with an 18,000 pound load, with the crane out of service at the time. The crane was considered a 40,000 pound crane. Mr. Brown stated that the QC procedure for UF6 handling cranes advised them to check the function of all functioning mechanisms. Mr. Brown had no question that he was complying with crane inspection testing procedure, testifying that no one stated that there wasn’t a procedure in place to perform the test. Ms. Marinelli testified that she thought it was okay to perform the test. TR 2570. During the test, after power was shut off, the crane’s load dropped and picked up speed as it was dropping. Mr. Brown estimated that the load fell about twelve to fourteen inches before the brakes set. Mr. Brown viewed this as a safety problem. TR 2167. The American Crane and Equipment Company (“ACECO”) performed a hands-on inspection of the crane. TR 2629. ACECO determined that the crane was performing as it was originally installed. RX 175.

Mr. Pierce stated that he agreed with the inspectors’ decision to do the test. TR 618. Mr. Pierce stated that Mr. Labarraque sent an email stating that the inspectors, operators and electricians should be commended for their approach to safety. RX 165; TR 3297. Mr. Brown generated an ATR after the test was done on the crane. CX 4. He initiated an ATR because he was concerned that placing the crane back in service could pose a serious risk of a UF6 cylinder accident. Ms. Marinelli did not think there was something wrong with the crane. Mr. Brown and Ms. Marinelli continued to disagree regarding the safety of the crane. TR 2177.

Mr. Michael Duda is the section Manager of the Electrical and INC Design Engineering Group at the Plant. Mr. Duda also initiated an ATR, dated October 24, 2002, questioning the fact that the test was performed on the crane. CX 6; RX 160. The two issues with which Mr. Duda was concerned were in what location on the crane power was terminated and, by what device the drop was measured. TR 4828. Mr. Labarraque requested Mr. Duda’s ATR to be marked as a SCAQ. Thereafter, Mr. Duda initiated a second ATR, stating that the QC inspection procedure does not provide adequate detailed instruction with acceptance criteria for testing UF6 handling cranes, so as to determine if they are operating or functioning correctly. CX 7; RX 161. Ms. Marinelli agreed with Mr. Duda that there was no procedure applicable to the October 18, 2002 test. TR 2627.

On October 28, 2002, a meeting was held with the NRA to discuss the crane. The attendees were: Gary Pierce, Dan Brown, Charlie Beal, Staci Marinelli, Mike Boren, Terry Sorrell, Louis Moffatt, and Calvin Pittman. This meeting was in preparation for a meeting to be held with the NRC that afternoon. Mr. Brown testified that he was surprised that the meeting dealt with what they allegedly did incorrectly regarding procedure, as opposed to the crane’s

difficulties. TR 2180. Ms. Marinelli testified that the QC Group was very vocal at the meeting and felt they were within their procedure. TR 2637. Ms. Marinelli stated that Mr. Pierce asked Mr. Duda how many ATRs he was going to write. TR 2638. Mr. Duda testified that Mr. Pierce “was yelling and screaming at me, along with Dan Brown yelling and screaming about why I was writing ATR’s. And they wanted to know how many more ATR’s I was going to write on this issue.” TR 4844.

Mr. Michael Boren works for USEC as the leader of the Nuclear Regulatory Compliance and Corrective Action Group. Mr. Boren testified that conducting a test or experiment without an approved procedure or approved authorization would be contrary to NRC regulation. Thus, Mr. Boren was concerned with the information regarding the October 18, 2002 test. TR 4915.

Mr. Pierce filed an ATR, dated October 29, 2002, stating that the inspectors had been “chilled” after the inspectors filed an ATR documenting the problem with the 337A South Crane. CX 9; RX 164. Mr. Pierce explained that the inspectors felt that the nuclear safety issue was being brushed aside for the more minor issue of whether the test was procedurally controlled or not. TR 1615. Mr. Brown testified that he felt that his ability to identify problems had been chilled. TR 2189. Mr. Reep investigated the situation and concluded that no chilling environment existed. CX 11; RX 174.

On November 13, 2002, Ms. Marinelli contacted ASME regarding the crane stopping distance. ASME informed Ms. Marinelli that some time delay between removing power and the brake setting is permitted. RX 266. Thereafter, Ms. Marinelli prepared an engineering evaluation and defined the success criteria as dropping within twelve inches. TR 2641; RX 175.

On November 19, 2002, Mr. Brown, Mr. Beal, Ms. Marinelli and Mary Lynn Thompson, the NRC representative, performed a second test. The November 19, 2002 test consisted of a single test performed several times. TR 2197; TR 2645. The test was based on a work package given to Mr. Brown by Mr. Pierce. RX 176; CX 53-A-10. Mr. Brown performed the test. The second test was performed with 100 percent load test on the crane. Mr. Brown had to estimate the stopping distance from about twelve feet from the crane. Ms. Marinelli documented a dropping distance of nine inches. TR 2590. Mr. Brown and Mr. Beal did not want to sign the test as acceptable without first speaking to Mr. Pierce. TR 2204. Mr. Brown stated that he had concerns with recording the nine inches based on a visual comparison. Mr. Brown did not want this to be construed as falsifying a document. TR 2210. Ms. Marinelli testified that the work package was returned to her with Mr. Beal’s signature, but without the stopping distance recorded. TR 2591. She further stated that it was the QC Group’s responsibility to perform the test and record the stopping distance. TR 2650. The failure to record the stopping distance constituted an error clock reset for NS&Q. TR 3336.

