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Issue Date: 09 May 2008

CASE NO.: 2006-ERA-00003

In the Matter of

JOHNNY F. NEAL
Complainant

v.

ENTERGY NUCLEAR OPERATIONS, INC.
Respondent

Appearances:

Johnny F. Neal, *Pro Se*, Sandwich, Massachusetts,

Douglas E. Levanway, Esq., Wise, Carter, Child, & Caraway, Jackson, Mississippi,
for the Respondent

BEFORE: COLLEEN A. GERAGHTY,
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Statement of the Case

This matter arises under the whistleblower protection provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851 *et seq.*, and the regulations promulgated at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C.A. § 2011, *et seq.* The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

Johnny Neal (the “Complainant”), filed a claim on September 6, 2005, alleging that his managerial level and compensation package, including stock options, merit increases, and outage bonuses, were reduced after he signed a Settlement Agreement resolving a prior complaint under the ERA.¹ The Complainant alleged these adverse actions were in retaliation for the initial 2002 complaint and subsequent settlement. In the present matter, Entergy Nuclear Operations (the “Respondent” or “ENO”) denied retaliating against the Complainant, contending both that the change in his management level predated the Settlement Agreement and that the Complainant accepted this change in the Settlement Agreement. The Respondent further denied reducing the Complainant’s compensation package, arguing that the Complainant’s merit raises prior to and after his initial complaint are comparable, and that the Complainant is not entitled to stock options or an outage bonus in his current position.

Both parties filed Motions for Summary Decision and on April 5, 2006, I issued a Recommended Order Denying Complainant’s Motion for Summary Decision and Granting In Part the Respondent’s Motion for Summary Decision (“Recommended Order”). In the Recommended Order I dismissed the Complainant’s claims related to the stock options from 2003-2005 and the merit increases in 2003 and 2004 as untimely, as the claims were not filed within 180 days after the violations occurred as required by the ERA. 42 U.S.C. §5851(b)(1); Recommended Order at 3-6. With regard to the 2005 merit raise, I concluded that there remained a question of fact as to whether the Complainant established a casual nexus between his protected activity and subsequent settlement in 2002 and the amount of his 2005 merit increase. Additionally, I found that a question of fact existed as to whether the Respondent had established a legitimate nondiscriminatory reason for the amount of the Complainant’s 2005 merit increase. Recommended Order 6-10. Therefore, I denied summary decision with regard to the 2005 merit increase claim. Finally, I determined that the Respondent had established a legitimate nondiscriminatory reason for failing to award the Complainant an outage bonus in 2005 and that the Complainant failed to present any evidence to show that the Respondent’s proffered reason for not awarding the 2005 outage bonus was pretext. As such, I determined that the Respondent was entitled to judgment as a matter of law on this portion of the Complainant’s claim.² Recommended Order 11.

The parties appeared before the undersigned on August 23, 2006, for hearing. After some discussion the parties requested time to discuss possible settlement of the claim. At the

¹ On May 8, 2002, the Complainant filed a complaint alleging violations of the employee protection provisions of the ERA. The Respondent denied the allegations and the matter was set for hearing before Administrative Law Judge Daniel Sutton. On November 12, 2002, a Settlement Agreement, Release, and Covenant Not to Sue was entered into by the parties and submitted for approval. Judge Sutton issued a Recommended Decision and Order Approving Settlement and Dismissing Complaint with Prejudice. OALJ No. 2002-ERA-00034 (November 29, 2002).

² The Recommended Order incorrectly included a Notice of Appeal Rights paragraph. Both parties appealed the Recommended Order to the Administrative Appeals Board (“ARB”). The undersigned issued an *Erratum* on April 20, 2006, indicating that the Notice of Appeal Rights paragraph had been included in error and that the Recommended Order did not resolve all aspects of the claim and was not intended as the final order. On July 26, 2006, the ARB issued a Final Decision and Order dismissing the parties’ appeals of the Recommended Order.

parties' request, the hearing was continued to November 1, 2006³, and again to December 4, 2006, at which time all parties were given the opportunity to present evidence and oral argument. The Complainant appeared *pro se* at the hearing and an appearance was made by counsel on behalf of ENO. Hearing Transcript ("TR") at 1. The Complainant and Donald Larsen, the human resources manager for Entergy Nuclear Operations at its Pilgrim nuclear plant, testified at the hearing, and Richard Goodrich, the director for security operations for Entergy Nuclear Northeast, testified by deposition. Documentary evidence was admitted as Complainant's Exhibits ("CX") 1-2, and Respondent's Exhibits ("RX") 1-6. TR at 35-36, 111-119, 150. The Complainant and Respondent both filed post-hearing briefs ("Cl. Br." and "Resp. Br." respectively).

Following submission of post-hearing briefs in a letter to the undersigned dated March 8, 2007, the Respondent submitted a new affidavit from Donald Larsen and sought to file it in this matter. In the new affidavit from Mr. Larsen, he corrected statements he made in two earlier affidavits and at hearing with regard to the Complainant's eligibility for participation in the stock option program beginning in 2003.⁴ In light of the post-hearing affidavit, I issued an Order affording the parties thirty days to file supplemental briefs addressing whether the Order Denying Complainant's Motion for Summary Decision and Granting in Part Respondent's Motion for Summary Decision as it relates to the stock options should be reconsidered. Both parties have filed supplemental briefs and the record is now closed.⁵

For the reasons set forth below, I conclude that the Complainant failed to establish by a preponderance of the evidence that his 2005 merit increase was reduced as a result of his protected activity. I have also determined that there is no basis to reconsider my April 5, 2006 Order on Summary Decision which dismissed the claims for stock options as untimely.

