

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 October 2014

Case No: 2006-ERA-00029

In the Matter of:

WILLIAM VINNETT,

Complainant,

v.

MITSUBISHI POWER SYSTEMS,

Respondent.

APPEARANCES: Michael Shane Welsh
Attorney for the Complainant

Laura L. Mall
Christopher M. Curran
Attorneys for the Respondent

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER ON REMAND

This matter arises under the employee “whistle blower” protection provisions of the Energy Reorganization Act of 1974, U.S. Code, Title 42, § 5851 (ERA) and its implementing regulations at 29 CFR, Part 24. The Complainant filed a complaint on June 26, 2005, alleging that Respondents retaliated against him in violation of the ERA by terminating his employment on February 25, 2005. The complaint was investigated and on July 25, 2006, the Director, OSHA, Tampa Area Office, dismissed the complaint by finding that there was no reasonable cause to believe the Respondent violated the ERA. On August 9, 2006, the Complainant filed timely objections to the Secretary’s decision and requested a hearing before an Administrative Law Judge. On June 11, 2008, Administrative Law Judge R.K. Malamphy granted Respondent’s Motion for Summary Decision. The decision was appealed to the Administrative Review Board. By Order of July 27, 2010 the decision on Respondent’s Motion for Summary Decision was

reversed and the case remanded for formal hearing. Two scheduled hearings were continued. By Order of May 2, 2013, the August 13, 2013 hearing was cancelled and the case reassigned to this Administrative Law Judge upon the scheduled retirement of Judge Malamphy.

A hearing was scheduled to commence October 21, 2013 in Newport News, Virginia, with the Parties and their respective witnesses granted leave to participate pursuant to Federal Rules of Civil Procedure (FRCP) Rule 43(a). The federal Government experienced a period of shutdown the beginning of October 2013. Upon re-opening of the government offices, a joint motion for continuance was granted and the hearing rescheduled to commence March 4, 2014.

Pursuant to ERA implementing regulations at 29 CFR §24.107(a), a formal hearing was held on March 4, 2014 in Newport News, Virginia, at which time the parties were afforded full opportunity to present evidence and argument as provided in the ERA and applicable regulations. At the hearing, Administrative Law Judge exhibits 1 through 13; Complainant's exhibits 7 to 10, 14, 16, 18, 23 to 25, 27, and 29 to 31; Respondent's exhibits 1 to 12, and 19 to 22 were admitted without objection (TR¹ 6-9, 12-15, 15-19, 154). Respondent's exhibits 15 to 17 were admitted over objection by Complainant's counsel after the Complainant was recalled to testify on the matters contained therein (TR 155-166). No additional exhibits were admitted into evidence. The Parties entered oral argument at the close of the hearing (TR 166-209).

The findings of fact and conclusions which follow reflect the complete review of the entire record, the argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent considered.

STATUTORY FRAMEWORK

The evidence of record establishes that the alleged adverse employment action is based on actions occurring in Orlando, Florida, which is within the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, the judicial precedents of the U.S. Court of Appeals for the Eleventh Circuit apply.

The ERA, at 42 USC §5851, provides in pertinent part:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

¹ The following exhibit notation applies: ALJX – Administrative Law Judge exhibit; CX – Complainant exhibit; RX – Respondent exhibit; TR – transcript page

- (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
- (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
- (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954;
- (E) testified or is about to testify in any such proceeding or;
- (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For the purposes of this section, the term “employer” includes –

- (A) a licensee of the Commission or an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2011);
- (B) an applicant for a license from the Commission or such an agreement State;
- (C) a contractor or subcontractor of such a licensee or applicant; and
- (D) a contractor or subcontractor of the Department of Energy that is identified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2021(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

(b) Complaint, filing and notification ...

- (3) (A) The Secretary shall dismiss a complaint filed under paragraph (1) ... unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
- (B)
- (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
- (D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

(g) Deliberate violations

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or the Atomic Energy Act of 1954, as amended. [42 U.S.C. 2011 et seq.].

(h) Nonpreemption

This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

Implementing federal regulations applicable to the ERA at 29 CFR Part 24 were revised effective January 18, 2011.² The revision related to renumbering and procedural matters which did not change the substantive law related to ERA. The revised regulations are used herein and provide, in pertinent part:

§24.102 Obligations and prohibited acts.

(a) No employer subject to the ... [ERA] or to the Atomic Energy Act of 1954 (AEA) ... may

discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee ... engaged in any of the activities specified in this section.

(c) Under the [ERA] ... it is a violation for any employer to intimidate, threaten, restrain, coerce,

blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee has:

- (1) Notified the employer of an alleged violation of such statute or the AEA of 1954;
- (2) Refused to engage in any practice made unlawful by such statute or the AEA of 1954, if the employee has identified the alleged illegality to the employer; or
- (3) Testified or is about to testify before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of such statute or the AEA of 1954.

(e) This part shall have no application to any employee who, acting without direction from his or

her employer (or the employer's agent) deliberately causes a violation of any requirement of ... [the ERA].

² Fed. Reg., Vol 76, No. 11, 2808-2826 (Jan. 18, 2011)

§24.109 Decision and orders of the administrative law judge.

(b)(1) In cases arising under the ERA, a determination that a violation has occurred may only be

made if the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

To prove unlawful retaliation under the ERA, the Complainant must show by a preponderance of the evidence (1) that he engaged in protected activity, (2) that the employer had knowledge of the protected activity, (3) that he was subjected to an adverse employment action amounting to discharge or discrimination with respect to compensation, terms, conditions, or privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action, 42 U.S.C. §5851(b)(3)(C). “If the employee does not prove one of these elements, the entire complaint fails.” *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013); *Muino v. U.S. Dept. of Labor*, 325 Fed. Appx. 791 (11th Cir. 2009) unpub; *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995)

Protected activity is a contributing factor if “the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision.” 76 FR 2812 (Jan. 18, 2011) If the complainant’s alleged protected activity constitutes a deliberate violation of the ERA and was done without the direction of the employer, the whistleblower protections provisions of the ERA are inapplicable to the complainant. 42 U.S.C. §5851(e); *Fields v. U.S. Department of Labor*, 173 F.3d 811 (11th Cir. 1999) Relief under the ERA may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. 42 U.S.C. §5851(b)(3)(C) “‘Clear’ evidence means the employer has presented evidence of unambiguous explanations for the adverse action in question. ‘Convincing’ evidence has been defined as evidence demonstrating that a proposed fact is ‘highly probable.’ ... ‘clear and convincing evidence’ [is] evidence that suggests a fact is ‘highly probable’ and immediately tilts’ the evidentiary scales in one direction.” *Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 13-074, 2014 WL 1870933, *6 (Apr. 25, 2014) citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

STIPULATIONS

The parties orally stipulated to, and this Administrative Law Judge finds, the following as facts in this case (TR 9-11):

1. At all times relevant to this proceeding, the Respondent was an employer within the meaning of the Energy Reorganization Act of 1974, as amended.

2. The Complainant was hired by Respondent on July 12, 2004 for the position of Field Project Manager.
3. The Complainant was assigned onsite for Respondent's clients at the Palisades Nuclear Power Plant on August 22, 2004 in the position of Mechanical Engineer – Vibration / Day.
4. The Complainant last worked at the Palisades Nuclear Power Plant on or about October 25, 2004.
5. The Complainant resumed work at the Respondent's Orlando office on or about October 25, 2004.
6. The Complainant received a warning letter regarding performance deficiencies from Respondent's Human Resource Manager, Bailey Weaver, and supervisor, John F. Daniels, on January 6, 2005.
7. The Complainant's employment with Respondent was terminated on February 25, 2005.
8. The Complainant's annual salary at the time of employment termination was \$75,010.00.
9. During the time of Complainant's employment with Respondent, Respondent was in the business of inspecting and performing periodic maintenance on turbines and generators in both nuclear and non-nuclear facilities.
10. John F. Daniels, as Respondent's Operations Manager for Steam Turbine Services, was the Complainant's immediate supervisor while Complainant was employed by Respondent.
11. George Tidwell served as Field Project Manager for work performed at the Palisades Nuclear Power Plant while the Complainant was assigned onsite work at the Palisades Nuclear Power Plant.

ADMITTED FACTS

The following admissions were entered as facts in the case (TR 19-21):

1. A degree conferred upon the Complainant by the New York Institute of Technology was a Bachelor of Science degree with a major in computer science.
2. The Bachelor of Science degree conferred upon the Complainant did not include a minor in mechanical engineering.

ISSUES

The following issues remained for determination (TR 21-22)

1. Did the Complainant engage in protected activity under the ERA from September 1, 2004 to October 30, 2004 ?
2. If so, did the Respondent have knowledge of the protected activity, as alleged in the complaint ?
3. If so, did the Complainant suffer an adverse employment action, as alleged in the complaint ?
4. If so, was the protected activity a contributing factor to the decision which caused the alleged adverse employment action of termination of employment on February 25, 2005 ?

5. If the Respondent violated the ERA whistleblower protection provisions, what is the appropriate relief to which the Complainant is entitled ?

POSITION OF THE PARTIES

Position of Complainant (TR 166-179, 202-209)

Complainant's counsel submitted that the case involves breach of trust toward the Complainant by Respondent and supervisor J. Daniels and toward the well-being and welfare of the public by Respondent's ignoring repeated warnings from the Complainant. He submits that the Complainant is an extremely skilled engineer who represented the Respondent at client facilities, prepared a report to sell services to a plant in Puerto Rico, and prepared a report on the Auburndale facility, which reports were admired by the Respondent when originally presented.

Counsel submits that the Complainant was dedicated to Respondent and found errors directly involving nuclear safety at the Palisades Nuclear Power Plant in the form of welding cuts on pressurized vessels, maintenance work being done and not signed off, incomplete maintenance reports, and maintenance reports with erroneous information. He argues that these concerns were made known to supervisor J. Daniels, who directed the Complainant to not discuss the issues with the customer.

Counsel argues that the Complainant was moved to making photocopies and other menial office tasks on December 7, 2004 and given a performance improvement plan in January 2005 as steps to get rid of the Complainant. Later the Complainant was assigned to complete an action list for a new contract at Gregory where the Complainant would be working on the gas turbine and not as a project manager. The Complainant filled out the actions list by noting the tasks he would be performing and assigning the remaining areas to other people who would be responsible for the tasks involved. He argues that the assigned action list was created as a pretext for the coming termination decision. He submits that the Complainant attempted to meet with the Vice President of Engineering to go over the Palisades report and discuss the Gregory outage but was fired instead.

Counsel argues the Complainant engaged in protected activity pursuant to 10 CFR §50.56³, Respondent and J. Daniels knew of the activity, Respondent subsequently took adverse action by reducing job responsibilities and terminating employment as "a direct result of [the Complainant] complaining and stirring the waters and not letting the issue of nuclear safety violations rest."

Counsel submits that Respondent provided the employee logs made by the Complainant at the pro se deposition, which were totally redacted; has never produced a CD of data requested in discovery; has not produced the work packages or data logs involved with the nuclear safety issue; and has failed to produce requested September 2004 e-mails from the Complainant to J. Daniels. He argues these failures demonstrate Respondent's circling of the wagons in this case, actions which should be construed against the Respondent.

³ It is noted that this particular section relates to the Commission issuing a license upon completion of construction of a facility or alteration of a facility in compliance with the terms and conditions of a construction permit.

Counsel argued that Respondent's use of inquiries into tuition assistance, use of a FEDEX mailing, and dry cleaning billing are red herring issues on trust and are not documented events. He argues that J. Daniels wanted to control Complainant's reported concerns "so that no one outside of his group would hear the issues that [the Complainant] was raising." He submits that the gas turbine classes the Complainant is accused of attending improperly were in the December 2004-January 2005 timeframe after the Complainant was told he would be working on the gas turbine at the upcoming Gregory power outage.

Counsel submits the Complainant had a reasonable belief there was violations of nuclear safety law or regulations, the complaints were ignored, and adverse actions were taken against the Complainant. He request nine years of back pay based on the annual \$75,000.00 wage being received at the time of termination, house closing costs, moving costs, and attorney fees and costs.

Position of Respondent (TR 23-29, 180-202)

Respondent's counsel submits the Complainant's employment was not terminated due to activity protected under the ERA but because of a demonstrated lack of skill inconsistent with claimed educational background and claimed work experience; a reference letter submitted by the Complainant with his application for employment that was not an accurate reflection of performance with that prior employer; deceit exhibited in the Complainant's attempt to obtain assistance in pursuing a Master's degree while employed by Respondent; and failures to follow direct orders of his supervisor. Counsel argues that the Complainant failed to place the Respondent on notice that it was acting unsafely or violating the law.

Counsel submits that during the Complainant's deposition testimony and hearing testimony "he never advised Respondent that its actions or omissions violated safety or violated the ERA or the Atomic Energy Act of 1954 ... [though] he listed several different instances that he alleged constituted notice to his employer that it was acting unsafely or in violation of the ERA ... [but there are] none that puts Respondent on notice in a definite or specific way that it was acting unsafely or in violation of the law." She referred to the Complainant's weekly report logs that "would probably include a list in the logs of any issues that occurred if they posed a safety problem" and argued that "none of the weekly reports ... contained any specific or definite notice that Mitsubishi was acting in violation of the law or safety as indicated by [the Complainant's] testimony." She argued that the evidence demonstrates that the September 2004 e-mails described by the Complainant as being sent to J. Daniels were never received by J. Daniels; and the Complainant "could not remember what was in the e-mails" or "whether the e-mails were about safety."

Counsel submits that the Complainant's report to J. Daniels turning a turn-over meeting of finding torch scars inside a pressurized water vessel generated the correct response by Respondent of evaluating the need for corrective actions, recommending corrective welding actions to the customer, and then performing the corrective actions. Thus demonstrating that the Respondent "is acting in the interest of safety, doing exactly what it was hired by Palisade to do."