Mr. Pierce met with Mr. Labarraque on November 22, 2002. Mr. Labarraque informed Mr. Pierce that the NRC was considering the fact that the inspector had not recorded the dropping distance on the work package at the time of inspection to be a willful violation. Mr. Pierce was unable to understand how the failure to record could be considered a willful violation. He informed Mr. Labarraque that he and the inspectors were going to meet with Bruce Bartlett of the NRC. Mr. Alderson, Mr. Brown, Mr. Beal and Mr. Pierce met with Bruce Bartlett. In addition to the meeting, each of them filed an NRC complaint stating that they did not agree with

the Engineering Department conclusion that the crane was safe with the twelve-inch drop and, thus, they felt chilled. TR 682.

Thereafter, Mr. Brown testified that he met with Mr. Jones. Mr. Brown alleged that Mr. Jones said that as a condition of employment, he “was not to say any more about the issue because it had been determined that this crane was now back in service, it was acceptable [] with a load drop that I still did not and still do not today agree with, that I would not say any more about it.” TR 2261. Mr. Brown testified that he considered this discussion with Mr. Jones to be discipline.

From October 12, 2002 through November 18, 2002, Mr. Alderson was off of work due to surgery on a detached retina. TR 2004. As such, during the 337A south crane incident, Mr. Pierce was the only supervisor in the QC Department and was covering many of Mr. Alderson’s duties.

The day after his meeting with the NRC, Mr. Pierce was sent home from work until further notice, on paid administrative leave. Mr. Pierce testified that he was told he was being sent home for performance reasons, but was given no further details. TR 714. Mr. Jones and Mr. Thompson testified that the administrative leave was not a form of discipline. TR 5034; TR 5330. Mr. Labarraque and Mr. Jones testified that they were not aware that on November 22, 2002 that Mr. Pierce had filed complaints with the NRC. TR 3325; TR 5039.

On December 16, 2002, the NRC issued an inspection report based on the November 22, 2002 findings. CX 38. The NRC found two severity level IV violations of NRC requirements. The NRC report was issued at noon and Mr. Pierce was sent home at 2:00 p.m. TR 711. The NRC issued the Notice of Violation because it found an unauthorized test was conducted, not because the load continued to drop after power was shut off. CX 38. In response, USEC stated that the root cause of the violation was a lack of a questioning attitude. CX 18.

The J-Bolt Inspection

After the 337A South Crane incident, Mr. Brown and Mr. Beal inspected the J-bolts on the cranes. They were asked to see if they could find any loose, broken or missing J-bolts and report how many were found. TR 2241. CX 21. Mr. Brown and Mr. Beal reported how many loose bolts were on each rail. RX 178. Mr. Brown testified that he was not instructed to mark which bolts needed fixed. TR 2248. The Engineering Department never informed Mr. Brown that they failed to perform all the tasks requested. TR 2339. The maintenance supervisor was displeased with the inspection. TR 2398. Mr. Labarraque testified that the inspectors’ performance of simply counting the number of loose J-bolts was “completely unacceptable.” TR 3340.

Decision-making Leave

Mr. Pierce filed his first complaint with the DOL on November 25, 2002. Mr. Pierce was called back to work on December 11, 2002. Upon returning to work, Mr. Pierce met with Mr. Labarraque, Mr. Jones and Mr. Thompson. Mr. Pierce was placed on decision-making leave to decide if he wanted to make a sincere desire and commitment to continue working for USEC.

Mr. Thompson explained that decision-making leave is the very last step in the progressive discipline procedure at USEC. TR 5337A.

On December 13, 2002, Mr. Pierce returned to work and met with Mr. Labarraque and Mr. Jones. A PIPC was developed for Mr. Pierce. CX 50-Y. Mr. Pierce's performance shortcomings were listed as (1) employee failed initial PIPC; (2) human errors and procedure compliance; (3) inadequate management oversight; and (4) ineffective corrective actions. CX 50-Y; RX 191. Mr. Pierce testified that he signed the PIPC on December 23, 2002 "involuntarily." Mr. Pierce explained that he was concerned about not meeting the success criteria, and that he thought that the new criteria were unachievable. TR 1402. Mr. Pierce asserted that the new requirements stated that he could have no errors for ninety days. Mr. Pierce thought this was unattainable because he had four errors in the preceding thirty days. Mr. Pierce requested to have his attorney review the PIPC before signing it. Mr. Labarraque permitted this request, but stated that the success criteria were not going to change. TR 739.

Mr. Pierce testified that the PIPC did not indicate that he needed to improve his conduct or behavior. TR 1702.

Mr. Pierce's Final Days of Employment

Mr. Pierce testified that, on January 2, 2003, Tony Camilleri, section supervisor in the Health Physics Department, approached him about performing a test for modification of building 350. The specific nature of the modification is classified. TR 5143; TR 746. Mr. Pierce stated that he informed him that the work could not be performed until Monday because employees were out on vacation. Mr. Camilleri approached Mr. Pierce again the next day. At that time, Mr. Pierce testified that he stated, "[i]f you're that desperate to get this installed, you can bypass this test." Mr. Camilleri testified that Mr. Pierce stated, "[n]ah, don't worry about testing it; just go ahead and install it." TR 5146. Mr. Camilleri stated that he persisted in trying to obtain inspector assistance from Mr. Pierce.

On January 3, 2003, Mr. Pierce, Mr. Camilleri, Mr. Walker, Mr. Fletcher and Howard Grief, Plant Maintenance Planner, attended a meeting to discuss the testing plan. Mr. Pierce stated that the test was not necessary to meet the code requirements. Mr. Pierce conceded that, due to continued pressure, he lost his temper. Mr. Pierce testified that it was not his intention to cause Mr. Camilleri fear or to make him feel intimidated. Mr. Camilleri testified that Mr. Pierce sounded angry and used foul language. TR 5150. On cross-examination, Mr. Pierce did not recall using foul language when referring to people. TR 1415. Mr. Pierce attests that he was terminated for losing his temper in the meeting. He further stated that he did not remember the meeting. TR 749. Due to the confrontation, Mr. Camilleri wrote a letter to Mr. Labarraque and Dale Kahre documenting the incident. RX 194.