II. Stipulations and Issues Presented

The parties have stipulated to the following: (1) The Complainant is a current employee of ENO; (2) the provisions of the ERA at issue in this case are applicable to ENO; (3) the protected activity alleged by Complainant occurred in 2001 and 2002; and (4) no subsequent protected activity is at issue in this case. TR 22.

³ On August 22, 2006, one day prior to the initial scheduled hearing, the Complainant filed a Motion for Reconsideration of the Recommended Order. The continuance to November 1, 2006 also took into account Respondent's need for additional time to respond to the Complainant's Motion to Reconsider. Aug. 23, 2006 TR 2-11.

⁴ Mr. Larsen's post-hearing affidavit raised a question as to whether my prior Order Denying Complainant's Motion for Summary Decision and Granting in Part Respondent's Motion for Summary Decision as it relates to the stock options, should be reconsidered. The Complainant did not object to the admission of Mr. Larsen's post-hearing affidavit. The affidavit is marked RX 7 and admitted.

⁵ On January 18, 2007, the undersigned issued a Recommended Order Denying Complainant's Motion for Reconsideration on the grounds that the ARB did not remand and reopen the record, and thus Complainant was not entitled to introduce newly proffered evidence. The substantive merit of the newly proffered evidence was also found insufficient to warrant reconsideration of the Recommended Order.

The remaining issue in dispute is whether Complainant established by a preponderance of the evidence that Respondent awarded him a reduced 2005 merit increase as a result of his protected activity in 2001 and 2002.

III. Findings of Fact and Conclusions of Law

A. Employment History and Background

The Complainant has worked at the Pilgrim Nuclear Power Plant (“Pilgrim”) in Plymouth, Massachusetts for 20 years. TR at 24. The Complainant held the position of security manager at Pilgrim for ENO for several years until October of 2001. *Id.* at 24-25. As security manager at Pilgrim, the Complainant was responsible for physical security of the facility, writing and managing the security budget, drug and alcohol testing, and industrial safety. *Id.* at 27-28. The Complainant testified that at different times during his tenure as security manager he supervised anywhere from two hundred to three hundred employees. *Id.*

After the events of September 11, 2001, the Complainant made a series of complaints to his supervisors regarding how security was being handled at Pilgrim. *Id.* at 54, 76.⁶ About this same time, he was interviewed by Nancy Desmond, the employee concerns manager, and Charles Hehl, an independent contractor, concerning the effectiveness of the employee concerns program. *Id.* at 53. As a result of the security concerns the Complainant raised, Nancy Desmond independently initiated an employee concern process. *Id.* This process included an internal investigation of Complainant’s security concerns by Mr. Hehl and another independent consultant, Keith Logan. *Id.*; CX 1-2.⁷

In October of 2001, the Complainant’s direct supervisor, Terry Weir, removed him from his position as security manager at the Pilgrim facility in Plymouth, Massachusetts and he was placed in a project manager position at the Indian Point Integration Project in White Plains, New York (“Indian Point”). TR at 44-50. The project manager position entailed integrating the security plans and operations of two previously separate but adjoining companies that the Respondent had purchased at the Indian Point site. *Id.* at 45-47. In contrast to the Complainant’s security manager position at Pilgrim, his position as project manager at Indian Point entailed no supervision or evaluation of other employees, nor any budget responsibilities. *Id.* at 88, 92. As a result, the Complainant’s job classification level was demoted from supervisory to individual contributor. *Id.* at 133-134. The Complainant testified that he was told by Mr. Weir that the change to project manager would not result in a reduction in salary or benefits. *Id.* at 52. The Complainant acknowledges that his base salary did not decrease as result of the move to Indian Point. *Id.* at 58.

⁶ The parties have stipulated that the Complainant’s post 9/11 security complaints amounted to protected activity under the ERA. Cl. Br. at 2; Resp. Br. at 2.

⁷ It appears that Mr. Hehl and Mr. Logan were later asked by ENO to investigate the termination and transfer of the Complainant. TR 49-50.

The Complainant testified that the change in his position to project manager was initially presented by Mr. Weir in early October 2001 as a potential promotion; if he took on the project manager position and successfully managed the transition at Indian Point then there was a possibility he would get a security director position in return.⁸ TR at 52-53. After he was offered the project manager job by Weir, the Complainant testified that he inadvertently overheard a conference call on October 6, 2001, between Mr. Weir and Weir's supervisor, a senior vice president of ENO. *Id.* at 55. According to the Complainant, he overheard Mr. Weir tell his supervisor "we have to get Neal under control, he thinks he's some kind of security expert, all he wants to do is spend money, this 9/11 thing is a flash in the pan." *Id.*; CX 1. After overhearing this statement, the Complainant told Mr. Weir on October 8, 2001, that he was turning down the offered project manager position, citing the conversation he overheard as the reason for his decision. *Id.* The Complainant testified that Mr. Weir then told him he was being moved out of security at ENO all together, but he could have another job at the plant. *Id.* at 55-56. When he refused, the Complainant testified that Mr. Weir terminated him for being "untrustworthy." *Id.*

At this point, the Complainant retained an attorney who entered into negotiations with ENO. TR at 56. Out of these negotiations came an offer of the position as project manager at Indian Point, with moving expenses covered by ENO. *Id.* at 47, 56. The Complainant was advised by his attorney to take this offer, and he did so on October 29, 2001. *Id.*⁹ Following his acceptance of the project manager position, Mr. Hehl and Mr. Logan issued a series of reports in November of 2001 in which they found that the Complainant did not suffer any retaliation for his security concerns or in being transferred from Pilgrim in Massachusetts to White Plains in New York because there was no reduction in his pay, benefits, or salary by ENO. CX 1-2; TR at 49-50.