Counsel argues that the personal logs of the Complainant were produced in pages labeled Bates M-0359 through M-0461 and that the daily logs were produced in labeled M-0153 through M-0216; but Complainant's counsel chose not to produce the documents. "There is no testimony of [the Complainant] having raised safety violations in the personal journal." Additionally, the testimony is that the personal journal was not given to the Respondent until the Complainant was being escorted out of Mitsubishi after being terminated, so the journal had no impact on the decision to terminated employment.

Counsel submits that the Complainant never talked to Mr. Walsh or advised Mr. Walsh of the topic to be discussed prior to the Complainant's termination of employment. She submits that letters to Mr. Walsh and Mr. Fuseya in Japan (CX 27, 29; RX 10) were composed and sent after the Complainant's employment was terminated. She argues that these events are after the Complainant's employment was terminated and cannot be considered protected activity under the ERA. She submits they are relevant to credibility because the Complainant never stated he thought he was being terminated for engaging in protected activity.

Counsel submits that J. Daniels denies discussing with the Complainant any deficiencies in safety procedures that the Complainant alleges went on at the Palisade Nuclear Power Plant; denies the Complainant ever addressing a claim that component engineers left the facility without being released; denied the Complainant ever told him anything that caused him to question, probe or change safety practices at Mitsubishi.

Counsel argues that the Complainant's employment was terminated for performance concerns (alienation of job site personnel, skill level questions by customer Palisades Nuclear Power Plant, incomplete data sheets and action item plan for the Gregory outage, incorrect generation of cost estimates, repeated mistakes after being corrected), failure to follow direct orders or direction (directly communicating with the customer, exclude dry cleaning from expense account, improper use of a FEDEX account, misleading management while attempting to secure tuition assistance for a Master's degree), inability to work in a team, demonstrated little or no experience for the position hired of field project manager, attending gas turbine morning meetings in another division without permission, demonstrated poor judgment and insubordinate conduct towards his supervisor J. Daniels during a meeting involving data on a CD. She notes that the Complainant "received a written warning regarding past performance, that included work completed on the Palisades job, during [the] January 6th meeting with his supervisor, and during that meeting [the Complainant] says nothing about safety, nothing about retaliation to either Mr. Daniels or to Mr. Bailey Weaver, that he believed the action was retaliatory, nor did he make any effort to speak to Mr. Weaver before he was terminated two months after the written warning." She submits that the Complainant was informed he was being terminated because his performance had not improved on February 25th but "made no statement at the termination meeting that he believed his termination was discriminatory or retaliatory." She argues that the Complainant first raised that he had been retaliated against in violation of the ERA 5 months after being terminated, yet failed to provide any specifics with regard to protected activity, and did not give any specifics alleging protected activity until another 7 months had passed and the Department was investigating the complaint.

Counsel argues that the Complainant did not engage in protected activity, did not place the Respondent on notice of the protected activity, and the manager who decided to terminate the Complainant's employment had no knowledge of any protected activity by the Complainant so there is no connection between termination and protected activity. She submits that the Complainant has failed to establish a prima facie case such that the complainant must be dismissed. She argues that "the Complainant was terminated from his position as a direct result of behaviors and performance failures of the kind that breached Respondent's ability to trust the Complainant."

SUMMARY OF RELEVANT EVIDENCE

Testimony of Complainant (TR 31-98, 159-166)

The Complainant testified that he started his college education in Chile and completed it in the United States. He reported changing his major from mechanical engineering to computer science and obtained a Bachelor's degree. He reported he considered the education "equivalent to two degrees in computer science and mechanical engineering."

The Complainant testified he was hired after school by General Electric (GE) and started in the design field. He worked for GE for 12 to 13 years. He worked at a steam turbine factory in Schenectady, New York "at the control unit ... in the kinetic, designing products, diaphragms" and "ended up doing maintenance, trouble shooting, design [and] manufacturing." He reported holding three positions at GE: design engineer designing stationary components as well as rotating components; steam engineering program working between Korea, Japan and Thailand; and plant maintenance areas. The facilities were nuclear and fossil fuel power plants in 20 countries. From GE he was hired by Mitsubishi Power Systems (Respondent).

The Complainant identified CX 23 as the job offer of field project manager made to him by Respondent dated June 9, 2004. The duties of field project manager consisted of being the "head of all the maintenance or installation people that are onsite and you have responsibility for all the work" and the power plant facility. He started work for Respondent on July 12, 2004 and was asked to go to Puerto Rico to assess some steam turbines and a generator for installation at Puerto Rico Electric Power Authority; and eventually Respondent received the contract. CX 24 refers to that work. He stated his second job for Respondent was to assess and report on a turning gear at the Auburndale Power Plant facility. CX 25 is that 2-page report. He did no further follow-up on the turning gear. He stated that he subsequently did some "minor stuff" before being assigned to the Palisades Nuclear Power Plant facility.

The Complainant testified that he was assigned to Palisade Nuclear Power Plant site as mechanical engineer – vibration - days. There was no a mechanical engineer assigned at the site at the time and also no nighttime vibration engineer. His duties would be go through previous reports, take readings in the control room, and assess the data to see if there are issues which occur in vibrations like dragging issues, balancing issues, fluid instability issues, operational issues, misalignment, component failure, and instrumentation; as well as related subset issues. CX 18 of a copy of his summary report he uses to present his analysis, potential causes and potential future concerns to the customer. He reported his work at Palisades Nuclear Power

Plant was a troubleshooting issue on a vibration excursion of bearing number 4, where he found some rubbing causing vibration which was fixed by increasing the diameter for clearance.

The Complainant testified that while at Palisades Nuclear Power Plant he noticed “work packages were not completed by the planning team that had been at the site for 3 to 4 months but left before he reported to the site. He stated he sent e-mails to his supervisor J. Daniels about the incomplete planning work packages but received no reply. He then made changes to the work packages directly related to his work involving the vibration excursion of bearing number 4. He stated some of the errors in the work package included removing the fire protection system that the plant did not have, which he considered a big error for a nuclear power plant work package that looked like it had been cut-and-pasted. He also identified a work package sequence directing disassembly of bearing number 4 without asking for data collection, which he considered a big mistake. He testified that he reported the concerns to J. Daniels by e-mail with a copy to senior engineer Munini and the project manager. He reported his other work package was related to connectivity of the hydrosystem. He stated that he was not assigned to evaluate the work packages, his job was implementation, and he found the error when reading the work package assigned to him. He stated CX 8 references the work packages and assignments. He stated the September 9, 2004 revision date was probably due to his information on his work package.

The Complainant testified that, with regards to the work packages developed in planning prior to implementation, “if you have the wrong instruction, you could go in the wrong direction; and you are in a nuclear power plant so you can’t afford to have mistake[s]. That is why we have all this planning. [having a work package which lists] components that are not belonging to the power plant or that specific unit, for me was unconsiderable. I was alarm by that kind of mistake.”

The Complainant testified that after Mr. Munini returned to the site he asked the Complainant to make all these corrections to the work package. He stated that the errors in his work packages caused him to need more time to complete the work and “also it let me know that the person who is planning is not savvy on my work ... [and] not aware to how these data should be taken.”

The Complainant testified that “Palisades was really ... a disaster. The Owner, the customer, was really complaining, and this was one of the reason[s] why Daniels get into the power plant. ... in day number 8, the outage was later 159 items behind.” He reported that the planned power outage at Palisades Nuclear Power Plant “was not a major outage. We didn’t remove any of the hood. We just remove the valve, control valve and manage the valves, vibration analysis, some filter changes. Is more packages on auxiliary equipment.” He testified that “I found so many problems I ended up doing more work because I was the only Mitsubishi employee. I ended up crawling on the ... moisture separator reheater. It is a component of some sort of auxiliary components from the [nuclear] turbine.” He reported he witnessed the shutdown ... [and] verified design clearance on the bearings ... revised the balance procedures in some of [the work] packages ... set the turning gear operation.” He testified “There was no body taking notes on the outage during the outage. So I took the initiative just to protect Mitsubishi to write the logbook onsite ... Because you are working in a nuclear power plant, and you have to know what is done every day and at the moments and sequence of event ... it’s a legal document ... you are

not allowed to use white-out” changes are made by lining through the change, making the change and initialing the change. “Everything has to be traceable.” He reported that “there were certain mechanism that was never fixed [on the nuclear turbine deck] for many outages, and I fixed that ... [and] put my name [on the work package] because I finished that work.” He testified that J. Daniels was onsite at the time when we were working overlapping 12-hour shifts to finish the outage work and J. Daniels was in on the turnover meeting held after each shift. During the turnover meetings the Complainant would read what he had written in the log book for that work shift when discussing daily work. Each worker would tell J. Daniels what work was done during the off-going shift.

The Complainant testified he found a hole, like from a welding torch, inside the master separator reheater number 9 (MSR 9), which is a pressurized steam vessel in part of the “clean steam” secondary steam loop of the Palisades Nuclear Power Plant. If anything would happen in the pressurized vessel, contaminated steam from the reactor could get into the clean secondary steam loop to the turbines, like one nuclear power plant in Toledo. He stated he reported the issue to J. Daniels in the work trailer and put the information in the daily logbook; but, J. Daniels told him not to “report these things to the customer.” He stated he was concerned about contamination of steam and the possibility of someone being burned if there was a break. He reported he contacted Mitsubishi in Japan and a recommendation was made to weld the hole. He left the site before any further actions on the matter was taken.

The Complainant testified that J. Daniels did not recognize the MSR 9 issue as a nuclear safety issue due to his background as a machinist, what was in the paperwork, the way he talked to the workers, the way people referred to him. It didn’t appear J. Daniels “at that time [knew] what he was talking about.”

The Complainant testified J. Daniels asked him to write the complete outage report in October 2004. He stated that the contractors responsible for other work packages in the outage left the site for other jobs and people who did not work on an equipment component signed off on the work package. He stated he wrote a report for two components he did not work and he was going to bring it to the attention of D. Walsh, the head engineer or vice president, but was fired three days later. He didn’t look into issues on other work packages. He reported that his problem writing reports for the two components he did not work upon, was that there were no data readings before the component was taken apart and no data readings after the part was reassembled, and in some cases there were missing millwright dirty data sheets, like on the maintenance foot valve. He stated that he explained the lack of data to J. Daniels and to Human Resources but they were silent. CX 18 was identified as the report the Complainant wrote.

The Complainant testified that when he talked to D. Walsh he was told he could not address his concerns at that time but would call the Complainant back. He states D. Walsh did not call back before he was fired three days later and that D. Walsh did not “get the details” of the specifics of his concerns about work issues.

The Complainant testified the main nuclear safety issue was contaminated steam from the primary loop leaking into the secondary loop at the turbine deck, which does not always happened, but it has happened. He stated there are three main parts to the plant: the reactor, the

turbine, and the electrical generator. The turbine has pressure terminators that provide direct input to the reactor protective system. The turbine is inside the nuclear protective area and cannot be accessed until after the worker completes onsite nuclear safety and procedural training. The turbine is nuclear plant equipment. He reported that all his work was within the nuclear protection area.

The Complainant testified that the provisions of 10 CFR §50.56 “require the monitoring of the effectiveness of maintenance at nuclear power plant. It requires what is called traceability, every instrument has a number, there is a calibration date, It’s some sort of inventory [of] who used the instrument, the date, and all this has to be logged.” He reported if a spare part is used, it has to be notated on the work package, but were not, so where he knew a spare part was used, he put that information into the work package. He reported his concern that hold points in the work packages were signed by people who did not do the work, because the contractors who did the work did not sign the hold point before they left the site. He testified that J. Daniels knew this when shown the draft outage report written by the Complainant; but remained silent except to ask that his name be taken off the first page and the report be mailed to the customer. He stated he removed J. Daniels name from the report, so only the Complainant’s name remained with the identification of Field Project Manager, and mailed a copy to the customer, kept a copy for Mitsubishi and kept his own copy. The final outage report was dated December 7, 2004.

The Complainant testified that after the December 7, 2004 outage report he was assigned diminished work duties, like copying the instruction book and write an action item list for the upcoming Gregory outage, which was a fossil fuel plant. Then he was asked to do quotes and later told to help with gas turbines even though hired for steam turbines. He stated that he was going to discuss the concerns with the vice president for engineering, but was fired three days later before the vice president for engineering could call back. The concerns involved “the work at Palisades, how bad we did ... the reactor pressure vessel ... leakages there ... we were late and many things happened there because the focus was on the reactor” not the turbine.

The Complainant testified he received a warning letter on January 6, 2005 that stated “I had to improve my plan on performance, but whatever they listed was not my responsibility ... because I was not the project manager at Palisades. But the way they describe this warning letter ... I was responsible for the project. I was a project manager on name only, but I never performed as a project manager. ... I was doing this highly specialized vibration engineer. I was doing all this maintenance, but I never work[ed] in Mitsubishi Power Systems as a field project manager.” He stated that when given the warning letter by J. Daniels and the person from Human Resources in a conference room, he told them he had no responsibility for the Palisades project, he had hunted for the people who left the site without signing off, other people signed off on the work projects who didn’t do the work. He stated that the Human Resources individual had two or three checks in his hand at the meeting and he signed the warning letter because he thought he would be fired on the spot; but he did not know what the Human Resources individual intended to do with the checks in his hand.

The Complainant identified CX 16 as the action list for the Gregory outage, which contains various tasks to be performed, who had the responsibility, the task due date and the task completion date. He testified that he was not the project manager for the Gregory outage so he

placed J. Daniels' name, or the more senior supervisor Innskeep's name, on the action item list for manager tasks. He reported completing his work on the action list on February 14, 2005. He testified the person from Human Resources told him the Gregory action item list was not well received by management because the action item list was assigned to the Complainant to resolve and he did not resolve them but reassigned the action items to his boss. He testified that CX 14 indicates the work he did at the Palisades site including the start-up test, the vibration analysis, the latch mechanism originally assigned to T. Samuelson, and the MSR originally assigned to D. Munini.