Mr. Grief wrote a summary of the meeting at the direction of Mr. Camilleri. TR 2403. Mr. Grief wrote that Mr. Pierce became aggravated, sarcastic, and very defensive. Mr. Grief viewed the behavior as "unprofessional." RX 195. Mr. Pierce testified that he felt defensive at the meeting because he was already placed on decision-making leave. He stated that he was under a lot of stress and that if he refused to provide the inspectors, he would be terminated. TR 5548. After the meeting, Mr. Pierce pulled inspectors off of another project to perform Mr.

Camilleri's project. However, when the inspectors went to perform the test, there was no work package ready for them to perform the test.

Mr. Pierce testified that after his decision-making leave, he was under terrible stress and was afraid that anything he did or said was going to cause his termination. He felt that the stress caused him to lose his temper. When he returned from decision-making leave, Mr. Pierce felt that his employer was going to find a reason to terminate him. Mr. Pierce testified that the last six months of 2002 were stressful and he was afraid that anything he did was going to cause him to be fired. TR 750.

Mr. Labarraque stated that the decision to terminate Mr. Pierce was made on January 9, 2003. Mr. Steven Jones, Mr. Bill Thompson, Mr. Starkey, Mr. Penrod and Mr. David Thompson attended a meeting on January 9, 2003 to discuss Mr. Pierce. Mr. Labarraque participated via telephone. Mr. Bill Thompson testified that the grounds for terminating Mr. Pierce included falling asleep in a safety meeting, arguments with employees whom initiated ATRs, and verbally abusing other employees. TR 5336.

On January 14, 2003, Mr. Pierce informed Phyllis White, Mr. Labarraque's administrative assistant, that he was meeting with an NRC investigator and would be off-site on January 15, 2003. TR 757. On that same day, a conference call was held with the USEC headquarters to discuss Mr. Pierce's termination. TR 5338.

Mr. Pierce was terminated on January 16, 2003. RX 204. Mr. Pierce stated that he was told that incidents at meetings occurring on January 2 and January 3, 2003 were a reason for his termination. At that time, Mr. Pierce did not recall the January 3 meeting, and was never provided the opportunity to give his version of the facts. Mr. Jones stated that he did not know that Mr. Pierce contacted, or met with the NRC on January 15, 2003. TR 3424, 5045. Mr. Labarraque and Mr. Jones met with Mr. Pierce to terminate him.

Mr. Pierce's Attempt to Secure Employment

Mr. Wright owns Seminole Systems, which provided an escort service to USEC, leading people around the Plant who did not have the necessary security clearance. Mr. Wright telephoned Mr. Pierce and inquired as to whether Mr. Pierce would be interested in an escort position. Mr. Pierce testified that he told Mr. Wright he would be interested in the position and Mr. Wright said he would submit his name for security clearance. TR 768. As USEC had an immediate need for people with security clearance, Mr. Wright could not hire someone if it would take months to get clearance reinstated. TR 2453. Sammy Bell, Manager of the security organization, testified that it would take five to ten days to have Mr. Pierce's clearance reinstated. TR 5471.

After a week of not hearing from Mr. Wright, Mr. Pierce called him. According to Mr. Pierce, Mr. Wright told him that Spencer Childers stated that Mr. Pierce caused problems at the Plant and that his name was not submitted for security clearance. TR 768. Mr. Wright testified that Mr. Childers told him that Mr. Pierce filed frivolous ATRs. TR 2457. Mr. Childers testified that, in regards to Mr. Pierce, he merely told Mr. Wright to check with Human Resources regarding Mr. Pierce's clearance status because he thought Mr. Pierce was terminated for cause. TR 4960. CX 193. Mr. Pierce's security clearance was terminated by the DOE on January 30,

2003. RX 206. Thereafter, Mr. Pierce contacted Jamie Feaser, security personnel at the Plant. Ms. Feaser informed Mr. Pierce that she had not seen his name for security clearance reinstatement. TR 768.

At this time, Mr. Pierce filed his fifth NRC complaint against USEC. Mr. Pierce informed the NRC that he was concerned about retaliation against Mr. Wright. He decided to also file this complaint with the DOL. TR 769. On May 21, 2003, USEC sent Mr. Wright a letter clarifying that they were free to hire Mr. Pierce. CX 33. Mr. Wright's company no longer provides escort services for USEC. The Seminole Systems contract was not renewed. TR 2427.

QC Department after Mr. Pierce's Termination

Mr. Jason Dwight Estes replaced Mr. Pierce as the QC Manager at the Plant. TR 5236. Mr. Estes testified that he has had zero errors and that the errors for the Department were related to ATRs already in the system, prior to Mr. Estes becoming QC Manager. He noted that NS&Q still maintains the error clock. TR 5251. Additionally, an on-call program has been developed for the QC Department. TR 2768.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Burden of Proof

In order for Mr. Pierce to prevail in this claim, he must establish that he engaged in protected activity under the ERA, that USEC knew he engaged in such protected activity, that USEC took adverse action against him, and that the protected activity was a contributing factor in the decision to take the adverse action. Complainant may carry his burden of proof on any element of a discrimination claim by direct or circumstantial evidence. *Samodurov v. General Physics Corp.*, 1989-ERA-20 (Sec'y Nov. 16, 1993).

The 1992 Amendments to the ERA set forth the burden of proof in ERA cases. The ERA requires a complainant to "demonstrate" that his protected activity was a contributing factor in the unfavorable personnel action. 42 U.S.C. § 5851(b)(3)(C). "Demonstrate" means to prove by a preponderance of the evidence. *See Bourland v. Burns International Security Services*, 1998-ERA-32 (ARB April 30, 2002).