Pursuant to his acceptance of the project manager position, the Complainant moved to the Indian Point site in White Plains, New York, where he worked for a little over a year. TR at 56. When he first arrived in White Plains he continued to report to Mr. Weir through December 2001. TR 51, 56. Thereafter, the Complainant began reporting to the director of nuclear security, Richard Goodrich. TR at 48; RX 2 at 5. In addition to his responsibility for integrating the Indian Point site, the Complainant also conducted security audits and assessments at that site. TR at 25, 56.

On May 8, 2002, the Complainant filed his initial complaint with the Department of Labor alleging ENO had violated employee protection provisions of the ERA in removing him from his security manager position and transferring him to a position at ENO's White Plains, NY facility for his protected security complaints. Recommended Order 1. On November 12, 2002, the Complainant, represented by counsel, and Respondent entered into a Settlement Agreement relating to the May 2002 complaint. *Id.* According to the terms of the Settlement Agreement,

⁸ The Complainant acknowledged during cross examination that he understood the move to project manager at Indian Point entailed reduced job responsibility and was thus a lower level position. TR at 60.

⁹ While no conclusive time line is set forth in the record, the Complainant represents this date in his brief. Cl. Br. at 2.

the Complainant was transferred back to the Pilgrim, Massachusetts facility in the position of project manager for corporate assessments, a position he continues to hold. *Id.* at 56-57. As project manager for corporate assessments the Complainant conducts internal security audits at various ENO plants and continued to work under the supervision of Richard Goodrich.¹⁰ TR at 57; RX 3 at 5-7. The position does not entail any direct supervision of employees, and the Complainant continues to be classified as an individual contributor. TR at 89.

On September 6, 2005, the Complainant brought the claim that forms the basis of the present matter alleging that his merit raises in the years 2003-2005 have been less than the merit raises awarded his peers in retaliation for his prior protected activity.

Complainant testified that prior to his protected activity, his merit increase percentage was always higher than the budgeted percentage given to supervisors to allocate, which he contends proves that supervisors have leeway in allocating merit raises. TR at 67. The Complainant also asserted that he did not believe that his merit raise in 2005 was fair when he compared himself to security managers, who he considered were his peers, and who were also rated as valuable contributors. *Id.* 79-80. The Complainant stated that while he never had been rated above a valuable contributor, there had never been any negative performance identified in his performance reviews. *Id.* at 66. Moreover, Complainant maintains that the performance review or rating sub-categories of “high” or “low” within the valuable contributor performance rating level do not exist. Cl. Br. at 5.

The Complainant acknowledged that his position as project manager was a lower level position than the position of security manager which he held in 2001. TR at 60, 87-88.¹¹ The Complainant indicated that as project manager he did not supervise other employees as he had when he held the security manager position. *Id.* The Complainant contends that his merit raise declined each year from 2002 when he settled his original ERA complainant, to 2005 when he filed the present complaint. *Id.* at 66-69. The Complainant stated that when he raised the issue of his merit raise with his supervisor, Mr. Goodrich, he was told that the company had dedicated less money for merit increases.¹² *Id.*

¹⁰ Mr. Goodrich remained the Complainant’s immediate supervisor until Goodrich left ENO to work for another company in October 2005. RX 3 at 4-6.

¹¹ The Complainant acknowledged that when he was removed from his security manager position at Pilgrim in 2001, he was assigned as a project manager to work on integrating two ENO facilities in White Plains, NY. When the Complainant settled his 2002 discrimination complaint, the settlement provided that he was to work out of the Pilgrim facility in Massachusetts, as a project manager for corporate assessments. Compl. Mot. Summ. Dec. Attachment 1; TR 86-89. The project manager for corporate assessments position required Mr. Neal to travel to various ENO facilities to assess their security programs. TR 86-89. Complainant agreed that since he was removed as security manager in 2001, the two project manager jobs he has subsequently held, first on the Indian Point integration project, and presently as corporate security assessments, he has not functioned as a manager and the “job is completely different.” TR 92. Nevertheless, the Complainant testified that when he settled the 2002 ERA complainant, his pay and benefits were to remain the same, even though he acknowledges that the settlement agreement itself is silent on this issue. TR 94.

¹² The Complainant testified that he believed the percentage available for merit increased dropped from 4 percent to 3 or 3.5 percent in 2003, but that the amount would vary. TR at 67. Mr. Neal also stated that when the company set aside 4 percent for merit increases he would get almost 5%, so he said the company had “leeway in what they could give.” *Id.*

In response to a question as to whether he knew “what criteria the company uses when they award an individual a raise that’s higher than the percentage?” the Complainant replied that he was not aware of any procedure or policy, and he believed the decision to exceed the established percentage was entirely within the discretion of the manager issuing money for his subordinates. TR at 69. The Complainant contends that he received a lesser percentage raise than other security managers who received the same performance rating. *Id.* at 69-70. Even though he acknowledged that security managers have supervisory responsibilities, which he does not as a project manager, the Complainant testified that he compares himself to this group because he construed statements from his supervisor Mr. Weir, made at the time of the initial request that he take on the project manager job, that there would be no change in his pay or benefits to mean that he would remain at the same management level as security managers. *Id.* at 70, 73-74. The Complainant then added that he believed the project manager job he was doing was a significant job and he did not “see it as a demotion or decrease in activity” from what he had been doing. *Id.* at 71.