The Complainant testified he received his termination letter (RX 9) on February 25, 2005. He stated that he did not know anything about the reason given that his job performance on the Gregory action item list was unacceptable and had to be done by another person. He stated that he was not the project manager for the Gregory outage. He stated that his performance was called unacceptable because he put management names next to tasks he considered he did not have authority to do. He reported completing tasks he could complete, like obtaining drawings and inspection sheets. He stated Human Resources was told that all the items on the Gregory action list had been assigned for the Complainant to complete. He emphasized that he had been told he was not going to be the project manager for the Gregory outage and some of the tasks on the action list were to be done onsite and not in the office. Had he been the field project manager he would have been doing some of the management tasks, unless it called for a specific person, like Klingman for the "analyze rotor cleaning scope."

On cross-examination, the Complainant testified that while working for GE he participated in a performance improvement plan but testified at deposition that he had never been told by GE that his performance needed improved. He testified that he participated in a dispute resolution process while with GE dealing with his personal improvement program and being ranked the lowest member of his group. He also testified that being placed on a performance improvement plan is not being counseled or being told that some aspect of performance or conduct needs to be improved. On examination by this Judge, the Complainant stated he had been counseled or advised that his performance or conduct had to be improved while employed by GE.

On re-direct examination, the Complainant testified that his complaint with GE was resolved internally and he then left GE. He reported that GE gave Mitsubishi a letter of reference after he had been hired by Mitsubishi. He stated a copy of the reference letter is attached to his deposition.

On examination by this Judge, the Complainant testified that he had to go through an internal process with GE to challenge the performance improvement plan and "the company realized I shouldn't be there ... so that process was neutralized. So then I decided to leave General Electric ... Before I left General Electric, we had an agreement which later GE breached the agreement."

February 22, 2007 Deposition Testimony of Complainant (RX 1)

The Complainant testified at deposition that he had previously sued his former employer, General Electric, for breach of contract involving a separation agreement that affected his wife's

job as a systems engineer. The suit commenced in 2005 after he had left GE and is still pending in Federal court in Atlanta, Georgia. He was not fired, nor asked to leave, by GE.

The Complainant testified that he was born in Punta Arenas, Chile and studied engineering for approximately two years at Concepcion University in Concepcion, Chile and also at Catholic University in Valparaiso, Chile. He came to the United States around 1982 on a student visa and went to Tulane University for English. He received a Bachelor's degree in computer science at the New York Institute of Technology with a minor in mechanical engineering. He went to resident status after marrying his first wife. Prior to working for GE he was a foreman for a vendor at a Hyatt Hotel in New Jersey. He began work in 1992 for GE as a co-op design engineer designing turbine blades and diaphragms (stationary blades). He left GE as a product service engineer two days before beginning with Mitsubishi. He testified that while at GE he received good performance reviews, was never disciplined and never told there was some aspect of performance or conduct that needed improved. As a product service engineer he was answering technical questions and solving problems with steam turbines from the office. He was making above \$70,000 per year salary.

The Complainant testified that he was terminated from Mitsubishi on February 25, 2005 and filed his OSHA complaint near the 6-month maximum period of time. He reported being familiar with the ERA from training and work at GE and that he had been inside the nuclear side of power plants several times in protective clothing. He reported the work with Mitsubishi was always on the turbine-side and not the reactor-side. He reported working three sites for Mitsubishi – a nuclear plant at Palisade, which was a pressurized water reactor (PWR) and two non-nuclear plants, one near Orlando and the other in Puerto Rico, before going to the Palisades facility.

The Complainant testified that at the Palisades site he did not go into the reactor-side of the facility and only worked in the turbine-side. He had to wear safety shoes, gloves and safety glasses. He did not contact the NRC for ERA complaints. He reported that by design a PWR plant like Palisades should not have irradiated water in the turbine-side of the facility, though sometimes PWR gets contaminated steam. He stated he reported to the Palisades plant in early September 2004 and left near the end of October 2004. On his return to the Orlando office he wrote the outage report for Palisades. He spent the entire month of November writing the outage report and sent the report about December 7 to 10, 2004. He stated that he maintained two log books while at Mitsubishi. One was the outage logbook for the work at Palisades. The other was a personal logbook. He reported the December 3, 2004 entry in the personal log indicated giving the Palisades outage report to his supervisor, J. Daniels, for revision on that date at 4:30 PM. He reported he was responsible for writing the entire report and that revisions were made prior to sending it to the customer.

The Complainant testified that he started working for Mitsubishi at \$75,000 per year and moved from Atlanta, Georgia to Orlando, Florida to save about \$8,000 per year in income taxes. He reported that Mitsubishi is a competitor to Westinghouse and not to GE because its different lines. He received an employee handbook when he reported to Mitsubishi. Upon examination of timesheets, the Complainant testified that it was possible that he started at the Palisades facility at 8:00 am, August 23, 2004 and last worked there on October 25, 2004. He reported sending

two e-mails to J. Daniels in September 2004 concerning technical procedural issues he found at the Palisades facility, with the first being around September 9th. He considered the procedural issues to be linked to safety “because you are asking the millwright to remove components that don’t exist” and considered the two e-mails reported violations of the ERA. He reported that the notes in the outage logbook also contained reports of ERA violations – the MSR; documents being signed when the responsible engineers were not on site; engineers leaving the site without being released or writing their own reports; no sign-off on the hold points; and incomplete inspection sheets.

The Complainant testified his first e-mail to J. Daniels concerned an instructional step in the work package procedure to the millwright to remove a fire protection system from the turbine when no such fire protection system existed at the Palisades facility. Upon repeated examination the Complainant was unable to explain why including a procedural step to remove a non-existent fire protection system violated the ERA, other than stating “The foreman is giving a wrong instruction in a nuclear power plant and that’s enough.” In response to the question of how did having a step to remove a non-existent fire protection system compromise the safety of the Palisades project, the Complainant stated “I caught the issue early, I didn’t know. I couldn’t know what happened because I caught the issue before it happened ... We made corrections to the [procedural steps], so we gave proper instructions ... After making the correction then that part of the procedure was right.” He stated J. Daniels never responded to the e-mail about correcting the turbine work package by removing the step involving a non-existent fire protection system. The Complainant explained that the e-mail had an attachment to it and identified Deposition Exhibit page #240 to 259 as the 20-page work package for the Number 4 Bearing, and page 246 as the page where he made the correction to the non-existent fire protection system by adding to step 3.1.2.3.1.01 the words “Work order 24323737 mentioned below corresponds to the EHC System flush, we need to find the corresponding work package and remove the fire protection piping. It seems that this unit does not have the fire protection system for bearings.” He also identified an entry for 3.1 “NDE Inspect Bearing” in the work package⁴ where he reported the work package called for a magnetic bearing inspection and he changed it to the more proper “PT” bearing inspection. His notation read “MT not really appropriate for this application.” In response to the question of how the changes to the work package were a violation of the ERA, the Complainant stated that “when I started finding errors and mistakes is when Mitsubishi’s behavior changed towards me. Everything started changing when I started finding errors.” He considered the mistake in the work package a violation of CFR 50.65⁵ “from the internet research that I did.” He reported that he highlighted the changes he made to the work package and that every highlight was a safety violation and declared “if it’s safety, then it’s illegal activity.” He stated he considered procedural issues in the work package as both safety issues and violations of the ERA and CFR 50.65.

The Complainant testified that his second e-mail to J. Daniels involved giving the wrong instruction in a work package to remove some hydraulics. He stated he could not remember the specifics but he made the correction in the work package procedural steps. He reported he sent the e-mail to J. Daniels and G. Tidwell but they did not respond to the e-mail. When questioned,

⁴ Deposition Exhibit Page # 00251, page number misstated by Complainant and Respondent’s counsel

⁵⁵ 10 CFR §50.65 “Requirements for monitoring the effectiveness of maintenance at nuclear power plants”

the Complainant testified that the work package error was a “procedural violation, which would be a violation of the Reorganization Act. We are skipping steps.”

The Complainant testified that “I always make copies of what I work on.” He argued that he was not in violation of the confidentiality agreement for employment with Mitsubishi “because I worked on these documents. I worked on these documents and I’m able to keep copies of my documents.” He reported he did not have copies of the two e-mails sent to J. Daniels and did not have an explanation as to why not.

The Complainant testified that while at the Palisades Nuclear Power Plant the general manager asked him to fill out weekly reports about activities, “site-related technical issues,” and that he filled out the weekly reports as best he could. He was expected to include technical issues in the weekly reports, what’s happening and problems with equipment. He reported that if there was a serious safety event that happened he would talk to his supervisor and “if it was serious issues, it’s not just the [weekly] report, I mean, you talk to your direct supervisor.” He stated that he would probably include a serious safety issue in his weekly report and “sometimes you go straight to your supervisor.” He agreed that it would be reasonable to expect that an engineer working on a site who finds a major problem would record it in the weekly work log and it would be odd if it were not recorded in the weekly work log.

The Complainant testified that the weekly report for 8/27/04 would notify the reader of a violation of the ERA because of the last paragraph includes the words “reviewed sections included pre-outage instructions” and that implies a violation. He stated that none of the weekly reports for 9/7/04, 9/19/04, 10/10/04, 10/17/04, 10/24/04 indicated that Mitsubishi was in violation of the law or operating unsafely. He stated that the weekly report for 9/27/04 would have put J. Daniels on notice that Mitsubishi was operating unsafely because it noted that a revision to work package 24322082 would be available the next week and that “document was supposed to be ready long before” and the last paragraph, reading “preparation and organization of the inspections sheets required by work package 24322082,” indicated the “problem is all these work packages are supposed to be ready and look where we are here, 9/27 and they were not ready and that’s the problem.” He testified that J. Daniels was placed on notice of safety issues in weekly report for 10/3/04 by the entry “How liable Mitsubishi is contractually on correcting vibration amplitude ? This question was raised because the present vibration characterization does not seem to be related to mass unbalance, and the keyphaser signal reading is unreliable. Also none of the rotors have a visible mark for the angles that identify the location or position of the weights.”

The Complainant testified that an “outage” is “basically a time where the power plant is shut down and repair work is done on the turbine ... scheduled maintenance.” He testified that at the Palisades Nuclear Power Plant he worked in the turbine room separate from the nuclear reactor building and did not enter the nuclear reactor building at the Palisades site.

The Complainant testified that he completed the outage report for the Palisades outage in November – December 2004 based on the information he possessed. The information contained incomplete technical inspection forms. He advised J. Daniels about the incomplete forms and completed the outage report for the customer as he found it, with missing information. He did

not falsify information in the report and no one asked him to falsify information in the report. He noted that there was no spare parts list for the outage report that were provided by the components engineers for the next planned outage, which probably referred to valve parts for the next outage at the Palisades site. He stated that failure to have a spare parts list for the next outage would be a violation of 10 CFR §50.56. So he made a list from the spare parts list available at the beginning of the outage and put that list in the outage report. He stated that 2 or 3 engineers provided some input for the outage report and another 2 or 3 engineers didn't provide information for the outage report, and one contract engineer refused to provide information. He testified that the outage report was correct based on the information he had, that he did not falsify information, and that if he did not have specific information, he left that out. He stated that as a result of some component engineers leaving the site "without being released or completing their jobs" meant that someone else had to sign documents that were supposed to be signed by the engineers who left. It did not result in false information being placed in the outage report but related to the hold points. "These hold points have to be signed step-by-step ... [and] these hold points were signed two or three days later by somebody else. That is a safety issue. That is a safety concern. That is a procedure violation."

The Complainant testified that during the inspection of MSR-9B he noticed several deep cuts that were approximately ½ inch inside the wall of the pressurized vessel and reported that in the shift turnover meeting during work at the Palisades Nuclear Power Plant when everyone was present. He noted concern about safety, integrity of the MSR, and contractual liabilities in case of a failure during operation. He indicated that it was probably after the inspection of the MSR that J. Daniels instructed him to use the chain-of-command and not talk directly to the customer. He reported that in mid-December 2004 he was retaliated against by management when blamed for the loss of a \$50,000.00 instrument used at the Palisades site "when it was well known that the mobilization and demobilization of the job site was the responsibility of the site project manager."

The Complainant testified he received a written warning regarding unacceptable job performance on January 6, 2005 (RX 5). He stated that they discussed he started off as a vibration engineer to be evaluated before being placed in a field project manager and that if he could not meet the lower level of responsibility he would not become a field project manager. He stated that the comment "commercial and customer sensitivity awareness is lacking, ability to relay ideas, communicate and work within a team must improve" do not apply to him because he was not working as a field project manager, he did not have a team, and he was working directly with the customer, though he did communicate with other Mitsubishi employees at Palisades. He stated that he agreed that it was important to be able to relay ideas, communicate and work within a team and that it would be a problem if he could not do those things. He agreed that he was required by his job with Mitsubishi to be sensitive and aware to commercial and customer relations and that lacking sensitivity would be a problem for Mitsubishi. He contested that he lacked sensitivity to customer relations. He testified that the first time his loss of credibility with coworkers and the customer was discussed was on January 6, 2005 when he got the warning letter. He reported that management discussed that his leadership and team building skills were not acceptable on January 6, 2005. He submitted that he never got to lead a group so the language did not apply to him. The Complainant testified that the comments in the warning letter "were out there after I sent a letter to Mr. Daniels because I wanted to address some issues

on Palisades. And that's why I am answering almost everything, every single one of these questions, because they are not applying to me. I was there as the vibration engineer; but I ended up running things sometimes and writing the report for people who had left the site and that's the problem I have ... I was doing the engineering job because they put me there in that role."

The Complainant testified that Mr. Daniels started the discrimination, harassment and retaliatory behavior by giving me an overabundance of assignments" and that he believed he was being overworked. He reported he was making copies from instruction books that the customer had and doing other jobs "just to lose my time and lose [Mitsubishi] money, I guess ... I could be doing some design work ... [but] it's not illegal ... but this was a sign of harassment and retaliation ... up to the day I was fired I was trying to arrange and have this issue fixed internally." He was assigned to prepare outage drawings and inspection sheets for two upcoming outages, assigned to prepare quotes for turbine outages, and prepare an action item list for the incoming outage at Gregory, Texas. It was "later when Mr. Weaver let me know that the list was not well received by managers."