Once the case has been fully tried on the merits, the relevant inquiry is whether Complainant prevailed, by a preponderance of the evidence, on the ultimate question of liability. The adjudicator must determine whether the complainant has proven, by a preponderance of the evidence, that the complainant engaged in protected activity under the ERA, that the respondent took adverse action against the complainant, and that the complainant's ERA-protected activity was a contributing factor in the adverse action that was taken. *Paynes v. Gulf States Utilities Co.*, 1993-ERA-47 (ARB Aug. 31, 1999). The term "contributing factor" means that the complainant does not need to prove that protected activity was a substantial factor, a motivating factor, or the sole factor in the employer's decision to take adverse action. This is a lesser standard than the "significant," "motivating," "substantial," or "predominant" factor standard sometimes articulated in case law under statutes prohibiting discrimination. *Van Der Meer v. Western Kentucky University*, 1995-ERA-38 (ARB Apr. 20, 1998).

If Complainant succeeds in meeting his burden, Respondent must prove by clear and convincing evidence that it would have taken the same actions in the absence of the protected activity. 42 U.S.C. § 5851(b)(3)(D). Clear and convincing evidence is a higher standard of proof than the preponderance of the evidence standard, but less than the standard of proof beyond a reasonable doubt.

Protected Activity

A complaint or charge of employer retaliation because of safety and quality control activities is protected under the ERA. *McCuiston v. Tennessee Valley Auth.*, 1989-ERA-6 (Sec'y Nov. 13, 1991). The intention of the whistleblower provisions of the ERA is to protect employees who raise awareness of safety concerns. The scope of the Act is to be broadly construed so as to prevent intimidation of employees through retaliation. *DeFord v. Sec'y of Labor*, 700 F.2d 281 (6th Cir. 1983). The functions of the QC and QA Departments are inherently protected activity under Section 5851 of the ERA. *Basset v. Niagara Mohawk Power Co.*, 1986-ERA-2 (Sec'y July 9, 1986). As Manager of QC Department, Mr. Pierce's duties inherently involved protected activity. Additionally, in his complaints and at the hearing, Mr. Pierce alleged specific instances of protected activity that led to the adverse employment actions.

Mr. Pierce filed five complaints under the ERA. Mr. Pierce alleges that he was retaliated against for filing such complaints. No employer may discriminate against an employee for commencing, or causing to be commenced, an action under the ERA. 42 U.S.C. § 5851(a)(1)(D).

Mr. Pierce alleges that he engaged in protected activity when he assisted his spouse, Nancey Pierce, with her claims against USEC. Mrs. Pierce was laid off by USEC during an Involuntary Reduction in Force. As a result of the lay off, Mrs. Pierce filed state and federal lawsuits against USEC. To constitute protected activity under the ERA, a complainant's acts must implicate safety definitively or specifically. *American Nuclear Res., Inc. v. United States Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). Thus, although I find that Mr. Pierce provided assistance to Nancey Pierce in her claims and that, due to the outward acts he provided, USEC was aware of his assistance to Nancey Pierce, I find that his acts of assistance did not implicate safety definitively or specifically. Additionally, Mr. Pierce's August 24, 2000 letter put USEC on notice that he was assisting Mrs. Pierce in her claims. The letter did not, however, address any safety concerns. As such, I find that Mr. Pierce did not prove by a preponderance of the evidence that his assistance to Mrs. Pierce constitutes protected activity under the Energy Reorganization Act.

On July 31, 2002, Mr. Labarraque became upset at a meeting with inspectors. Mr. Pierce informed the Employee Concerns Department that Mr. Labarraque's behavior caused a chilling effect among the inspectors. Internal complaints are covered under the ERA. 42 U.S.C. § 5851(a)(3)(A); *Jones v. Tennessee Valley Authority*, 948 F.2d 258 (6th Cir. 1991). Informal and internal safety complaints may constitute protected activity. *Nichols v. Bechtel Construction, Inc.*, 1987-ERA-44 (Sec'y Oct. 26, 1992); *Dysert v. Westinghouse Electric Corp.*, 1986-ERA-39 (Sec'y Oct. 30, 1991). *Crosier v. Portland General Electric Co.*, 1991-ERA-2 (Sec'y Jan. 5, 1994) (Complainant questioning his supervisor about an issue related to safety constitutes protected activity). To promote a safe plant, QC inspectors must feel that they will receive no retaliation for reporting safety issues and discussing work duties with management. Thus, I find

that Mr. Pierce's complaint to the Employee Concerns Department implicates safety and constitutes protected activity under the ERA.

As discussed above, on October 19, 2000, Mr. Pierce and Mr. Labarraque spoke at a NRC Discrimination Task Group meeting. Mr. Pierce discussed policies regarding a safety conscious work environment. I find that Mr. Pierce's comments implicated safety. On July 12, 2001, Mr. Pierce spoke at another NRC meeting. NRC meetings inherently involve safety issues and the implementation of NRC regulations. As such, I find that Mr. Pierce's participation in the NRC meeting constitutes protected activity under the ERA. *Dobreuenaski v. Associated Universities, Inc.*, 1996-ERA-44 (ARB June 18, 1998) (Participating in a television report on alleged leakage of radioactive waste is protected activity under the ERA's whistleblower provision).

During the 337A South Crane incident, Mr. Pierce filed an ATR stating that the inspectors felt "chilled" for documenting a crane problem and that the nuclear safety issue was being ignored. This ATR alleged a safety concern. Thus, I find that Mr. Pierce's act of filing the ATR constitutes protected activity under the ERA. *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991) (A complaint or charge concerning an unsafe condition communicated to management or to the NRC is protected under the ERA).