B. Complainant’s and Comparator’s Past Performance Reviews and Merit Raises¹³

The Complainant has utilized other security managers as the proper comparative employee group. The Respondent has asserted that the security managers are comparable to the Complainant in salary only. Resp. Br. at 6 n.4. Nevertheless, the Respondent has accepted the Complainant’s comparative group for purposes of evaluating the present claim involving the 2005 merit raise. In evaluating this claim, it is important to consider the merit raises provided to this group of employees and to the Complainant over time.

In 2001, ENO set the merit raise budget for its employees at 4 percent. RX 3 at 9; TR at 134-135. The Complainant testified that he received a valuable contributor rating throughout his tenure at ENO. TR 66. In April 2001, the Complainant received a 3.9 percent raise (\$3,822.05) from Mr. Weir for his 2000 performance. RX 4. Of the two other security managers employed at that time, Comparator D was given a raise of 4.7 percent (\$3,983.95), and Comparator E received a 4.4 percent (\$2,516.27) increase. *Id.*

In 2002, the merit raise budget was again set at 4 percent. RX 3 at 9; TR at 134-35. In April 2002 the Complainant received a 3.8 percent merit raise (\$3,818.37). RX 4. This merit increase was not based on a performance evaluation for the previous year, as the Complainant was new to the project manager position at that time. *Id.* There were only two other security managers at this time. Comparators D and E were rated high contributors and received a 4.4 percent raise (\$4,449.20) and a 4.9 percent raise (\$2,925.51), respectively. *Id.*

In 2003, Respondent decreased its merit raise budget to 3 percent. RX 3 at 9; TR at 135. The Complainant again received a rating of valuable contributor for his performance in 2002 and

¹³ While discussions of performance reviews and merit raises prior to 2005 are relevant to the 2005 merit raise issue because they illustrate Respondent’s pattern of awarding merit raises, they are not being evaluated here for any retaliatory character. *See* Recommended Order at 9.

was awarded a 3.5 percent merit raise (\$3,697.46). RX 4. Of the two security managers employed, Comparator D was also rated a valuable contributor and was awarded a 3.5 percent merit increase (\$3,720.98). *Id.* Comparator E also received a 3.5 percent raise (\$2,420.90) but was rated as a high contributor for his work in 2002. *Id.*

In 2004, the merit raise budget remained at 3 percent. RX 3 at 9; TR at 135. The Complainant was rated as a valuable contributor for 2003 job performance and received a 2.9 percent merit raise (\$3,203.64) in April 2004. RX 4. In 2004 there were three security managers. Like Complainant, Comparator B was also rated as a valuable contributor and received a lump sum merit raise of \$2,600, which was less than a 2.9 percent increase. *Id.* Comparator D received a high contributor rating and was awarded a 4 percent raise (\$4,401.39). *Id.* Comparator E was not rated as he was new to the position but he was awarded a 2.9 percent raise (\$2,637.00). *Id.*

In 2005, the year at issue, the merit raise budget held at 3 percent. RX 3 at 9; TR at 135. That year, the Complainant was rated as a valuable contributor for his work in 2004 and received a merit raise of 2.2 percent (\$2,419.67). RX 4. Two of the security managers, Comparators C and E, were also rated valuable contributors but were awarded merit increases of 3 percent (\$2,726.46), and (\$2,779.11), respectively. *Id.* Comparators B and D were rated as a high contributors for 2004 and were awarded 3.3 percent raises (\$4,290.00) and (\$3,776.39), respectfully. *Id.*

C. Respondent's Performance Review and the Merit Raise Procedure

1. Richard Goodrich's Testimony

Richard Goodrich served as the director of nuclear security for ENO out of the White Plains, New York site. RX 3 at 5.¹⁴ Mr. Goodrich was the Complainant's direct supervisor from January 28, 2002 until he left ENO in October 2005. *Id.* at 4-6. Mr. Goodrich currently works as the corporate manager of nuclear security for the Tennessee Valley Authority. *Id.* at 4. Mr. Goodrich explained that as a project manager the Complainant's position was a step below that of a security manager. *Id.* at 7-8.

Mr. Goodrich was responsible for determining the percentage of the Complainant's merit raise each year from 2002 to 2005. *Id.* at 8-9. Mr. Goodrich testified that at ENO merit raises are based on performance for the previous year, and are awarded each year on the first of April. *Id.* at 12. Mr. Goodrich explained that as director of security at ENO he was provided a targeted amount, three or four percent annually during his tenure, for setting merit raises for the employees he supervised. *Id.* at 9. While he could assign individual merit raises above or below this amount he was expected to award merit raises for his group which on average met the budgeted target rate. *Id.* at 10. Mr. Goodrich testified that in addition to the targeted amount, he was given "guidance" from ENO on the factors to consider when assigning individual merit raises, including "what the current salary structure was for the individual, what their responsibilities were, what their performance was throughout the year." *Id.* at 9, 17. He said salary structure was a relevant factor because merit raises were assigned based in part on where

¹⁴ Mr. Goodrich testified through deposition.

an employee's salary was within the salary range for their position. *Id.* at 22. Mr. Goodrich also testified that he took into account whether an employee's salary was commensurate with his job responsibilities. *Id.* at 23.

Under ENO's performance evaluation system, employees are rated as falling into one of three performance categories: high contributor, valuable contributor, or needs improvement. *Id.* at 14.¹⁵ Mr. Goodrich stated that there are further variances within these three performance levels, for example low-valuable contributor or high-valuable contributor. *Id.* at 14, 18. Mr. Goodrich testified that if he had employees whose performance was assessed as being within one performance level, such as valuable contributor, he would further differentiate them within the assessed performance level, based on how proactive they were, how quickly they performed their job duties, and how far they went beyond the minimum requirements and expectations for their position. *Id.* at 11, 14-15, 18, 21.