The Complainant identified a February 14, 2005 e-mail to T. Matsushima, R. Innskeep, C. Malobicky, J. Daniels and R. Klingman as an example of notification of illegal activity. The February 14, 2005 e-mail attached the checklist for the Gregory outage, which was different than the Palisades project.

The Complainant testified he thought J. Daniels terminated his employment, though the Unit Sales Manager, B. Weaver, signed the termination letter (RX 9). He stated the reason for termination on February 25, 2005 was termed a performance issue.

The Complainant testified that he made verbal complaints to Mitsubishi regarding safety violations and unlawful activity. He testified that he did not have any written document showing a complaint about safety violations or illegal activity involving Mitsubishi. He testified that he talked about his concerns at Palisades with J. Daniels, who did not respond, and escalated the concerns by talking to the Vice President of Mitsubishi on February 23, 2005. He reported sending letters to the Vice President.

The Complainant testified that his July 26, 2005 letter to J. Russell of OSHA was his first letter requesting an investigation. He reported that he contacted the Nuclear Regulatory Commission (NRC) after he was terminated, approximately three times between March or June 2005 and December 2005. His contact with the NRC used code number 561603 and not his name. He stated he explained to the NRC "what had happened to me [at Palisades], and they confirmed, yeah this is a NRC violation because I wanted to make sure ... but at the same time I didn't want to identify myself because nuclear power plants are my customers as well." He stated he told the NRC about "skipping procedures, skipping hold points witnessed by engineers when they left, and incomplete forms sent to customers in terms of equipment traceability. He testified that he didn't identify Mitsubishi to the NRC and may have written down the names and dates of the NRC conversations and it might be in boxes he hadn't unpacked and on documents he hasn't produced. He testified that Mitsubishi "have 98% of the documents [requested in discovery, and] ... maybe I don't have more documents."

The Complainant testified that he has no written documentation about any critical information about safety concerns being expressed before he was fired with anybody, including J. Daniels, the Vice President, President, or the office in Japan.

The Complainant testified that he wrote the outage logbook while at Palisades and that he started his personal black and white binder / logbook on December 3, 2004. He agreed that he kept the binder in a locked drawer and that no one knew the binder existed until after he left Mitsubishi. He agreed that the December 3rd entry recorded that he had “issued Palisades final outage report to Jack Daniels for revision” at 4:30 PM. The next subsequent entry was December 11, 2005. He reported he did not tear any sheets from the binder and that he left it on Mr. Weaver’s desk when he left Mitsubishi on the date of his termination. He reported that he began making notes because “Mr. Daniels wasn’t answering the question or concern that I had ... [and] I was planning to show it to ... Mr. Walsh, Vice President of Operations. He indicated that the first letter he sent to Mr. Walsh was when he was terminated and he planned to show him the personal logbook when he talked to Mr. Walsh. He stated “you can’t go to the Vice President with a single note; you have to have something, maybe a month worth of documentation.”

The Complainant testified that because of the termination he lost seven to eight months of wages, cost of relocation, cost of moving furniture and cars, closing costs on the house. He stated that he did not think that he was incompetent and that he doesn’t agree with that reason for being terminated. He stated he began working for PSE&G after being terminated by Mitsubishi. For PSE&G he went around New York, New Jersey and Connecticut as a contractor to come up with a plan to anticipate power plant problems in about 12 units. The payroll came through another consulting company at \$60.00 per hours with 40 to 50 hours per week for five months, during October 2005 to February 2006. After that he worked two or three months at a refinery in Los Angeles, California rotating pumps for about \$45.00 per hour. He was verbally offered a job as a rotating engineer at \$95,000.00 per year but did not take the job. Then he started worked for Siemens in June 2006 as an operation and auxiliary engineer at \$80,000.00 per year. He reported receiving a recognition reward for trouble shooting in the simulator and being assigned high profile jobs doing controlled retrofits on rotator stress evaluators, a software integration, on Westinghouse units. The installs require modification of the software program to solve problems. He does the engineering aspect and computer people do the software modifications. It is an office job in Orlando. His supervisor is J. Walsh, the manager of engineering, operation and auxiliaries.

Notes on Attachments to the February 22, 2007 Deposition Testimony of Complainant (RX 1)

Procedural Plan for Westinghouse BB81 No 4 Bearing & Pedestal Disassembly, Inspection and Reassembly – This 20 page document is similar to CX 8 except for the following additional entries:

- a. Page 3, Paragraph 2.1.3 has the additional words “(my understanding is that Dan Munini already made changes to this area, his text will be incorporated in the next version)” – wording not included in CX 8
- b. Page 7, Paragraph 3.1.2.3.1.01 has the additional words “Work order 24323727 mention below corresponds to the EHC System flush we need to find the corresponding work

- package to remove the protection piping. It seems this unit does not have the fire protection system for the bearings.” – the entire page 7 is not included in CX 8
- c. Page 8, Paragraph 3.1.2.3.1.04 has the additional words “The diameter of the wire should be small [unreadable] crush the wire will not indent the bearing [unreadable].” – wording not included in CX 8
 - d. Page 12, Paragraph 3.1.2.3.3.04 has the additional words “[unreadable] really suitable for this application] – wording not included in CX 8
 - e. Page 15, Paragraph 3.1.2.3.5.05 has the additional words “[unreadable] the wire should be sufficient small so that the force necessary to crush the wire will not indent the bearing [unreadable]” – wording not included in CX 8
 - f. Page 16, Paragraph 3.1.2.3.5.08 has the additional words “Work order 24323727 mention below corresponds to the EHC System flush we need to find the corresponding work package to remove the protection piping. It seems this unit does not have the fire protection system for the bearings.” – wording not included in CX 8

J. Daniels’ January 18, 2005 e-mail to Complainant. This exhibit indicates that the Complainant’s supervisor requested the Complainant “Please continue with the pre-planning on the Gregory job. Develop an Action Item List for the Gregory job. Use the Proposal DOR as a guide. ... We will review the action item list Monday 1/24/05.”

Complainant’s personal notebook. This 7 page exhibit is completely redacted by black-out, except for “Friday, December 3, 2004 @ 4:30 PM. I [unreadable] Palisades Final Outage Report to Jack Daniels for revision. Friday December 11, 2004 @ 4:20 PM.”

Francis Sc...cliff, Regional Investigator signed document. This 5 page exhibit entitled “William Vinnett Allegations of protected activity and discrimination” is typed written and unsigned by the Complainant. The document bears a handwritten date of “4/25/05” which pre-dates the current ERA complaint filed with OSHA. There is no identity given for the individual is who signed page 5 and the Complainant did not sign the exhibit either; however, based on the sequence of events and the Complainant’s testimony, this April 25, 2005 document was part of an exchange between the Complainant and the NRC and not OSHA. The matters set forth therein are similar to that which the Complainant addressed under oath at the formal hearing and in deposition. This exhibit is not considered as evidence in this case.

Testimony of Jack Daniels (TR 100-134)

Mr. J. Daniels testified that he is the Director of Manufacturing and Repair Services for Mitsubishi Hitachi Power Systems in Savannah, Georgia and in 2004 and 2005 he was the Complainant’s supervisor as Operations Manager for Mitsubishi Power Systems.

Mr. Daniels testified that there were performance issues with the Complainant related to his “ability, a talent, to alienate himself within a group, which is very important in a team atmosphere in a field service atmosphere, ... not so detailed in his work [involving] estimates and scheduled ... [the Complainant] misrepresented the truth to me on an occasion that was very critical in our relationship ... [and] I had learned that I must be looking at whatever [the Complainant] has given me very carefully.” He testified that on one occasion the Complainant

gave him a paper to sign for tuition reimbursement for a Master's degree and stated the signatures of Human Resources and J. Daniels was just a formality because it had already been approved through the corporation. He told the Complainant his opinion that tuition assistance was a benefit that had to be earned through service to the company, the Complainant had only been at the company 3 or 4 months, and he denied the request. He stated he told the Complainant to go to Human Resources and if they would approve it to have them come back so it could be discussed some more. He reported receiving a call from B. Weaver at Human Resources that he would not approve the request for tuition assistance.

Mr. Daniels testified that the Complainant "was not focused on his work ... [and] always seemed to have another agenda that didn't seem to be related to our steam turbine department." He stated the Complainant exhibited odd behavior by going around attending other departmental meetings and was asked not to do that again. He testified that he "never really saw evidence of [the Complainant] having been in our line of business ... [and classified the Complainant's work as] the level of an engineer out of school, maybe a second year out of school, needed a lot of coaching, a lot of mentoring."

Mr. Daniels testified that he gave the typical Gregory action item list to the Complainant with the instructions "to start knocking down these [68] items one by one." He described the action item list as a punch list for the outdoor job site. The job needed lighting, fuel, port-a-potties, office trailers, drawings for the unit, cranes and welding machines. He reported he did not expect the Complainant to complete every one of the 68 items; but to complete "over half for sure, because half of it is work that someone has to do" it doesn't mean who does the work is going to be the project engineer and at the time only the Complainant worked in the department for J. Daniels. He testified that the Gregory action item list was generated as a template from previous jobs, so that not all the items may apply to a specific upcoming job, but the list "will give a person a very good head start and an experienced person a great head start." He stated he may have given the Complainant a list of vendors to contact in that area of the country to start procuring some of the items needed to sustain a job. He identified RX 8 as the Gregory action item list and indicated that it was expected that the applicable items would be in place before getting to the job site. The tool kit would include having safety equipment like hardhats and safety glasses; consumables would be oxyacetylene for welding, potable water; equipment like portable crane, welding machines and cribbing. The list should indicate procured or purchase order in place, equipment to be delivered on a specific date. He testified the list included "all the things you need in preparation for an outage, exactly what [the Complainant] was hired to do." He reported that "It's not unusual for a service engineer to be getting ready for two or three jobs in the office and knocking down these types of lists." He noted that the names placed on the Gregory action item list as the person to be responsible were added by the Complainant.

Mr. Daniels identified RX 6 as a list he wrote listing chronologically the events behind the Complainant's performance appraisals and evaluation as a field service project manager and Mitsubishi. He reported that when he arrived at the Palisades Nuclear Power Plant outage "it was noticeable that [the Complainant] had alienated himself. The team members were complaining [and] the customer had spoken with me several times asking about [the Complainant]. I did ask [the Complainant] not to communicate with the customer. It really wasn't his job to do so. We had a lead floor engineer on days [S. Conway] and we had a lead

project manager there on days [G. Tidwell] and I was there.” He stated that the Complainant’s chain-of-command would have been to Conway and Tidwell. He stated the customer was concerned about who would decide about the balance shot of number 4 bearing and who would solve the vibration issue and if there would be an increase in outage time because of disassembly and reassembly. The customer was assured the Complainant would not be making those decisions and that the team was gathering data to feed to engineers, in the Orlando, Florida office, who would be making the call in collaboration with the customer.

Mr. Daniels testified that at Palisades “all the engineers are out on the floor. They’re all doing their jobs, inspecting. If they do have findings, we write it up and we go through the chain of command ... up through the [Mitsubishi] lead guy on day shift, ... and then through the [Mitsubishi] project manager.” He testified that the Complainant was just going to the customer and the customer was complaining to him about it, so he repeatedly asked the Complainant to report up through the shift lead engineer, or project manager or himself and not go directly to the customer. He stated that he told the Complainant it was company policy not to use FEDEX to ship personal items, to which the Complainant replied that it was a grey area. He also told the Complainant that employees were allotted so much for food, clothing and phone calls on per diem and that dry cleaning wasn’t a separate reimbursable item; but that the Complainant claimed dry cleaning expenses on two occasions after being told not to. He stated he considered the Complainant’s logic and behavior very troubling and that the Complainant’s decision-making and logic was always skewed in his own personal interest and not the company’s interest.

Mr. Daniels testified that at the Palisades job site the Complainant was “out on the job with 50 other field techs and Mitsubishi engineers, project managers and the customer and I didn’t see any evidence of leadership or initiative, [or] technical ability.” He reported the Complainant “always had bad things to say about everyone, derogatory remarks, poor performance. I didn’t see any evidence of leadership, initiative in taking responsibility ... at Palisades.” He stated that the Complainant did not take the initiative of writing a log book to track work at Palisades; but had to be instructed to fill in the standard job log book for the day shift.

Mr. Daniels testified that the Complainant required significant supervision, significant coaching and significant mentoring such that he doubted the Complainant had ever done the type of work before that he claimed on his resume. He stated that his breaking point with the Complainant came when the Complainant tried to get him to sign off on tuition assistance reimbursement form.

Mr. Daniels testified he was present with B. Weaver from Human Resources, when the Complainant was given the warning letter on performance. He stated his observation about the Complainant’s lack of performance demonstrating a lack of field service experience and a lack of lead project manager abilities and that the Complainant had to improve his job duty performance and some behavioral issues. He reported the Complainant did not raise any safety issues and signed the written warning, though his body language conveyed he did not want to sign the warning statement.

Mr. Daniels testified that it was the duty of everyone in the steam turbine department to do quotes on sales department requests for quotes. At the time only he and the Complainant were in

the department so the Complainant was started off with a very easy and routine quote load involving a valve inspection or two. Each quote would be prepared using a template, and every quote received from the Complainant had to be marked up and corrected time and time again. The Complainant seemed to ignore the form because if you have people traveling to Texas, you check a box and travel funds are added the estimate, so he needed to be coached, but continued to make the same mistake afterwards.