On November 22, 2002, Mr. Pierce and other QC inspectors filed complaints with the NRC regarding the 337A South Crane incident. It is protected activity for an employee either to testify or participate in an NRC enforcement proceeding, or to file a complaint or charge of employer retaliation with the DOL because of safety and quality control activities. 42 U.S.C. § 5851(a)(1)-(3); *McCuition v. TVA*, 1989-ERA-6 (Sec'y Nov. 13, 1991); *Basset v. Niagara Mohawk Power Co.*, 1986-ERA-2 (Sec'y Sept. 28, 1993). When Mr. Pierce and the other QC inspectors filed their complaints, they engaged in protected activity. USEC's knowledge of the complaints goes to the issue of causation, not whether the protected activity occurred.

Mr. Pierce informed Mr. Labarraque that he was going to meet with the NRC to discuss the 337A South Crane tests. It is clear that any discussions Mr. Pierce had with the NRC involved a safety issue as to whether the crane was operating properly. Thus, I find that Mr. Pierce's meeting with the NRC on November 22, 2002 constitutes protected activity under the ERA. A complainant's contact with a NRC investigator can be protected activity, even if it is unclear as to why the investigator interviewed the complainant. *Collins v. Florida Power Corp.*, 1991-ERA-47 (Sec'y May 15, 1995). Mr. Pierce again met with an NRC investigator on January 15, 2003. I also find this meeting with the NRC was protected activity under the ERA.

As noted above, Mr. Pierce received two "below expectations" ratings on his February 13, 2001 mid-year performance review. Mr. Pierce informed USEC, through a letter from his attorney, that he felt the rating was unjustified and in retaliation for supporting his wife in her claims against USEC. The Administrative Review Board has held that a complainant's complaint to his employer about the fairness of his performance evaluation was not protected activity within the meaning of the ERA whistleblower provision because it did not relate to the health and safety purposes of the ERA. *Childers v. Carolina Power & Light Co.*, 1997-ERA-32 (ARB Dec. 29, 2000). I find that Mr. Pierce did not raise any safety concerns in his complaint regarding the performance review. As such, I find that this complaint does not constitute protected activity under the ERA.

In summary, I find that, as QC Manager, Mr. Pierce's duties inherently involved protected activity. I further find that Mr. Pierce engaged in protected activity when he: (1) filed his claims with the DOL; (2) participated in NRC meetings; (3) filed a complaint with the NRC; (4) filed a complaint with the Employee Concerns Department; and (4) filed an ATR regarding the safety of operating the 337A south crane.

Adverse Employment Action

The Complainant must prove that the employer took an adverse action against him. Mr. Pierce alleged numerous adverse employment actions in his complaints and at the hearing. "An 'adverse action' is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman*, 1997 U.S. App. LEXIS 16225, No. 95-6850 (11th Cir. July 2, 1997) (ALJ 1993-ERA-44).

Mr. Pierce alleges that the "below expectations" ratings on his mid-year PPR, dated February 13, 2001, was an adverse action taken in retaliation for his protected activity. As the mid-year PPR is an official document that is maintained in the employee's personnel file, this document may affect later reviews and salary increases. Thus, I find that the PPR may have an adverse affect on the employee's future employment and, as such, is an adverse employment action. *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993) (Negative comments and warnings contained in the performance evaluation are an adverse work evaluation, affecting the terms of Complainant's employment, and constitute an adverse employment action).

Mr. Pierce argues that the written reminder he received for sleeping during a safety meeting was an adverse employment action. The company policy permits a written reminder, or more severe discipline, for sleeping while at work. Thus, although I find that USEC was justified in imposing the written reminder, the reminder constitutes an adverse employment action. *Self v. Carolina Freight Carriers Corp.*, 1989-STA-9 (Sec'y Jan. 12, 1990) (Disciplinary letter that served to progress the complainant toward suspension or discharge adversely affected him, even though the letters did not result in suspension or termination).

In his November 25, 2002 complaint, Mr. Pierce argues that USEC took adverse action against him when on November 22, 2002, he was sent home on paid administrative leave. Although USEC argues that the administrative leave was not a disciplinary action, I find that Mr. Pierce's suspension from work and security badge removal constitutes an adverse employment action.

Mr. Pierce filed a complaint, dated December 12, 2002, stating that USEC placing him on decision-making leave was an adverse employment action. USEC asserts that Mr. Pierce was placed on decision-making leave to determine if he wished to continue his employment with USEC. I find that the December 11, 2002 decision-making leave was an adverse employment action.

Upon returning to work after his decision-making leave, Mr. Pierce was forced to commit to a PIPC action plan that he argued would be impossible for him to pass. As such, on December 22, 2002, Mr. Pierce filed a complaint with the DOL, arguing that the implemented PIPC action

plan was an adverse employment action taken against him by USEC. Under normal circumstances, a PIPC would not be an adverse employment action. It would merely be a means to provide employees a second chance to improve their work product. However, in Mr. Pierce's situation, USEC placed Mr. Pierce on a plan that they knew, from his previous work, that he could not meet. As such, the PIPC appears to be a foundation upon which Mr. Pierce could be terminated at a later date. Thus, I find the PIPC action plan was an adverse employment action.

Mr. Pierce filed a fourth DOL complaint after he was terminated from USEC. USEC's termination of Mr. Pierce on January 16, 2003 was inarguably an adverse employment action.