While Mr. Goodrich supervised the Complainant in his position as project manager, he also supervised other employees who were in security manager positions. RX at 7. Mr. Goodrich testified that a project manager position was a step below a manager position at ENO because it did not entail supervision of personnel. *Id.* at 8. As such, a project manager is classified as an individual contributor rather than a supervisor. *Id.* Even though Mr. Neal held a position one level below a manager position, Mr. Goodrich noted that the Complainant had a higher salary than some higher level security managers who reported to Mr. Goodrich. *Id.* at 8.

Mr. Goodrich described the Complainant's 2004 work performance as follows:

Mr. Neal met the requirements as a valuable contributor. But I would say that Mr. Neal did not - was not a high-speed, was not a proactive person. Mr. Neal did what he was instructed to do. But I would judge him that he did not go beyond that. Within that valuable contributor category, there are others in that category that also met the requirements but also went beyond within the job scope meeting requirements, instead of just doing what they were told to do.

RX 3 at 14-15. Mr. Goodrich further testified that Mr. Neal "was not a high contributor within the valuable contributor category...he did meet the minimum requirements, but did not go beyond. *Id.* at 18. Mr. Goodrich said that the Complainant had an "extremely high" salary for his position as he did not supervise other employees. *Id.* at 18. When asked by ENO counsel whether the Complainant was "overpaid for his position", Goodrich answered "yes." *Id.* ENO's Counsel then asked Goodrich whether the Complainant "[s]hould have been paid as much as these security managers at a site?" *Id.* at 19. Mr. Goodrich replied "[n]o, not as a project

¹⁵ Employees not in their positions for six months are not rated, but may receive a merit increase.

manager, no. He should not have been.” *Id.*¹⁶ As such, Mr. Goodrich took into account the Complainant’s salary each time he awarded him a merit raise percentage. *Id.* at 24.

Mr. Goodrich testified that in 2004¹⁷ Comparator C was a security manager at the Vermont Yankee facility who made approximately \$10,000 less per year than the Complainant. RX 3 at 17. He considered Comparator C to be a “high” valuable contributor within the valuable contributor performance level based on his job performance in 2004. *Id.* Mr. Goodrich awarded him a 3 percent merit raise by “taking a look at the salary, taking a look at how the person performs in their category... [and] taking a look at the target percentage.” *Id.*

Comparator E was the manager of security at the James Fitzpatrick facility, according to Mr. Goodrich. RX 3 at 20. Comparator E was rated as a valuable contributor on the performance scale. *Id.* Mr. Goodrich stated that he rated Comparator E as a “high” valuable contributor within the valuable contributor performance level because he was “very proactive. He didn’t just come in and meet the minimum requirements to do the job.” *Id.* at 21. However, Mr. Goodrich stated that Comparator E’s performance was not sufficiently high to move him up to the next rating level which was “high contributor.” *Id.* at 20-21.

Mr. Goodrich also confirmed in his testimony that Comparators B and D were rated at the highest performance level of “high contributor” in 2004 because they consistently went beyond their minimum job requirements. *Id.* at 16-20. In the end, Mr. Goodrich emphasized that Comparators B, C, D, and E were all responsible for more facets of their security programs and supervised a number of people, and also that he took into account an employee’s salary within the salary range when awarding merit raises. *Id.* at 22.

On cross-examination by the Complainant, Mr. Goodrich acknowledged that when he was hired at ENO, he was made aware that the Complainant had filed a whistleblower complaint, but he did not recall who told him and he said he did not know the specifics of the complaint. *Id.* at 23, 28-29.

2. Donald Larsen’s Testimony

Donald Larsen has held the position of manager of human resources at the Pilgrim plant since 1998. TR at 117. Mr. Larsen stated that each ENO site is given a merit salary budget. *Id.* Mr. Larsen explained that those supervisors responsible for assigning merit raises to employees are given the merit salary budget by a site vice-president. *Id.* at 117-118. Mr. Larsen testified that the two most significant factors in awarding merit raises are job performance and the amount of an employee’s salary within a given salary range. *Id.* Mr. Larsen clarified that each position at ENO has a salary range or a market reference value which cannot be exceeded. *Id.* at 120. He testified that in the event that an employee is deserving of a merit raise but is at the highest point of the salary range for his position, the raise is awarded as a lump sum so as not to exceed the

¹⁶ When Mr. Goodrich was asked by ENO counsel whether he knew why the Complainant made more money than a number of the managers who reported to Goodrich, or “how that happened,” Goodrich responded “I just know that his rate when I came into the company was higher than most of the managers at that time.” TR at 8.

¹⁷ Performance ratings for the 2004 year served as the basis for merit increases awarded in April 2005.

salary limit with a percentage increase. *Id.* at 120-122. When an employee is near the salary limit, but not at the limit, the supervisor has discretion and may choose to award either a lump sum or percentage raise. *Id.* at 123-124. However, Mr. Larson stated that awarding a lump sum in this situation is not done very often. *Id.* at 124. Mr. Larsen also testified that from a human resources standpoint, the fact that the Complainant had a higher salary than some higher level managers would be taken into account when determining his merit raise percentage. *Id.* at 134. He conceded that ENO's process for awarding merit raises leaves supervisors a tremendous leeway in awarding merit raises. *Id.* at 138.

On cross examination, Mr. Larsen admitted that supervisors are not provided performance review guidelines through any formal or written policy or procedure. *Id.* at 140-142. However, he stated that supervisors are given written guidelines from corporate on how to evaluate job performance and assign merit raises. *Id.* Furthermore, Mr. Larson stated that a supervisor's assignment of merit raises is subject to higher review, and one could expect repercussions if a merit raise was awarded improperly. *Id.* at 154.