Mr. Daniels testified that he had read the Complainant's personal log after the Complainant left the company. He reported that it was difficult to read and that a lot of the content dealt with whether the Complainant was going to be the project manager at the Gregory job site. He testified that there was nothing in the personal log to cause him to probe into Mitsubishi's safety practices or to wonder if there had been a violation of the ERA or Atomic Energy Act. He testified that he never received any e-mails from the Complainant, or have conversations with the Complainant, that gave cause to question Mitsubishi's safety practices. He testified that he read the daily logs from the Palisades job site and nothing therein caused him to question Mitsubishi's safety practices or to raise a concern that Mitsubishi had violated the ERA or Atomic Energy Act. He reported that no conversations with the Complainant would have caused him to probe further into the daily logs for safety concerns or violations. He testified that he had read the weekly reports from the Palisades job and nothing therein would have caused him to question Mitsubishi's safety practices or concern over violations of the ERA or Atomic Energy Act.

Mr. Daniels testified that about every 18 months in nuclear power plants there is a routine 20-day outage when the plant changes its nuclear fuel in the containment side of the plant that boils the water. The plant uses the outage time to perform maintenance and preventive maintenance on the turbine generator side. This includes changing oil, peripheries, some valve work, and some MSR work. At the Palisades job the turbines and generators were not opened. The work was done wearing work shoes and normal dress and involved work on the periphery.

Mr. Daniels testified that he considered the Complainant's actions taken before and during his seeking tuition assistance reimbursement as the final straw of misrepresentation of truth. He stated the Complainant's "behavior is unpredictable [and became] what will he do tomorrow?" Additionally he did not have the skill set for the job and it was in the best interest of everyone to part ways. He stated he had discussed these concerns with B. Weaver and did not personally attend the termination meeting.

Mr. Daniels testified that there was an incident when the Complainant was trying to compile information for the final report on Palisades outage when came into his office and threw down a data CD on the desk and stated that data and files were missing from the disk. He was very angry when told to contact the lady who generated the disc or to get help from IT. He testified that he handed the disk back to the Complainant and later found that the information was indeed on the CD. He considered this abrupt, unpredictable behavior coming from the Complainant as not that of a leader.

On cross-examination, Mr. Daniels testified that the tuition assistance reimbursement events occurred after the Palisades work. He stated that he did not promise the Complainant tuition reimbursement during the hiring interview process and that it is part of the company benefits that

a person is entitled to tuition reimbursement in the manager's discretion. He restated that the Complainant had alienated the entire team at Palisades and was not a team player. He reported that it was the engineers' job to inspect and report errors found and to service the machines and that was the business of Mitsubishi.

Mr. Daniels testified that part of the Complainant's job duties was to help write and execute procedures and that the procedures evolve on the job sites occasionally. He stated that he did not believe that the Complainant finding procedural errors directly attributed to the Complainant not being a team player. He denied any concern about the Complainant not coming directly to him at the Palisades job site because he had directed the Complainant to follow the chain of command through the day shift engineer and project manager; and it is the project manager who should be talking to the customer.

Mr. Daniels testified that he did not know if the Complainant used the FEDEX number to send papers regarding his personal housing package upon employment and doesn't recall if he asked the Complainant about the FEDEX contents. He stated if company business is involved, use of the FEDEX number is permitted.

Mr. Daniels testified that the Complainant was tasked with writing the Palisades outage report because he had been at the job site, all the information needed was there, and he should have been able to compile the report those first couple of months on the job. He reported that the Complainant had been able to access the data on the CD for the report after the incident in his office.

On re-direct examination, Mr. Daniels testified that the Complainant completed the Palisades outage report in 1-1/2 to 2 months.

On examination by this Judge, Mr. Daniels testified that CX 14 was a planning tool which shows work order number, work breakdown structure, and equipment. They were preventive maintenance items that were going to be performed at Palisades. The E9B MSR crawl-through inspection referred to the E9B, where the manhole cover would be opened, the large MSR would be entered, and, if time permits, go in with pipefitters and perform a tremendous amount of welding to repair it during the outage. A person literally crawls through and takes a visual look and then a recommendation is made to the customer. He reported that welding was recommended for the MSR at Palisades and that the welders would have to be qualified to come into the nuclear plant, qualified to work in confined spaces, and qualified to weld 300-series stainless steel.

June 20, 2012 Deposition Testimony of John F. (Jack) Daniels (EX 2)

Mr. Daniels testified at deposition that he is currently the Director of Manufacturing and Repair Operations for Savannah Machinery Works, a Mitsubishi Power Systems venture company. He has held that position for about 1-1/2 years.

Mr. Daniels testified that after trade school and one year job as a shop expediter he went to work for Westinghouse Electric as a machinist and over twenty years became a project engineer,

machine engineer and program manager. While working for Westinghouse he went to Widener and received a Bachelor of Science degree in industrial engineering and a Master's degree in engineering. After Westinghouse Electric he worked in Houston, Texas for TurboCare as operations manager in a factory manufacturing steam turbines and repairing power generation equipment and turbo compressors. He was there approximately 7-1/2 years from 1997. He then began work for Mitsubishi Power Systems in 2004 as operations manager. His initial task was to "start forming a group that could disassemble, inspect and reassemble steam turbine generators on the customer's site." He was responsible for hiring personnel to staff the group and, with help from Human Resources, began the hiring process March 1, 2004, for engineers and technicians. He also began building the needed tool sets.

Mr. Daniels testified that the Complainant was hired into his group as a field project engineer based in part on his resume that indicated he was an engineer. The typical project manager job involved the preplanning aspects of larger projects, such as prepare documents, plan jobs, prepare schedules; may involve interacting with the customer; helping assemble the required tool set; and job site work to lead the assigned team in executing the contract in a safe, quality manner. He stated that the team members do cost estimating for the scope of a potential project requested by the sales team and that one of the Complainant's first tasks after hiring involved estimating.

Mr. Daniels reviewed CX 23 and testified that it looked like a typical job offer letter and that he did not specifically recall the Complainant's job offer letter. He indicated that a July 26, 2004 letter dealing with a July 21, 2004 trip to Puerto Rico Electric Power Authority (PREPA) examined during the deposition was a typical estimate report that had been prepared by the Complainant. The reports are an assessment of what work should be done for the customer and is used by the sales team to present to the customer. The assessment done by the Complainant for PREPA was satisfactory. The engineers accompanied the salesmen and looked at the components involved and then submitted the assessment report. Mitsubishi did secure PREPA as a client for the work assessed.

Mr. Daniels testified that the August 16, 2004 document involving the Auburndale turning gear as examined at the deposition was an assessment report written by the Complainant based on site observations made by the Complainant. He did not know if work resulted from the assessment report but that the Auburndale Power Plant was a client of Mitsubishi. He stated that neither the PREPA site nor Auburndale site were nuclear power plant sites. He reported that his role with the Complainant from July to September of 2004 was that of coach and mentor to observe the Complainant's interaction with other team members and teach him how to complete simple tasks and progress to being placed in a group environment with more experienced individuals to learn and have some responsibility. He stated that for the first few months after hiring, people are given a lot of leeway. He testified that the Complainant was the first engineer hired for his group in 2004. He kept a file folder for each of his engineers in which he kept vacation requests, time-off requests, and things like that. He reported that he had two or three mentoring / coaching sessions with the Complainant before the Palisades job and several mentoring / coaching sessions during the Palisades job and after the Palisades job.

Mr. Daniels testified that the Complainant joined the company in the Orlando Service Center in Orlando, Florida in July 2004. Other than the PREPA and Auburndale assessments prior to the Palisades job, the Complainant “would have been doing the routine office tasks of estimating, preparing for upcoming jobs, preparing quotations, general pipeline things, along with trying to learn ... how we operate within MPSA, our infrastructure, do we use Excel, do we use Word, do we use e-mail ... who are in the different groups, things like that.”

Mr. Daniels testified that the Palisades Nuclear Power Plant contract was to inspect and perform preventive maintenance during a planned outage. He reported that there were approximately 40 people present for contract work under Mitsubishi, with the majority being union workers with their own bosses and union. He stated that he had a project manager who was in charge of the Mitsubishi crew and that the project manager reported to him as the operations manager. The period at Palisades was approximately September 19, 2004 to October 29, 2004. He stated the Complainant “would have been helping the project manager prepare, and the floor engineers prepare, for the outage, make plans moving or rigging, those kinds of things. He had responsibility I believe for having a package for one of the work scopes up there ... writing a process to inspect one of the issues the customer wanted us to investigate there and learn from the experience there and hopefully be able to grow where a short time after he might be able to do a job like that ... to show the ability to manage a little bit larger ... That’s my job, to get these guys out and teach them and let them grow and see how they are as leaders.” He stated the Complainant had some specific roles and that he was evaluating the Complainant on the ability to learn from others; see how the Complainant works under the environment with a large group; and look for leadership abilities he was looking for in a project manager. During the job there was coaching and mentoring, but performance evaluation would typically be after the job is done. He indicated that the work at Palisades was a corroborative effort with Palisades’ employees. The work done would be in the final report of the work that was done as a whole. He testified that he assigned the responsibility of writing the final report for the Palisades contract to the Complainant. He indicated that it is possible that the final report is the only document that shows the work done by each of the engineers on the project. He testified that the Complainant “was a regular employee with us, my first employee in, and I wanted him to compile the data and he was at the site before the outage for some time, maybe to the end, I’m not sure. So he was present and it seemed only fitting that ... our team should compile and be responsible for the final outage report.” He reported that he, the Complainant and Seth Conway were regular Mitsubishi employees at the Palisades site and that Greg Tidwell, a turbine generator engineer, was a subcontractor for Mitsubishi at the Palisades site. Kathy Cross was contracted by Mitsubishi as the project clerk to perform secretarial duties. John Wozniak and Tom Samuelson were contracted engineers. Other independent contractors were Dan Munini (a floor engineer), Mike Corgey, Jack Sides, David Swanner, Jim Wilson and Cecil Poole. Naoki Kanaya was a full time employee from the mother company in Japan, Mitsubishi Heavy Industries.

Mr. Daniels identified Exhibit #4 to the deposition⁶ as an Outage Report for the Palisades Nuclear Power Plant Outage; he could not identify the document as the Final Outage Report. He stated that the initial report compiled by the Complainant required revision and that he did not

⁶ Deposition attachment pages 00262 to 00317. Pages 318 to 382 consisted of technical data in support of the report.

recall how many revisions were required before the final report was produced. He noted that the power outage at Palisades began September 19, 2004 and continued until October 15, 2004. He reported that the typical project manager would complete an outage report in one to three weeks, so the Complainant took longer than usual to prepare the final outage report. He stated that while preparing the outage report the Complainant came to him irritated and aggravated with a data CD and tossed it on the desk in an unprofessional manner saying he could not get required data from the CD. He stated that it is not required to have his name on the outage report and that some engineers put his name on the report and some do not, it did not matter to him.

Mr. Daniels testified that he observed the Complainant on a daily basis at the Palisades outage and that one of his biggest concerns about the Complainant was that the Complainant “had a very tough time demonstrating – had no ability to function in a team environment. He pretty much would alienate any group he went to work with and people would come and request ... [that he] assign [the Complainant] somewhere else today. He just didn’t seem to have the ability to adapt and work with other people at all.” He testified that he discussed the concerns with the Complainant as part of the coaching.

Mr. Daniels testified that it is typical for engineers to go to a power plant site before an outage and call vendors, set up vendors, issue purchasing orders and print out drawings as part of the preparations. He did not recall if the Complainant was at Palisades Nuclear Power Plant before the September 19, 2004 outage began. He denied that the Complainant brought to his attention deficiencies or issues related to the Palisades outage, or technical errors in some of the procedures that were being written for work at the facility. He denied receiving e-mails from the Complainant regarding deficiencies, issues or errors in written procedures. He specifically testified that he did not recall the Complainant sending him e-mails on September 9, 2004 about technical errors in procedures being written for the No. 4 bearing inspection at Palisades. He also stated he did not recall the Complainant informing him that inspection sheets were incomplete; that the data was not included in those inspection sheets for different parts of the inspection process; and that there was no record or list of spare parts needed for the outage.

Mr. Daniels testified he did not recall the Complainant working on the Diablo Canyon power plant outage report or asking him to identify missing sections in the report. He reported that Mr. Innskeep was a general manager for steam turbines to whom he reported.

Mr. Daniels testified the Complainant worked on the Gregory Power Partners outage in Corpus Christi, Texas, where his job was “to assist in the project planning, issue [purchase orders] to the vendors, get vendors lined up, start gathering drawings, make data sheets, for the job in the hopes that he would probably go participate in that job and get in on the ground floor.”

Mr. Daniels testified that his engineers are required to keep a logbook when they are at an outage facility and that the logbook typically comes back to the Orlando office. He stated that when an engineer has completed a shift the off-going engineer was supposed to have a discussion with the on-coming engineer about what was done in the previous shift. He reported that during the Palisades outage he was personally present when the Complainant conducted the turnover discussion with the next shift. He denied ever telling the Complainant not to disclose discovered error to the on-coming shift. He reported that the engineers recorded data during their shift on

data sheets and would enter the work done during their shift in the logbook. He did not recall an issue of component engineers not completing data sheets at the end of their shift or of the Complainant discussing such deficiencies or issues with him. He did not recall the Complainant talking to people from the office in Japan about the Palisades outage.

Mr. Daniels testified that the gaps in the valve seat blue check stop valve #4 indicated on page 000349 of the Palisades Nuclear Power Plant outage report used at deposition “is not a violation of safety procedures. [The component engineer] made a mistake and did not sign in the block. ... typically [when a valve doesn’t seat fully, we] report to the customer and ask them if he wants to repair it.” He testified that it was not true that the Complainant brought the valve seat issue to him or that the Complainant brought to his attention during the Palisades outage that the engineer did not sign the data sheet. He testified that his testimony was that the Complainant never brought those issues to his attention “absolutely.” He reported the data sheet should have had “an engineer’s signature in there and it should have comments explaining why the seal was not complete.” He stated that component engineers cannot just leave the facility during a job, they are released when they are finished, unless there is a personal matter. He did not recall the Complainant discussing with him an issue of component engineers leaving the Palisade outage job before being released. He did not recall any component engineers departing the Palisades outage job before completing their obligations, and would doubt that two component engineers did leave before being released.