On May 16, 2003, Mr. Pierce filed his final complaint against USEC. Mr. Pierce was not hired by Seminole Systems as an escort at the Plant. Mr. Pierce alleges that USEC prevented this employment and, thus, subjected him to an additional adverse employment action. I find that Mr. Pierce did not prove by a preponderance of the evidence that USEC blocked his employment with Seminole Systems. As such, I find that his failure to be hired by Seminole Systems was not an adverse employment action taken against him by USEC.

In summary, I find that the following actions taken against Mr. Pierce by USEC were adverse employment actions: (1) the written reminder for sleeping in a safety meeting; (2) the February 13, 2001 "below expectations" rating; (3) the November 22, 2002 administrative leave; (4) the December 11, 2002 decision-making leave; (5) the December 22, 2002 PIPC action plan; and (6) the termination of Mr. Pierce.

Protected Activity a Contributing Factor in Adverse Employment Action

Complainant must prove, by a preponderance of the evidence, that Respondent had knowledge of the protected activity prior to taking the adverse employment action, and that the protected activity contributed to the adverse employment action. Complainant may establish causation by showing direct or circumstantial evidence of anti-whistleblower animus on the part of a respondent. *Dillard v. Tennessee Valley Authority*, 1990-ERA-31 (Sec'y July 21, 1994). *See e.g. Samodurov v. General Physics Corp.*, 1989-ERA-20 (Sec'y Nov. 16, 1993) (A complainant may make the required showing of knowledge (that the respondent was aware of the complainant's protected activities when it took the adverse action) by either direct or circumstantial evidence).

As noted above, functions of the QC Department are inherently protected activity under the ERA. Clearly, USEC had knowledge that Mr. Pierce was a QC Manager. Thus, USEC had knowledge that Mr. Pierce engaged in protected activity.

Mr. Pierce alleges that his assistance to his spouse, Nancey Pierce, in her claims against USEC, caused USEC to retaliate against him. As noted above, I find that any assistance Mr. Pierce provided to Nancey Pierce is not covered under the Energy Reorganization Act as protected activity because it did not implicate safety definitively or specifically. I further find that USEC did not retaliate against Mr. Pierce for any assistance he provided to his wife. As such, Mr. Pierce did not prove by a preponderance of the evidence that his assistance to Nancey Pierce in her claims against USEC was a contributing factor in any of the adverse actions taken against him by USEC.

Mr. Labarraque alleges that he did not know Mr. Pierce filed a complaint with the NRC on November 22, 2002, and that he did not know that Mr. Pierce met with the NRC on January 15, 2003. Based on the testimony of Mr. Pierce and Mr. Labarraque, I find that Mr. Labarraque had knowledge that Mr. Pierce was meeting with the NRC on November 22, 2002 to discuss the 337A South Crane test. Mr. Labarraque had knowledge that Mr. Pierce previously filed an ATR regarding the test and that he had knowledge of numerous meetings and arguments over the crane test. Based on these conclusions, I find that Mr. Labarraque could reasonably infer that, during a meeting with the NRC, Mr. Pierce would raise any issues he thought necessary to remedy the situation, including filing a complaint to initiate an investigation. A suspicion that Complainant filed complaints with government agencies is sufficient to show respondent's knowledge. *Pillow v. Bechtel Construction, Inc.*, 1987-ERA-11 (Sec'y July 19, 1993). Thus, I find that Mr. Labarraque had knowledge that Mr. Pierce possibly filed complaints with the NRC.

Mr. Pierce testified that, on January 14, 2003, he told Phyllis White, Mr. Labarraque's assistant, to tell Mr. Labarraque that he would be off-site meeting with the NRC on January 15, 2003. Mr. Labarraque stated that he had no knowledge that Mr. Pierce was meeting with the NRC on January 15, 2003. At this time, Mr. Pierce was under tremendous stress to perform his duties perfectly. Mr. Labarraque previously lectured Mr. Pierce on informing people when he would be off-site. Thus, I find Mr. Pierce's testimony credible, in that he conveyed this information to Ms. White because he was attempting to meet all of Mr. Labarraque's requirements. Ms. White was not a witness at the hearing. Mr. Labarraque provided no evidence as to why Ms. White would not have performed her duty of conveying the information. Thus, I find that Mr. Pierce informed Ms. White of his meeting and that Ms. White conveyed the message to Mr. Labarraque.

Consequently, on the day Mr. Pierce met with the NRC to discuss the crane testing, he was sent home on paid administrative leave. After returning to work, Mr. Pierce was terminated the day after he met with the NRC on January 15, 2003. Adverse employment action may follow the protected activity so closely in time as to justify an inference of retaliatory motive. *Mandreger v. The Detroit Edison Co.*, 1988-ERA-17 (Sec'y Mar. 30, 1994) (Six months between an initial internal complaint and a job transfer constituted a sufficient temporal nexus between the protected activity and adverse action to raise the inference of causation); *Crosier v. Portland General Electric Co.*, 1991-ERA-2 (Sec'y Jan. 5, 1994) (Three to four month gap between complainant's protected activity and his discharge was sufficient to raise the inference of causation). In addition, where a significant period of time elapses between the time of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Shusterman v. Ebasco Serv., Inc.*, 1987-ERA-27 (Sec'y Jan. 6, 1992). I find that the temporal proximity between Mr. Pierce's NRC meetings and the adverse employment action justifies a finding that Mr. Pierce's protected activity contributed to the adverse employment actions.

Furthermore, Mr. Pierce filed five complaints with the DOL, dated November 25, 2002, December 12, 2002, December 22, 2002, January 16, 2003 and May 16, 2003. USEC was informed each time Mr. Pierce filed a complaint. The November 25, 2002, December 12, 2002 and December 22, 2002 complaints were filed within three months of Mr. Pierce's termination. No adverse actions were taken against Mr. Pierce after the January 16, 2003 and May 16, 2003 claims were filed. Due to the close proximity between when the complaints were filed and Mr.