Mr. Larsen also testified that the stock option program at ENO changed beginning in 2002-2003 with the company offering far fewer stock options in the succeeding years. *Id.* at 124-125. There was a reduction in options granted between 2001 and 2002 and then a dramatic reduction between 2002 and 2003. *Id.* at 149. The change resulted in many fewer employees receiving stock options than in previous years. *Id.* at 125. Stock options are a performance based program. *Id.* at 124. Mr. Larsen initially testified that supervisors and perhaps a small group of employees within the valuable contributor classification may potentially be eligible for stock options under the revised program. *Id.* at 126-137. Mr. Larsen later testified that after the change in the stock option policy, only employees with supervisory responsibilities were potentially eligible for stock options. *Id.* at 126, 139-140. Mr. Larsen said that once the change in policy occurred he no longer received stock options. *Id.* at 125.

IV. Discussion

A. Analytical Framework

The ERA's whistleblower provisions are intended to protect employees who raise awareness of safety concerns, and they are to be broadly construed so as to prevent intimidation of employees through retaliation. *DeFord v. Secy of Labor*, 700 F.2d 281 (6th Cir. 1983). As one court has noted: "[w]histleblower provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment." *Trimmer v. U.S. Dept of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999) quoting *Passaic Valley Sewerage Comm'rs v. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993).

The Act prohibits any employer from discharging or otherwise discriminating against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity. 42 U.S.C. §5851(a). The ERA requires a complainant to demonstrate that his protected behavior was a contributing factor

in the unfavorable personnel action that followed. 42 U.S.C. §5851(b)(3)(C). Demonstrate in this context means to prove by a preponderance of the evidence. *Dysert v. Florida Power Corp.*, 93 ERA 21, slip op. at 3 (Sec'y Aug. 7, 1995), aff'd sub nom. *Dysert v. U. S. Secretary of Labor*, 105 F. 3d 607, 609 10 (11th Cir. 1997); *Trimmer v. U. S. Dept. of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Stone & Webster Engineering Corp. v. Herman*, 115 F. 3d 1568, 1572 (11th Cir. 1997).

In order to prevail in a whistleblower complaint brought under the ERA, a complainant must prove, by a preponderance of the evidence, that: (1) the complainant engaged in protected activity; (2) the respondent took adverse action against the complainant; and (3) the complainant's protected activity was a contributing factor in the adverse action that was taken. *Paynes v. Gulf States Utilities Co.*, USDOL/OALJ Reporter (HTML), ARB No. 98-045 at 4 (Aug. 31, 1999).¹⁸ Even if the complainant meets this burden, the employer may avoid liability if it is able to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. 42 U.S.C. §5851(b)(3)(D). *Trimmer*, 174 F.3d at 1101-02; *Stone & Webster Engineering Corp.*, 115 F.3d at 1572.

In order to prevail on his complaint, the Complainant must establish by a preponderance of the evidence that the Respondent took adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* and other anti-discrimination statutes. See *Overall v. Tennessee Valley Authority*, ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097 (2000). Where there is direct evidence of discrimination, then the complainant prevails unless the respondent can establish an affirmative defense. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act case). The Complainant has not offered direct evidence of discrimination in support of his claim.

When direct evidence of discrimination is not available, a complainant first must create an inference of unlawful discrimination by establishing that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. See *Bartlik v. U.S. Department of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2).¹⁹ The burden then shifts to the respondent to proffer legitimate

¹⁸ The "contributing" factor standard is a lesser standard than the significant, motivating, substantial, or predominant factor standard sometimes articulated in case law regarding other statutes prohibiting discrimination. *Van Der Meer v. Western Kentucky University*, 1995-ERA-38 (ARB Apr. 20, 1998).

¹⁹ Since this case was fully tried on its merits, it is not necessary for the Court to determine whether Complainant presented a *prima facie* case and whether Respondent rebutted the showing. *U.S.P.S. Bd. of Governors v. Aikens*,

nondiscriminatory reasons it took the adverse action. Under traditional Title VII analysis, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

B. Protected Activity, Respondent's Knowledge and Adverse Action

The Parties agree that the Complainant engaged in protected activity in 2001 and 2002 when he filed and then settled a claim under the Act alleging that he was removed from his position as security manager and transferred to a temporary assignment at ENO's facility in White Plains, New York for raising safety and security concerns. RX 1; Resp. Br. at 2. The Respondent was aware of the Complainant's protected activity. Therefore, I find the Complainant engaged in protected activity in raising security complaints in 2001 and settling the complaint in 2002 and the Respondent had knowledge of these actions.

The Complainant asserts that as a consequence of his protected activity, he has been subjected to adverse action in that his annual merit raises have declined in comparison to the merit raises awarded his peers in each year following 2002.²⁰ Cl. Br. at 3. The Respondent has not argued that the Complainant was not subjected to adverse action with regard to the 2005 merit raise. Resp. Br. 9 -14. As the Complainant's 2005 merit raise was less both as a percentage and as a dollar amount than the merit raises awarded his peers, I find that he has established adverse action.