Mr. Daniels testified that the final outage report was sent to Palisades Nuclear Power Plant. He stated that sometimes the customer acknowledges receipt of the report and sometimes they do not. Some clients ask Mitsubishi to come back again at the next outage. Such a request would come through sales and Mitsubishi did go back to Palisades for the next outage at 18 months.

Mr. Daniels testified that the Complainant “was given an action list and asked to enhance it and start work on the pre-planning for Gregory” project. The Complainant was asked “to complete the actions one by one in preparation for the job ... it was made clear to him that he was going to participate and that he needed to prepare to go to site,” the Complainant was to go and perform the majority of the items on the action list. He did not expect the Complainant to do a few of the action items and then assign the majority of the action items to other people.

Mr. Daniels identified the January 6, 2005 warning letter and the February 25, 2005 termination letter given to the Complainant. He stated that the regular font paragraph in the warning letter contained excerpts from the Complainant’s job description and the italic font contained the observations and job performance statement up to January 2005 based on his observations of the Complainant. He explained the issues involved after the warning letter was “a culmination of things; observations of [the Complainant’s] behaviors, skills, ability to perform duties that we had hired a project manager for. [The Complainant] had not demonstrated any abilities that pertained to the job description. He continued with the Gregory job [and] continued with smaller jobs in the office, such as estimating, and just came to the conclusion [we] made a mistake and [the Complainant] did not live up to his end of the bargain on the job description.” He acknowledged the Complainant never had the position of project manager while at Mitsubishi. He stated “absolutely not” when asked if the January warning letter was issued because the

Complainant “repeatedly called your attention to Nuclear Regulatory Commission violations at the Palisades Nuclear Power Plant facility.

Testimony of Bailey Weaver (TR 135-146)

Mr. B. Weaver testified that he is the Senior Human Resource Manager for Mitsubishi and knows both J. Daniels and the Complainant. He stated he coordinated the Complainant’s hiring. He testified that on several occasions after hiring Complainant he discussed the Complainant’s performance with J. Daniels. The concerns included the Complainant’s inability to perform at the level for which he was hired, continuing to place laundry on his expense reports after being told not to do so, coming with a tuition reimbursement form which the Complainant stated had been already approved and only needed HR’s signature, use of a FEDEX number and attending meetings outside of his own department.

Mr. Weaver testified he instructed the Complainant that the company does not pay for a Master’s degree and only goes through to a Bachelor’s degree level. He reported that he subsequently got a telephone call from the Lake Mary corporate office indicating that the Complainant had presented an educational assistance form to sign and had indicated that it had already been approved by Mr. Weaver. He considered the Complainant trying to get the corporate office to sign a tuition assistance reimbursement after being denied as very odd behavior by the Complainant.

Mr. Weaver testified that he had several discussions with J. Daniels and his supervisor R. Innskeep over the odd behaviors of the Complainant in a short period after being hired. It was not normal behavior from an HR point of view. Termination was discussed but a written warning was elected as applicable at that point, after 5 months employment. He stated that on paper we were led to believe he had a good solid background and a recommendation from GE, a competitor, as well as nothing but good things to say by the recruiter used to recruit the Complainant. It was determined to see if the Complainant could be turned around. There had been a tremendous investment in the Complainant, including the lump sum to take care of relocation and moving expenses.

Mr. Weaver testified that the written warning (RX 5) was created in the HR department and delivered to the Complainant in January with J. Daniels present. The Complainant was informed his behavior and job performance was lacking and he needed to make corrections or he would lose his job and be terminated. He testified that when the concern over the Complainant began, he instructed J. Daniels to prepare a list of concerns in a chronological manner in case the concerns grew into more. The list of concerns created by J. Daniels is RX 6 and was reviewed by HR in creating the written warning. RX 6 only went through to the written warning and was a living document J. Daniels was asked to keep. He testified that the written warning was signed by all three persons present at the meeting and that the Complainant did not raise any issues involving safety at Palisades or in general. He stated the Complainant never raised the issues of safety or retaliation with him. He considered the written warning events as “fairly boiler-plate. We had a new employee that was not performing, though he was concerned about the Complainant’s credibility and values.

Mr. Weaver testified that it would be very odd to go into a termination meeting by himself; but could not recall if J. Daniels was present during the Complainant's termination meeting. He testified that during the termination meeting the Complainant did not raise any safety issues, did not raise any retaliation issues, and did not raise concerns in a more general manner. The standard practice was to collect cell phones, credit card and computers. The last thing the Complainant did was to hand in "two notebooks, and just said these are the company's, these belong to the company" and then he "pretty much left the building at that time."

June 11, 2004 Job Offer Letter (CX 23; RX 22)

This exhibit indicates Respondent offered employment to the Complainant for the position of Field Project Manager out of the Orlando Service Center in Orlando, Florida by B. Weaver as Manager, Human Resources. At least 60% of the work involved travel from the service center. The immediate supervisor was J. Daniels as Operations Manager, Steam Turbine Service. Base salary was \$75,010.00 per year prorated for any partial employment. Employment was to start July 12, 2004, or as otherwise agreed.

Duties were listed as "select and apply field service engineering techniques and procedures in the installation, modification, maintenance, repair, and troubleshooting of steam turbines." The duties would include (1) direct work for installation, repair and maintenance of customer turbines, generators, exciters, heat transfer apparatus and auxiliaries; (2) provide knowledge and expertise to management, engineers and suppliers; (3) assist personnel at job site in determining company responsibility and actions; (4) assign work to other technical and professional personnel as necessary; (5) interface with customer personnel; and (6) prepare accurate reports.

Provisions were made to pay the Complainant a "lump sum allowance" in the amount of \$11,581.00 for expenses in establishing a home in Orlando, Florida. The company also agreed to pay normal household third-party moving company expenses, up to 7% sales commission for the sale of a house, and closing costs on the sale of a house, provided the sale was within one year of date of hire. The Complainant was to receive 401K coverage and tuition reimbursement under the same terms as other employees. Commencing in calendar year 2005, he would also accrue 10 vacation days, 5 sick days and 2 personal days per calendar year.

The complainant was advised of the need to protect confidential information and adhere to company employment policies and procedures.

Summary of Company Benefits (CX 31)

This exhibit explains in more detail the benefits the Complainant would be entitled to upon hire, relocation and working for the Respondent Employer.

PREPA Steam Turbine & Generator Assessment of July 26, 2004 (CX 24)

This exhibit indicates that the Complainant traveled to Puerto Rico Electric Power Authority (PREPA) on July 21, 2004 "to inspect and assess the present condition of two ... steam turbines

and their respective generators.” The inspection was the basis for a quote for work recommendations to be presented the customer July 30, 2004.

Auburndale Power Plant Turning Gear Report of August 16, 2004 (CX 25)

This exhibit indicates that the Complainant traveled to the Auburndale Power Plant and inspected a particular turning gear in operation on August 12, 2004. He reported his findings and needs for further information from the customer prior to making a work recommendation.

Exhibits Relevant to Palisades Nuclear Power Plant Outage (CX 7, 8, 9, 10, 14, 18, 30; RX 1 deposition exhibits)

These exhibits reflect that there was an outage planning period prior to September 19, 2004; a power plant outage period from September 19, 2004 through October 29, 2004; and a post-outage period for reporting after October 29, 2004.

Outage Planning Period –

Approximately 66 general work orders were prepared for jobs to be completed by Respondent’s workers during the PNPP outage. The Complainant was responsible for work orders (WO) #24322024 startup test of K-1; #24321928 latch work on K-1-HP; #24322082 balance of the K-1-LPA; and #24322084 crawl-through inspection of E9B.

The work package for WO #24322082 for “LP Turbine Bearing Vibrations” was revised initially on July 29, 2004. There was no date for an indicated “002” revision.

The work package for “Westinghouse BB81 No. 4 Bearing & Pedestal Disassembly, Inspection and Reassembly” was revised on September 9, 2004 due to “Initial Issue.”

The following Purchase Requisitions were prepared by the Complainant⁷:

8/3/2004	Vendor service for Dust Blast Services
8/9/2004	Assistance of Valve Factory Engineer N.K. San
8/11/2004	Vendor service of Generator Engineer

Outage Period –

On September 23, 2004 the Complainant reported to G. Tidwell on WO #24322082 that the turning gear failed to break away during the unit shut down (on or about September 19, 2004) and the customer recognized that the symptoms were different from other shut downs. The Complainant recommended the turning gear be inspected to troubleshoot operational malfunction. The work was not authorized.

⁷ CX 30 includes an 8/3/2004 purchase requisition for overhaul and testing by Paragon Technologies for specific equipment associated with work at the PNPP but does not indicate the person who requested the services. Additionally, there are three purchase requisitions prepared by the Complainant on 8/11/2004 related to the Diablo Canyon project.

On September 23, 2004 the Complainant recommended to B. Kubacki that four torch cuts in the MSR under WO #2342084 be repaired, 23 demister pads be replaced and welding repairs be made on certain support sections. On October 6, 2004 the customer elected not to proceed with the recommended repair of the reported torch cuts. The demister pad replacements and support section repairs were completed.

On September 29, 2004 the Complainant reported to G. Tidwell on WO #24322082 that the existing keyphaser location and geometry were inappropriate for the application and compromised vibration data acquired during shut down; clearances for the pedestal cover and upper half bearing were excessive; foreign particles were found in the lower half bearing; and the journal was scored. The Complainant recommended reinstalling the keyphaser probe, correct the clearances, clean the bearing, and polish the journal. The recommended work was authorized on September 30, 2004 and completed on or about October 27, 2004.

Work performed on WO #24321928 involved bench testing of two air solenoid valves on the K-1-HP turbine latch activated from the control room. The customer elected to replace the valves, which was completed on October 27, 2004.

Post-Outage Report Period –

The final Outage Report for the PNPP outage is dated December 7, 2004 and indicates it was prepared by the Complainant as Field Project Manager. The scope of work involved maintenance on the Westinghouse steam turbine and exciter from September 20, 2004 through October 15, 2004. Testing of the work was delayed until November 16, 2004 due to work on the PNPP reactor. 12 major areas of work were specified. 21 specific employees of Mitsubishi Power Systems (MPS) and Nuclear Management Company (NMC) were identified as outage personnel. The following relevant personnel were identified in the final report.

- B. Kubacki as Turbine Generator System Engineer (NMC)
- J. Daniels as Operations Manager (MPS)
- G. Tidwell as Field Project Manager (MPS)
- S. Conway as Lead Engineer Days (MPS)
- D. Munini as Lead Engineer Nights (MPS)
- J. Wozniak as Planning / Scheduling (MPS)
- J. Cross as project Secretary (MPS)
- K. Cross as Off-site Project Secretary (MPS)
- Complainant as Vibration Engineer / Field Project Manager (MPS)

The Site Organizational Chart identified the Complainant as “Mechanical Engineer Vibration – Days” and indicated his 1st level (immediate) supervisor as S. Conway, 2nd level supervisor as G. Tidwell, and 3rd level supervisor as J. Daniels. An extensive, 5 page “Recommended Spare Part List” was also included (CX 30, pg 11-15).

The report on WO #2431928 indicates air solenoid valves were removed from the High Pressure turbine latch activated from the control room and were found to be in good working order upon

bench testing. The customer elected to replace the air solenoid valves. One new valve failed upon testing in place and contaminated an air cylinder. Both were replaced on October 27, 2004. Following replacement the latch mechanism was tested and found to be in good working condition.

The report on WO #24322082 indicates that the original scope of work was to take vibration readings and compute relocation of balance weight for the Low-Pressure Turbine A, #4 Bearing. The work was expanded perform mechanical checks and analyze the causes of vibration observed by the customer since the rotors had been replaced in 1999. Initial vibration was taken as the PNPP shutdown. Problems requiring correction involved repositioning the keyphaser; mark the rotor zero position on October 27, 2004; correct excessive clearance in the shim pads and pedestal cover; retool clearance on thrust bearing oil seal rings; strap lap scores from the jack shaft surface, and clean iron oxide deposits.

The report on WO #2432084 indicates that the Moisture Separator Reheater (MSR) 9B was inspected and replacement of 23 demister pads, the duct end - duct support bar was recommended. Weld repairs were conducted on a perforated plate below top hat 3, upper plates at the steam inlet area, and center support area. On October 6, 2004 the customer elected not to repair four torch cuts found in the shell barrel above the demister pads. The MSR access cover was reinstalled on October 7, 2004. RX 1 attachments indicate the Complainant prepared a "Recommended Repair Plan" to B. Kubacki for the welding, and demister pad replacement, and torch cut repairs on September 23, 2004.

The report did not include a detailed report on the work associated with WO #2432024 Startup test of K-1. None of the data sheets included in CX 18 were recorded or approved by the Complainant.

The steam turbine startup was on November 16, 2004 with full speed / no load achieved. On November 21, 2004 the unit reached 100% load.