Pierce's termination, I find that the protected activity of filing ERA complaints with the DOL contributed to the adverse employment actions.

The testing of the 337A South Crane led to numerous safety-related disagreements. Mr. Pierce continued to voice the opinion of the QC Group. He made every effort to support the view of his inspectors and to have their view heard by those in authority. Mr. Labarraque initially supported the findings of the QC inspectors. The testing eventually led to the NRC issuing a Notice of Violation for an unauthorized test. Thus, I find that Mr. Pierce's vocal opinions in this matter contributed to the adverse actions that were taken against him after the NRC issued the Notice of Violation.

Mr. Pierce Proves his Claim

Mr. Pierce proved that he engaged in numerous protected activities and that his job inherently involves protected activity. He further proved that USEC took numerous adverse employment actions against him. Mr. Pierce established that various protected activities were known by USEC at the time adverse actions were taken against him, and that such protected activities motivated USEC to take the adverse action against him. Mr. Pierce has thus established, by a preponderance of the evidence, that his protected activity was a contributing factor in the adverse employment actions taken against him.

Non-discriminatory Reason for Adverse Employment Action

Complainant has proven, by a preponderance of the evidence, that his protected activity contributed to the adverse employment actions taken by Respondent, to avoid liability. Respondent must now prove legitimate, non-discriminatory reasons for the adverse employment actions. The Respondent's burden is a burden of production.

USEC has asserted numerous deficiencies in Mr. Pierce's work performance as reasons for his termination. USEC noted Mr. Pierce's "below expectations" ratings on his February 13, 2001 performance review. USEC justified the rating by citing the NS&Q error free clock resets. However, Mr. Pierce was never informed that any failure of the QC Group in meeting the goal would affect his performance review. The error free clock was reset because a QC inspector failed to spot excessive reinforcement on a weld, and due to an ATR initiated by Mr. Labarraque. Neither error was an act personally performed by Mr. Pierce, but each was noted on his performance review because he was the QC Manager. Mr. Brown testified that after Mr. Pierce was terminated, he no longer heard anything about an error free clock. I find that the performance rating due to the error free clock resets is not a legitimate, non-discriminatory reason for adverse employment action. The error free clock discriminated against Mr. Pierce in the imposition of the 30-day arbitrary goal and the probable non-use of the clock after Mr. Pierce's termination.

USEC also argued that Mr. Labarraque had problems getting Mr. Pierce to complete assignments. Mr. Labarraque asked Mr. Pierce to develop an action plan regarding low scores on an employee survey. Mr. Pierce presented a plan to Mr. Labarraque, though Mr. Labarraque found that the plan was insufficient. However, while Mr. Pierce and Mr. Labarraque clearly had different views on how to resolve the situation, or whether a situation existed that needed to be resolved, the evidence does not prove that Mr. Pierce disobeyed Mr. Labarraque's orders.

Mr. Labarraque also testified to Complainant's performance problems regarding the on-call program. Mr. Labarraque asked Mr. Pierce to develop an on-call program for the QC Group. Mr. Pierce informed Mr. Labarraque of numerous issues that needed to be addressed before an on-call program could be implemented, and requested advice from the Human Resources Department. Mr. Pierce never received a response. It was reasonable for Mr. Pierce to involve the Human Resources Department, as they would need to address salary requirements and on-call hours. Thus, Mr. Pierce performed his assignment in a reasonable manner. Although USEC presents evidence that Mr. Pierce's assignment was feasible because an on-call program was developed after his termination, USEC does not present whether Mr. Pierce's issues with the on-call program were resolved, or whether Human Resources advised the QC Group on the proper implementation of an on-call program. I find that Mr. Pierce's actions in attempting to implement an on-call program were not a legitimate reason for taking adverse employment action against him.

Mr. Pierce alleges that the written reminder he received for sleeping in a safety meeting was severe for the incident. As noted above, I find that the written reminder was an adverse employment action. Sleeping on the premises is clearly a prohibited act according to company policy. I find that the written reminder for sleeping during a safety meeting is reasonable. I further find that USEC proved by clear and convincing evidence that there was a legitimate, non-discriminatory reason for issuing a written reminder to Mr. Pierce.

USEC alleges, in part, that Mr. Pierce was disciplined and later terminated for becoming aggressive and arguing in numerous meetings. At the time of allegedly losing his temper, Mr. Pierce was discussing safety related issues and, thus, engaging in protected activity. The record contains testimony and evidence that Mr. Pierce was not the only USEC employee to lose his temper at meetings. This includes an incident where Mr. Labarraque raised his voice and stormed out of a meeting.

As discussed above, on January 3, 2003, Mr. Pierce became angry at a meeting and used foul language. When he was terminated, Mr. Pierce was informed that his actions at this meeting were a reason for his termination. At this time, Mr. Pierce had already been placed on administrative leave, decision-making leave and a new, stricter PIPC. As such, Mr. Pierce was placed under a tremendous amount of stress. The record does not contain any evidence that Mr. Pierce had temper problems prior to being transferred to NS&Q. Mr. Pierce testified that he thought any small issue would cause his termination. USEC did not terminate other employees for arguments during meetings. Thus, Mr. Pierce's arguments cannot be separated from his protected activity. As such, I find that USEC did not establish that Mr. Pierce's arguments are a legitimate, non-discriminatory reason for terminating his employment.

In summary, I find that USEC produced clear and convincing evidence that Mr. Pierce received a written reminder on July 18, 2002 for a legitimate, non-discriminatory reason. I further find that USEC did not produce clear and convincing evidence that they had legitimate, non-discriminatory reasons for implementing the following actions: (1) the February 13, 2001 performance review; (2) the November 22, 2002 administrative leave; (3) the December 11, 2002 decision-making leave; (4) the December 22, 2002 PIPC action plan; and (5) the termination of Mr. Pierce.