C. Was the Complainant's Protected Activity a Contributing Factor in the Adverse Action ?

In *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), the Court in interpreting the Whistleblower Protection Act, 5 U.S.C. §1221(e)(1), construes the words "a contributing factor" to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." In the present matter, Complainant and the Respondent agree that a supervisor has discretion in determining the amount of a merit raise. Nevertheless, the exercise of discretion must have some rational or explainable basis. The Complainant acknowledges that he has received a merit raise each year following his protected activity. However, he contends that the percentage and dollar amount of his annual merit increase has been less in each year following his protected activity in 2001 and 2002. Cl. Br. at 6. The Complainant appears to assert that the 2005 merit increase which was less than similarly

460 U.S. 711, 713-14 (1983); *Roadway Express*, 929 F.2d at 1063; *West v. Kasbar, Inc./Mail Contractors of America, Inc.*, ARB Case No. 04-155, OALJ Case No. 2004-STA-34 (Nov. 30, 2005); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ NO. 1999-STAA-5, slip op. at 7-8 (ARB March 29, 2000). Once the respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case. *Ciotti v. Sysco Foods of Philadelphia*, 97-STA-30 at 5 (ARB July 8, 2003). Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of whether protected activity was the reason for the adverse action. *Id.*

²⁰ As noted, the 2005 merit raise is the only issue before me.

situated peers was simply the most recent instance in a series of actions Respondent has taken in retaliation for his 2001 and 2002 protected activity. *Id.*

Respondent argues that the three year gap between the protected activity in 2002 and the 2005 merit raise militates against a conclusion that retaliation motivated the Respondent when it awarded the 2005 merit increase, particularly in light of the pattern of merit raises following the Complainant's protected activity. ENO Br. at 10-11. The Complainant contends that the fact that the percentage of his merit raises has declined since his protected activity even compared to similarly rated peers establishes that his protected activity was a contributing factor in the award of his 2005 merit raise.

The temporal relationship between the protected activity and the adverse action is one factor utilized in determining whether there is a correlation between the two events. *Bonnano v. Stone & Webster Eng'g Corp.* ARB Nos. 96-110, 96-165, ALJ Nos. 95-ERA-54, 96-ERA-7, slip op. at 2 (ARB Dec. 12, 1996) (no causal nexus where three year gap and lack of evidence of animus on part of Respondent following protected activity). Although I concluded that the claims regarding merit increases in 2003 and 2004 are untimely,²¹ I construe the Complainant's brief as arguing that Respondent's actions with regard to the merit raise is a continuing or current violation. Therefore, an examination of the time-barred merit raises in 2003 and 2004 is relevant background evidence in evaluating any causal connection regarding the timely 2005 merit increase claim. *Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002) citing *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977).²²

The evidence confirms that the percentage of the Complainant's annual merit raise has declined in each year since 2002. In addition, the record before me establishes that beginning in 2003, ENO reduced the amount the company budgeted for merit increases from 4 percent to 3 percent.

In April 2003, the Complainant received a 3.5 percent merit increase based upon a 2002 performance rating of valuable contributor. The Complainant's 2003 merit increase was above the 3 percent the company budgeted. There were three security managers in the comparator group in 2003.²³ In that year Comparator D was also rated a valuable contributor and, like the Complainant, received a 3.5 percent merit increase. Comparator E received the highest rating of high contributor and also received a 3.5 percent raise. Comparator B did not receive a rating and he received a 4.2 percent increase, a higher percentage raise than that received by the Complainant. Accordingly in 2003, the Complainant received the same percentage merit

²¹ On April 5, 2006, I granted Respondent's motion for summary decision on the claims related to the 2003 and 2004 merit increases as the claims were not timely.

²² The Complainant's reliance on *Cotter v. Harris*, 642 F.2d 700, 704 to support his contention that his protected activity was a contributing factor in the amount of his 2005 merit increase is confusing. The issue in that case involved entitlement to Social Security Disability Benefits and the case did not address whistleblower or employment discrimination issues.

²³ The Claimant acknowledged that he does not compare himself to the security managers who received the rating of high contributor as he recognizes that these employees received a higher performance rating and thus presumably would be entitled to a higher percentage merit increase. TR at 81.

increase as like rated Comparator D and the same percentage as Comparator E, even though E had a higher performance rating.

In April 2004, the Complainant was rated as a valuable contributor, for 2003 performance, and awarded a 2.9 percent merit increase. Comparator B, like the Complainant, was rated a valuable contributor and was awarded a lump sum of \$2,600, which was less than 2.9 percent and a lesser dollar amount than the Complainant's merit increase. Comparator C did not have a performance rating and was awarded a 2.0 percent merit raise. Comparator D received the highest rating, high contributor, and was awarded a 4 percent merit increase. Finally, Comparator E was new to the position and received a 2.9 percent increase. Thus, in 2004 the only security manager who received a higher percentage raise than the Complainant was Comparator D who also received the highest rating as high contributor.

In April 2005, merit increases for 2004 performance were awarded. The Complainant, like Comparators C and E, was rated a valuable contributor. The Complainant received a 2.2 percent merit increase. However, Comparators C and E were awarded merit increases totaling 3 percent each. Comparators B and D received the highest rating of high contributor and both received merit increases of 3.3 percent. Based upon the evidence presented, the Complainant's 2005 merit increase of 2.2% was less than the 3 percent merit increase of Comparators C and E who received the same valuable contributor rating as the Complainant.