Performance Notes by J. Daniels (RX 6)

This exhibit was identified by J. Daniels as his list of performance deficiencies seen in the Complainant that was kept upon recommendation of the Human Resources Manager B. Weaver, when J. Daniels expressed concerns about Complainant to B. Weaver in November 2004. B. Weaver stated the list was used to compose the January 6, 2005 warning letter. The entries are summarized –

Timeframe	Comment
7/12/04	Hired; authorized to work at home 1 week.
7/19/04	Started work in Orlando office.
7/24/04	Visited PREPA with Service Sales Manager to inspect & assess condition of 2 steam turbines.
8/12/04	Traveled to Auburndale Power Plant with R. Francis to assess turning gear malfunction.
8/23/04	At Palisades Nuclear Power Plant (PNPP) site

To 10/24/04	<ol style="list-style-type: none"> 1. Demonstrated inability to follow directions – several requests to communicate issues to customer through jobsite project manager and ignored; no regard to commercial or customer sensitivity; customer concerned about WV continued talk of breaking coupling & required assurance no plan to do that; WV has lost credibility with customer; printer purchase & trailer organization other examples. 2. WV lost all effectiveness with customer & other MPS personnel; no evidence able to be part of team or operate within team structure. 3. Failed to demonstrate required skills for Project Manager; serious doubts WV can be effective on field sites or has performed as a Project Manager. 4. No evidence WV taking initiative on site; continued to do own thing and not follow orders after “pitching in and becoming part of the team” discussed.
11/04	<p>WV assigned to complete outage report for PNPP which “should have been easily completed within two weeks” but took 7-8 weeks to complete.</p> <p>Discussed concerns about WV with HR.</p> <p>WV complained about Site Clerk and data CD useless; threw CD on desk and began walking out of office; WV stopped, counseled on inappropriate conduct in office, and ordered to contact Site Clerk and resolve issue; learned later all data on CD but missed by WV.</p> <p>WV made many derogatory remarks about peers; yet to see WV take responsibility of any kind; no evidence of leadership qualities; quick to blame poor performance on others.</p>
1/05	<p>WV came to have tuition form signed for Master’s degree alleging signature mere formality and already approved by HR; denied.</p> <p>B. Weaver stated did not approve tuition form.</p> <p>Informed WV company does not pay for Master’s degrees after checking with Lake Mary office.</p> <p>Very disappointed and concerned with WV’s behavior and decision-making process; has own agenda not related to business</p>
1/6/04	<p>B. Weaver & I had long talk with WV on job performance and issued warning letter for poor performance.</p>
1/05	<p>GM of Field Service/Gas Turbine questioned why WV attending Gas Turbine morning meetings; advised WV not to attend other departmental meeting without approval & “have a lot of work to get done”; no reason for attending meetings given by WV; WV told behavior a concern “and expected him to be timelier with his work assignments.”</p> <p>Told WV use of FedEx number to ship personal items unacceptable; WV considered it a gray area; “another example of poor decision-making.</p>
1/05 –	<p>WV given instruction and coaching on cost estimating on very</p>

2/05	<p>simple work; all estimated required significant editing; items pointed out as incorrect still incorrect on resubmission</p> <p>Discussed poor performance on work estimates; basic work junior engineer 2 years out of school expected to perform easily; no evidence WV has performed that type of work or field work before as stated in interview and on resume/application.</p> <p>Gregory Outage assignment –</p> <ol style="list-style-type: none"> 1. WV assigned planning process for spring outage; provided overview and specific instructions on where to begin; supervision of WV very time consuming; no sign of initiative, drive or previous experience; most tasks redone by someone else. 2. WV failed to obtain pricing on 7 common items used in outage after vendors suggested. 3. WV worked 1 month and failed to generate data sheets as assigned. 4. WV copied drawings from company manual and made binder for site. 5. WV assigned to put together action plan; assigned most action items to J. Daniels or Daniel’s supervisor. <p>WV assigned to pull drawings and generate data sheets for Colver job; not started by WV.</p>
2/25/05	WV terminated based on overall job performance.

January 6, 2005 Warning Letter (RX 3)

This exhibit indicates the Complainant started work for Mitsubishi on July 12, 2004 and includes the statement “Below is a summary of essential functions of the position outlined in the job offer letter. You agreed by your signature that you were able to perform these functions. Based on your job performance as they relate to the essential functions of the position, you are not successfully fulfilling the requirements.” It then listed 5 essential functions and the noted deficiencies. The deficiencies included (1) Commercial and customer sensitivity awareness is lacking. Ability to relay ideas, communicate and work within a team must improve; (2) Commercial and customer sensitivity awareness is lacking. Credibility issues with customer and staff an issue; (3) Leadership and team building skills are not acceptable; (4) Ability to relay ideas, communicate and work within a team environment are not acceptable. The ability to lead a team and complete a project in a timely manner is inadequate; (5) Ability to relay ideas and communicate with customer is meager; and, (6) The ability to multi-task is deficient, the Importance of following the appropriate chain of authority is not adhered to and the sense of urgency to complete assignments in a timely manner is absent.”

The letter directed “You must improve your job performance to acceptable level or you will be subject to disciplinary action up to and including immediate termination of your employment.”

Complainant's February 14, 2005, Gregory Action Item List Updated E-mail (CX 16; RX 7, 8)

In this email the Complainant notified T. Matsushima, R. Innskeep, C. Malobicky, J. Daniels and R. Kingman that "I have updated the Action Item List for the Gregory outage. I have also added more tasks based on inputs from the different e-mails received, which elevated the Action List to 68 ... I have assigned names to the list, please feel free to make comments and update the information accordingly."

The Complainant noted on the attached action item list that he had completed item 50 (prepare outage inspection sheets) on February 1, 2005; was working on item 49 (prepare outage drawings); had completed item 66 (drawings for three assemblies) on February 1, 2005; and had assigned 63 of the remaining items to his supervisor, J. Daniels as one of the responsible individuals to complete the action required. Item 67 involved a Steam Turbine Team meeting. Item 68 (design required to remove generator rotor) was assigned to T. Ishihara.

Attached to the exhibit was a January 18, 2005 e-mail from J. Daniels directing the Complainant to "continue with the pre-planning on the Gregory job. Develop an Action Item List for the Gregory job. Use the Proposal DOR as a guide ... We will review the action list Monday 1/24/05."

Employment Termination Letter of February 25, 2005 (RX 9)

This exhibit was issued by B. Weaver as Manager, Human Resources, and noted that the Complainant had been issued a warning letter for poor performance on January 6, 2005 by B. Weaver and J. Daniels. This exhibit states "Since that written warning, you were assigned to the planning effort for an upcoming outage. Your job performance on this assignment was unacceptable and had to be assigned to another person to complete. Also, during this period, you were assigned to complete quotes for future work. Your work during this assignment had to be reviewed carefully by your Manager due to multiple errors and even when informed of the errors, you repeated those errors. Based on the above, it is with regret that I must inform you that your employment with MPS is terminated effective Friday, February 25, 2005."

Complainant's March 7, 2005 letter to D.M. Walsh (CX 27; RX 10)

This exhibit was made after the Complainant was terminated and has no impact on the termination decision. In the exhibit the Complainant states "I spoke with you on Tuesday, February 22, 2005. I ended up being terminated from my position as Field Project Manager, effective date February 25, 2005." The Complainant requested his termination be reconsidered after consideration of "the NMC log book I gave to Mr. Bailey, my personal log notes left inadvertently at Mr. Bailey's office on my last day of work, and the action item list sent via e-mail to the steam turbine group on 02/14/05."

Complainant's March 18, 2005 E-mail to B. Weaver (RX 11)

This exhibit was made after the Complainant was terminated and has no impact on the termination decision. In the e-mail the Complainant references a conversation with B. Weaver

and a “revised Release 03/18/2005” that he would sign. He stated “The best way to handle this situation will be to reverse the termination decision in which I would continue my employment with Mitsubishi as February 26, 2005, or obtaining in-house transfer with the same salary, benefits and relocation package offered at the time hired.” The attachment reflected B. Weaver, as Manager, Human Resources, had sent the Complainant specific terms for a separation agreement and release on March 18, 2005. B. Weaver did not testify at the hearing about this exhibit.

Complainant’s April 4, 2005 letter to N. Fuseya (CX 28)

This exhibit was made after the Complainant was terminated and has no impact on the termination decision. In the exhibit the Complainant states “I am seeking your attention since I believe I have been treated unfairly regarding my termination of employment ... I am writing this in case there is a chance to reverse the termination of employment by working at either MPS or Mitsubishi Heavy Industries ...”

DISCUSSION

“The complicated statutory and regulatory scheme enacted by Congress and the Nuclear Regulatory Commission was designed to encourage employees ... to report unsafe practices in one of the most dangerous technologies mankind has invented. It is clear that the NRC envisioned substantial employee involvement in the regulatory process. ... the NRC explained the need for employee involvement - The Commission, to effectively fulfill its mandate, requires complete, factual and current information concerning the regulated activities of its licensees. Employees are an important source of such information and should be encouraged to come forth with any items of potential significance to safety without fear of retribution from their employers. 47 Fed. Reg. 30453 (1982).” *Rose v. Sec’y of Dept. of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) “As a remedial statute, the ERA should be liberally interpreted to report perceived nuclear safety violations without fear of retaliation.” *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, No. 09-123, 2012 WL 694495, *7 (ARB Feb. 29, 2012) citing *Fields v. Florida Power Corp.*, No. 97-070, 1998 WL 122759 (ARB Mar. 13, 1998) *aff’d sum. nom.*, *Fields v. U.S. Dept. of Labor Adm. Review Bd.*, 173 F.3d 811 (11th Cir. 1999)(per curiam). “The ERA thus protects employees who raise nuclear safety-related concerns from retaliation in the form of discharge or other actions that arise to the level of discrimination with respect to ‘terms, condition or privileges of employment.’” *Williams v. Mason & Hanger Corp.*, No. 98-030, 2002 WL 31662916, *8 (ARB Nov. 13, 2002) [extending ERA protections arising with nuclear power plants subject to the NRC to nuclear weapons disassembly plants subject to the DOE]

In his July 26, 2005 ERA complaint the Complainant alleges “I believe my termination was a result of my concerns communicated to MPS⁸ management since early September 2004 when I started noticing significant amount of technical errors, deficiencies on MPS process and inappropriate work practices endorsed by the company during the Palisades nuclear outage.” From the Complainant’s testimony at the hearing and deposition, the Complainant considered the following specifics communicated to MPS management –

⁸ “MPS” refers to Mitsubishi Power Systems, the Respondent Employer

- a. as noticed “significant amount of technical errors”:
 - incomplete planning work package for vibration of No 4 bearing related to removal of a non-existent fire protection system and no steps on collecting data prior to disassembly of the No 4 bearing
 - wrong instruction on removing hydraulics

- b. as “deficiencies on MPS process”:
 - claims found hole in MSR and told by J. Daniels not to report it to customer but that he contacted Mitsubishi in Japan recommending it be welded
 - hold points being signed off by people who did not do the work 2 or 3 days later was safety issue
 - “how liable Mitsubishi is contractually on correcting vibration amplitude” placed J. Daniels on notice of a safety issue because “present vibration characterization does not seem to be related to mass unbalance and keyphaser reading unreliable[and] none of rotors have a visible mark for the angles that identify the location or position of the weights.”

- c. as “inappropriate work practices endorsed by the company”:
 - lack of onsite logbook of daily activity
 - maintenance work being done and not signed off in 2 work packages he did not work on
 - incomplete maintenance reports
 - maintenance reports with erroneous information

- d. reported deep cuts in MSR and expressed safety concerns at daily meeting to J. Daniels

- e. made spare parts list for next outage to put in final report

I. The Complainant established by a preponderance of the credible evidence that he engaged in protected activity by review and correction of pre-implementation work packages involving equipment at the Palisades Nuclear Power Plant between August 22, 2004 and September 2, 2004.

The Complainant testified that during the pre-implementation stage of the Palisades Nuclear Power Plant outage he made specific corrections to the work package involving the No. 4 bearing WO #24322082 to remove reference to a fire protection system that was not present and to add a data collection sequence before disassembly of the No. 4 bearing unit. He stated that he considered these big safety issues and notified his supervisor J. Daniels by e-mail in early September, with a copy to the senior engineer Munini and the project manager G. Tidwell. The excerpts from WO #24322082 used at the Complainant’s February 22, 2007 deposition (RX 1) contain wording for the recommended changes to the WO. CX 8 is the September 9, 2004 WO #24322082 which reflects that the recommended changes were made in the WO prior to the WO being followed during implementation. He acknowledged in deposition testimony that the WO

was corrected prior to the work being performed. In his deposition the Complainant also stated the errors in the WO were procedural errors and a violation of 10 CFR §50.56, “from the internet research that I did.” Supervisor J. Daniels testified in deposition that the Complainant did not discuss the discrepancies in the procedural plans and that he did not receive any e-mails from the Complainant about the discrepancies or changes to the procedural plans, which brings into question whether the e-mails, and copies thereof, existed. The Complainant testified in deposition that he “always makes copies of what I work on” but did not keep copies of the e-mails. The Complainant testified that engineer Munini had asked him to make the changes to the procedural plans when Munini returned to Palisades Nuclear Power Plant. Evidence of record established that D. Munini was an independent contractor who functioned as a floor engineer under contract to Mitsubishi Power Systems during the Palisades Nuclear Power Plant outage.

The documentary evidence establishes that the procedural plan for work order #24322082 for LP Turbine Vibrations issues had been composed and subsequently revised on July 29, 2004. The Parties have stipulated that the Complainant began work at the Palisades Nuclear Power Plant on August 22, 2004. CX 8 is the same procedural plan with the notation of revision on September 2, 2004. The revisions related to removing a non-existent fire protection system, removing hydraulics, and collecting data prior to disassembly of the Westinghouse BB81 No. 4 bearing, are those the Complainant testifies were made by him during the work-up (pre-implementation) phase at the power plant. The procedural plan was to be implemented during the actual work on the low pressure turbine at the nuclear power plant and used by technicians to guide them through the disassembly, analysis of problem areas (vibrations), corrections of problem areas and reassembly of the ancillary equipage. This is not contradicted by the evidence of record.

Proper procedural plans for the testing, data collection, disassembly and reassembly of essential energy generating and ancillary equipage is a reasonable and necessary process to ensure nuclear-safety at nuclear power plants, whether the work is performed inside or outside the reactor containment facility. There is no showing that the changes suggested and/or made by the Complainant to these procedural plans violated the ERA or AEA.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant established by a preponderance of the credible evidence that he engaged in protected activity by review and correction of pre-implementation work packages involving equipage at the Palisades Nuclear Power Plant.