CONCLUSION

The reasons for the adverse actions articulated by USEC all relate back to Mr. Pierce's protected activity. The numerous performance issues addressed by USEC as a means for ultimately terminating Mr. Pierce all stem from Mr. Pierce's protected activities. The non-discriminatory reasons cannot be separated from the retaliatory reasons. *Smalls v. South Carolina Electric & Gas*, 2000-ERA-27 (ALJ July 11, 2001) (Permissible and impermissible motives for Complainant's discharge could not be separated; thus, Employer had not shown by clear and convincing evidence that it would have given Complainant a less-than-satisfactory performance rating in the absence of his protected activity). Mr. Pierce had no performance issues in the twenty-plus years of his employment before entering the NS&Q Department. At the time of restructuring, USEC made numerous changes and continued to add to the duties of Mr. Pierce. These changes increased the stress placed on Mr. Pierce and his efforts to ensure the safety of the Plant.

After listening to the testimony and observing the demeanor of Mr. Pierce, I find that Mr. Pierce was dedicated to the safety of the Plant. USEC did not establish by clear and convincing evidence that it would have taken the same actions against Mr. Pierce absent his protected activity. Mr. Pierce has therefore established, by a preponderance of the evidence, that his protected activity contributed to his termination.

However, I further find that Mr. Pierce did not prove by a preponderance of the evidence that his protected activity contributed to the written reminder issued to him for sleeping during a safety meeting. Additionally, Mr. Pierce did not prove by a preponderance of the evidence that his protected activity contributed to Seminole Systems' failure to employ him.

Relief Requested

After a finding that a violation of the Act has occurred, the administrative law judge shall make a finding as to reinstatement, compensation, and compensatory damages. 29 C.F.R. § 24.7(c)(1). Section 24.7(c)(2) provides that upon issuing a recommended order finding a violation in an ERA case, the administrative law judge shall also issue a preliminary order providing all the relief specified in paragraph (c)(1) of this section, with the exception of compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary and shall be effective immediately.

Mr. Pierce testified that he wishes to be restored to his position as QC Group Manager at USEC. (9/23/04). He stated that his wage for the year preceding termination as \$72,000. Mr. Pierce did not receive a raise for the year 2003. If he had received the raise, his wage would have been \$74,160. (9/23/04). Mr. Pierce received a pension from USEC in 2003 in the amount of \$17,351. In 2004, he received a pension of \$13,200. Due to leaving early, Mr. Pierce only receives 51% of his pension. Mr. Pierce collected unemployment benefits in 2003 in the amount of \$682. In 2003, Mr. Pierce worked at the following companies: (1) Precision Machine as a machinist in 2003 earning \$6,525; (2) Country Inn Hotel earning \$119; (3) as a meter reader earning \$124; and (4) Hunter Martin & Associates earning \$5,373. (9/23/04). As of the hearing in this case, Mr. Pierce has not worked since the first of November 2004. (1/11/05). Mr. Pierce requests an award amount equal to two times his back pay for compensatory damages.

In his post-hearing brief, Mr. Pierce requests immediate reinstatement as Manager of the QC Group at the Plant. Mr. Pierce also requests all back pay and benefits which he would have received if he remained employed since January 16, 2003. He also requests lost pension and health benefits and contributions to those plans for the hours that he otherwise would have worked. Mr. Pierce further requests assessment of prejudgment interest on any back pay award that he receives. Mr. Pierce also requests that USEC be required to post a notice of the determination of this claim on employee bulletin boards for a period of not less than 90 days, as well as reimbursement of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred in connection with his DOL complaints.

In light of the foregoing, I conclude that Mr. Pierce is entitled to reinstatement and back pay. Accordingly, I hereby make the following award:

1. United States Enrichment Corporation shall immediately reinstate² Complainant to his position as of the date of termination.
2. United States Enrichment Corporation shall immediately pay Complainant back pay in the amount of his annual salary of \$72,000³ per year, from the date of termination until the date of reinstatement.
3. Consistent with this Recommended Decision and Order, Respondent shall pay Complainant interest on the back wages at the rate specified in 26 U.S.C. § 6621(a)(2) (1988)⁴.
4. Counsel for Complainant shall file a Petition for Fees and Costs within thirty (30) days after the filing of the Recommended Decision and Order for all legal services rendered. Respondents may file objections to said application for fees and costs within fifteen (15) days of receipt.
5. Respondent must post notice at the Paducah Gaseous Diffusion Plant for a period of ninety (90) days on employee bulletin boards.

I find that the above award adequately compensates the Complainant and, thus, no award for compensatory damages is granted.

RECOMMENDED ORDER

IT IS RECOMMENDED THAT the complaint of Gary Joe Pierce be granted in part and dismissed in part. It is recommended that Gary Joe Pierce's complaints dated November 25, 2002, December 12, 2002, December 22, 2002 and January 16, 2003 be granted. It is recommended that the May 16, 2003 complaint be dismissed.

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GERALD M. TIERNEY
Administrative Law Judge

² Upon reinstatement, Respondent must also reinstate any lost vacation and sick leave. Respondent must also reinstate any lost pension and health benefits and contributions to those plans for the hours he would otherwise have worked.

³ Complainant alleges that if he would have had a better performance review, then he would have received a raise. I find that the raise and the amount of the raise is discretionary and not a guarantee of employment. Thus, the back wages due do not incorporate any salary increase.

⁴ See e.g. *Doyle v. Hydro Nuclear Services.*, 1989-ERA-22 (ARB May 17, 2000).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s Recommended Decision and Order. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).