The evidence is undisputed that Respondent reduced the amount budgeted company-wide for merit increases from 4 percent to 3 percent in 2003. This provides a partial explanation for the decrease in the percentage of the Complainant's merit increases. In addition, a comparison of the merit raises awarded the Complainant and security managers in 2003 and 2004 shows, contrary to the Complainant's assertion, that in the two years immediately following the protected activity the Complainant was treated similarly to other security managers who received the same valuable contributor rating with regard to the merit raises.²⁴ It was not until the 2005 merit increase that the Complainant was awarded less than the two other individuals with the same rating. The adverse action then occurred three years after the Complainant's protected activity. Thus, the Complainant is unable to rely upon temporal proximity between the protected activity and the adverse employment action to support an inference of retaliation in carrying his burden of demonstrating that his protected activity was a factor in the award of a reduced merit raise in 2005.²⁵

The Complainant might still prevail had he established other facts tending to show that Respondent was motivated by his protected activity when it awarded a reduced merit increase in 2005. However, the Complainant has not produced any other evidence showing retaliatory

²⁴ Additionally, as noted, in the first year following his protected activity the Complainant received a 3.5 percent raise which was above the budgeted amount and in the second year he received 2.9% which was essentially equivalent to the 3 percent budgeted.

²⁵ In the period prior to his protected activity, Complainant received a 3.9 percent merit increase in 2001 and a 3.8 percent raise in 2002, when the budgeted amount for merit increases was 4 percent.

animus by Respondent in awarding him a lower 2005 merit increase.²⁶ In the absence of temporal proximity or any other evidence of animus in the award of the 2005 merit increase, I find that the Complainant failed to meet his burden of showing that his protected activity contributed to or played a role in the Respondent's decision regarding his 2005 merit increase. Accordingly, the Complainant is not entitled to relief under the Act.

D. Reconsideration of Order Denying Complainant's Motion for Summary Decision and Granting in Part Respondent's Motion for Summary Decision -- The Stock Options

In my April 5, 2006 Recommended Order Denying Complainant's Motion for Summary Decision and Granting in Part Respondent's Motion for Summary Decision Order and my January 18, 2007 Recommended Order Denying Complainant's Motion to Reconsider Order denying Complainant's Motion for Summary Decision and Granting in Part Respondent's Motion for Summary Decision, I concluded that the Complainant failed to show that Respondent fraudulently concealed the nature of the position he accepted in 2002 such that the statute of limitations equitably tolled with regard to the claim for stock options in 2003-2005. As the claim for stock options was not filed within 180 days after the violation occurred, I found the claims untimely and dismissed the claims. (Apr. 5, 2006 RO). In this matter, the Respondent filed two affidavits from Donald Larsen, human resources manager at ENO's Pilgrim facility, in which he stated that when the Complainant went from security manager to project manager/individual contributor, he was not eligible for stock options. (Resp. Motion for SD (Larsen 2/2/06 Affd ¶ 7) and Respondent's Resp. to Compl. Motion for SD and Amended Mot. for SD (Larsen 3/27/06 Affd. ¶ 4). At the December 4, 2006 hearing, Mr. Larsen appeared to testify that some employees classified as individual contributors as well as managers with supervisory duties were potentially eligible for stock options. He later testified that stock options were potentially available only to individuals who were supervisors, or higher management and the highest performers. Since the Claimant was an individual contributor he was no longer eligible for stock options.

The Complainant argues that the Decision dismissing the stock option claims as untimely ought to be reconsidered as Larsen's affidavits show that the Company actively misled him as to the stock options, and therefore the statute of limitations tolled. Comp. Br. for Recon. of Order Denying Compl. Mot for SD and Granting In Part Resp. Mot. for SD at 2-4. The Respondent argues that the Complainant has failed to show that equitable tolling of the statute of limitations applies to his claim for stock options. Supp. Br. in Supp. Mot. for SD at 2-4. Respondent asserts that prior to this litigation, the Company never told the Complainant that he was ineligible for stock options based on the change in status from security manager to project manager/individual contributor.

²⁶It is not enough for Complainant to simply show that his 2005 merit increase was less following his protected activity. He must demonstrate that Respondent awarded the lower raise in 2005 in retaliation for his 2002 protected activity. Complainant has not alleged or shown that following his protected activity he was subjected to unwarranted criticism, assigned undesirable duties, shunned by co-workers or any of the more common ways employees may demonstrate unlawful animus.

After reviewing the evidence and considering the parties' arguments I find that the Complainant has failed to show that the Respondent fraudulently misled him with regard to the stock options such that equitable tolling of the statute of limitations is appropriate. The evidence shows that the confusion over whether the Complainant's change in status from a security manager to an individual contributor/project manager rendered him ineligible for stock options occurred in the course of this litigation as a result of Larsen's inaccurate statements on this issue. The Complainant acknowledged at the hearing that he was never told by Respondent that his move from security manager to project manager made him ineligible for stock options. Rather, he stated that when he asked his supervisors, Weir and Goodrich, why he did not receive stock options in 2003, 2004 and 2005 he was told that the stock option program changed and that they had not received stock options themselves. The evidence showing that Respondent modified its stock option program and thereafter awarded significantly fewer stock options is undisputed. Goodrich testified that following the change in policy, stock options were very limited and were awarded to only the highest achievers. Respondent published the number of stock options in its annual report. The Complainant has not established that the Respondent unlawfully concealed its actions in terms either changing the stock option plan or in awarding stock options and therefore has not satisfied the requirements for equitable tolling of the statute of limitations. Therefore, there is no basis to reconsider my April 5, 2006 Order on Summary Decision which dismissed the stock option claims as untimely.

V. Conclusion

For the forgoing reasons, I have determined that the Complainant has failed to meet his burden of establishing that his 2001 and 2002 protected activity contributed to Respondent's decision to award a reduced 2005 merit increase. Accordingly, I find and conclude that Complainant is not entitled to relief under the Act because no adverse employment action was taken by Respondent in retaliation for his alleged protected activity. Based on the foregoing, Complainant's complaint must be dismissed. Accordingly, the undersigned finds and concludes that Complainant's complaint be **DISMISSED**.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions, or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, N.W., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, N.W., Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).