II. The Complainant failed to establish by a preponderance of credible evidence that he engaged in protected activity involving alleged “deficiencies on Mitsubishi Power Systems process” at the Palisades Nuclear Power Plant.

The Complainant alleges the deficiencies of process are (1) being told by Operations Manager J. Daniels not to report a hole in MSR to the customer; (2) hold points being signed off by people who did not do the work, and (3) asking “how liable Mitsubishi is contractually on correcting vibration amplitude.”

As set forth below, the Complainant did conduct a visual inspection of the moisture separator reheater (MSR) and reported those findings to his supervisors, who in turn evaluated the findings

and recommended specific repairs to the customer, Palisades Nuclear Power Plant. The Complainant in his deposition testified that J. Daniels told him not to talk directly with the customer sometime after the inspection report of the MSR. J. Daniels testified that the customer's representative had concerns over who was the spokesman for Mitsubishi Power Systems and the Complainant's comments at the worksite involving lack of work progress, delays, and possible extension in the outage period. J. Daniels testified he instructed the Complainant to use the chain-of-command and report to his superiors and not directly to the customer. The credible evidence of record demonstrates that the nuclear-safety relating findings of the Complainant on the condition of MSR 9 were communicated through the supervisory chain to the customer without independent efforts of the Complainant and demonstrates that the Complainant failed to establish by a preponderance of the evidence that the direction given to the Complainant to make reports through his supervisors and not to go directly to the Complainant was a nuclear-safety related event falling within the protection of the ERA under the circumstances of this case.

The Complainant testified that after he returned to the office in Orlando he was tasked with writing the final outage report on the work performed by Mitsubishi Power Systems at the Palisades Nuclear Power Plant. He stated that he noticed on two sections that work had been done by individual contractors who did not sign-off on the hold points set forth in the work order procedural plan. He testified that he intended to tell MR. D.M. Walsh but did not. He reported that his supervisor J. Daniels should have been aware of the discrepancies when he reviewed the draft outage report. In his deposition he stated he had told J. Daniels about the signature discrepancies. He reported that J. Daniels did not say anything about hold point sign-offs. The Parties stipulated that the Complainant returned to the Orlando, Florida office on or about October 25, 2004. Supervisor J. Daniels testified that the Complainant had come to his office about complaints that data for the final outage report could not be retrieved from a CD, the Complainant was given direction on where to find assistance in the matter, and that the Complainant was able to retrieve the necessary CD data to write the final outage report. The credible evidence of record establishes that J. Daniels reviewed a draft outage report the end of November which contained his name and the Complainant's name on the report and that the final outage report was completed on December 4, 2004 with only the Complainant's name on the report as Field Engineer. Here the Complainant has failed to establish by a preponderance of the evidence⁹ that he engaged in activity protected by the ERA by reporting hold-point signature irregularities to supervisors or other personnel with authority or responsibility to take action on such a complaint.

The Complainant made the entry "How liable Mitsubishi is contractually on correcting vibration amplitude?" in the weekly log for October 3, 2004. He argues that this put supervisor J. Daniels on notice of "deficiencies on MPS process." However, the exhibits related to the LP turbine and bearing #4 vibration issues reveals that the turbine was shut-down on September 23, 2004 and that on September 29, 2004 the Complainant reported to his immediate site supervisor G. Tidwell that the existing keyphaser location and geometry were inappropriate for the application

⁹ Where the credible evidence of record is in "equipoise", that is evenly balanced, the party proponent with the burden of proof (persuasion) must loose. *Director, OWCP v. Greenwich Colliers*, 512 US 267, 281 (1994); *Schaffer v. Weast*, 546 US 49 (2005)

and compromised vibration data acquired during shut down; clearances for the pedestal cover and upper half bearing were excessive; foreign particles were found in the lower half bearing; and the journal was scored. The Complainant recommended reinstalling the keyphaser probe, correct the clearances, clean the bearing, and polish the journal. The recommended work was authorized on September 30, 2004 and completed on or about October 27, 2004. The credible evidence of record establishes that the work process to address the vibration issues of the #4 bearing were brought to the attention of senior supervisors with recommended corrections, the corrective steps were authorized and subsequently performed. Accordingly, the Complainant has failed to establish by a preponderance of the evidence the required objective belief that a reasonably prudent person of similar training and experience of the Complainant and with the same knowledge of events would consider the words “How liable Mitsubishi is contractually on correcting vibration amplitude” to be a report of “deficiencies of Mitsubishi Power System process.”

After deliberation on all the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of credible evidence that he engaged in protected activity involving alleged “deficiencies on Mitsubishi Power Systems process” at the Palisades Nuclear Power Plant.

III. The Complainant failed to establish by a preponderance of the credible evidence that he engaged in protected activity involving alleged inappropriate work practices endorsed by Mitsubishi Power Systems at the Palisades Nuclear Power Plant.

The Complainant alleges the inappropriate work practices are (1) lack of onsite logbook of daily activity, (2) maintenance work being done and not signed off in two work packages he did not work, (3) incomplete maintenance reports, and (4) maintenance reports with erroneous information.

The Complainant testified that during the implementation phase he “took the initiative just to protect Mitsubishi to write the logbook onsite” and that he read from the logbook at each daily turnover shift meeting to discuss the work done that shift with supervisor J. Daniels present. In deposition the Complainant state that he kept two logbooks while at Mitsubishi, one was the logbook for work at Palisades Nuclear Power Plant and the other was a personal logbook. The evidence established that the Complainant did not share his personal logbook with anyone prior to his employment termination and the personal logbook was left behind with the human resource manager when the Complainant left Mitsubishi Power Systems. During his deposition J. Daniels testified that engineers are required to keep a logbook at outage facilities, that the off-going engineer would advise the on-coming shift engineer of the work done the previous shift, that he was present during the shift turnovers where the Complainant would make the work turnover report with the next shift, and that the logbook typically went back to the Orlando office after the outage was completed. During the formal hearing J. Daniels testified that the Complainant did not take the initiative of writing a logbook to track work at the Palisades Nuclear Power Plant but had to be instructed to fill in the standard job logbook for the daily shift work. This presiding Judge finds that the Complainant has failed to establish by a preponderance of evidence that he engaged in protected activity involving a deficiency in work practices by a lack of onsite logbook.

The Complainant testified that he wrote a report for two components he did not work and he was going to bring it to the attention of D. Walsh but was fired three days later before he could bring the work issues to D. Walsh's attention. He stated that his problem with writing reports for two components he did not work on was that there were no data readings before the component was taken apart and no data readings after the component was reassembled and in some cases, like the maintenance of the foot valve, there were missing millwright dirty data sheets. He testified he explained the lack of data to supervisor J. Daniels and the human resource manager at the time he was presented the January 6, 2005 warning letter. J. Daniels testified about an incident when the Complainant came to his office with complaints about not being able to access a data CD. As noted above, the Complainant was directed to another for assistance and was able to retrieve the data existing on the CD. J. Daniels testified in deposition that an engineer did not sign a data sheet involving the gaps in stop valve #4 which was a mistake; but that the Complainant "absolutely" never brought issues involving an engineer not signing data sheets to his attention; nor did he bring attention to component engineers leaving the Palisades Nuclear Power Plant outage job before being released. J. Daniels testified that when the January 6, 2005 performance warning letter was delivered to the Complainant by B. Weaver of Human Resources in his presence, the Complainant did not raise any safety issues and signed the warning letter, though the Complainant's body language was he did not want to sign the letter. B. Weaver testified that when the Complainant was given the January 6, 2005 performance warning letter he did not raise any issues involving safety at the Palisades Nuclear Power Plant or in general. B. Weaver testified that he met with the Complainant alone to deliver the February 25, 2005 termination letter and that the Complainant did not raise any safety issues, did not raise any retaliation issues, and did not raise concerns in a more general manner, though he handed in two notebooks and left the building at that time. This presiding Judge finds that the Complainant has failed to establish by a preponderance of evidence that he engaged in protected activity by reporting a deficiency in work practices by maintenance work being done and not signed off in two work packages at the Palisades Nuclear Power Plant that he did not work upon.

The maintenance work reports from the Palisades Nuclear Power Plant outage the Complainant that the Complainant alleged were incomplete or had erroneous data allegedly involved work at the Palisades Nuclear Power Plant that was performed by engineers other than himself. The Complainant testified that when he completed the final outage report based on the work orders, work reports and data from the Palisades Nuclear Power Plant outage, he did not falsify any data. For the reasons set forth above, this presiding Judge finds that the Complainant has failed to establish by a preponderance of evidence that he engaged in protected activity by reporting a deficiency in work practices involving incomplete maintenance reports and maintenance reports with erroneous information from the Palisades Nuclear Power Plant outage work performed by Mitsubishi Power Systems.

IV. The Complainant established by a preponderance of the evidence that he engaged in protected activity by reporting concerns involving moisture separator reheater (MSR) #9 at the Palisades Nuclear Power Plant.

The evidence establishes that the Complainant personally inspected moisture separator reheater (MSR) #9 at the Palisades Nuclear Power Plant as part of Work Order #24322084. Based on his observations, the Complainant made a written recommendation on September 23, 2004 to

Respondent's Turbine Generator Systems Engineer, that the four torch cuts in the MSR be repaired, 23 demister pads be replaced and welding repairs made to certain support sections. The recommendation was presented to the Customer through the Respondent's supervisors. On October 6, 2004 the Customer elected not to repair the four torch cuts and authorized the demister pad replacement and support section repairs. The demister pads were replaced and selected welding repairs were made as part of the outage work performed by Respondent for the Customer.

Reporting of torch cuts within pressurized MRS #9 and related structural support repairs is a reasonable and necessary process to ensure nuclear-safety at nuclear power plants. There is no showing that the repairs recommended by the Complainant violated the ERA or AEA.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant established by a preponderance of the credible evidence that he engaged in protected activity in reporting concerns involving MSR #9 at the Palisades Nuclear Power Plant.

V. The Complainant failed to establish by a preponderance of credible evidence that he engaged in protected activity by making a spare parts list to include in the final outage report.

The Complainant testified that he prepared a spare parts list to include in the final outage report. He opined that the spare parts list probably referred to valve parts for the next power outage at the Palisades Nuclear Power Plant. He alleged that failure to have a spare parts list would be a violation of 10 CFR §50.56.

Here the Complainant speculates that the spare parts list is for use in some future outage period at the Palisades Nuclear Power Plant. Supervisor J. Daniels testified that he did recall the Complainant stating that there was no list of spare parts for an outage. There is no evidence that a reasonably prudent person with the Complainant's knowledge, ability and experience would envision such a list that merely identifies numerous spare part items for some future reference use as impacting present nuclear safety at the Palisades Nuclear Power Plant. Since the Complainant has failed to establish an objective belief that a spare parts list for use as a reference in some future period of plant outage, the Complainant has failed to establish by a preponderance of credible evidence that he engaged in protected activity by making a spare parts list to include in the final outage report. There is no need to evaluate whether the Complainant had a credible subjective belief in this issue.

VI. The Complainant has established by a preponderance of the evidence that the Respondent had actual knowledge prior to the Complainant's employment termination that the Complainant engaged in protected activity by changing procedural steps in specific pre-implementation work packages involving equipage at the Palisades Nuclear Power Plant.

The Complainant testified at hearing that he made changes to specific work procedure packages during the pre-implementation phase of the Palisades Nuclear Power Plant for the planned outage in September 2004. He testified that he reported these changes by e-mail to supervisor J.

Daniels, Lead Night Engineer D. Munini, and Project Manager G. Tidwell but did not receive a reply e-mail. He testified in deposition that he keeps copies of all documents on which he works but has no copies of the e-mails he alleges to have sent to the three identified individuals. J. Daniels testified that he never received such e-mails and did not discuss the described changes to the work procedure packages. The changes made by the Complainant are in the work package dated September 9, 2004, but there is no indication of who entered the few minor changes or who, other than the Complainant, knew of the specific changes.

J. Daniels and the Complainant both testified that the Complainant made verbal end-of-shift reports by reading from the weekly log he maintained at the Palisades Nuclear Power Plant. The entries for week of August 27, 2004 and September 27, 2004 refer to changes to the work packages.

After deliberation on the credible evidence in this case, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that the Respondent had actual knowledge prior to the Complainant's employment termination that the Complainant engaged in protected activity by changing procedural steps in specific pre-implementation work packages involving equipment at the Palisades Nuclear Power Plant.¹⁰

VII. The Complainant has established by a preponderance of the evidence that the Respondent had actual knowledge of the Complainant's protected activity involving moisture separator reheater #9.

The documentary evidence establishes that the Complainant reported his findings of his inspection of MSR #9 and recommendations for repair to the Respondent's turbine systems engineer on or about September 23, 2004. Supervisor J. Daniels testified that the Complainant had discussed the MSR #9 findings with him and the Customer, with the Customer requiring assurance that the Complainant would not be deciding what action to take on repairs or impact on the outage period; but, rather, Respondent's engineers would evaluate the findings and make recommendations to the Customer. The recommendations were made to the Customer and the Customer approved the demister pad and structural support repairs but declined to perform repairs to the reported internal torch cuts.

The evidence also establishes that J. Daniels had a direct role in the hiring and firing of the Complainant, such that the Complainant has established by a preponderance of the evidence that the Respondent had actual knowledge of the Complainant's protected activity involving MSR #9.

¹⁰ Where the credible evidence of record is in "equipoise", that is evenly balanced, the party proponent with the burden of proof (persuasion) must lose. *Director, OWCP v. Greenwich Colliers*, 512 US 267, 281 (1994); *Schaffer v. Weast*, 546 US 49 (2005)

VIII. The Complainant suffered an adverse employment action when his employment was terminated on February 25, 2005.

The Parties have stipulated that the Complainant's employment began on July 12, 2004 and ended on February 25, 2005. The evidence establishes that the termination of employment was not voluntary or at the request of the Complainant but due to Respondent's dissatisfaction with the Complainant's actions during the period of employment. Accordingly, this presiding Judge finds that the employment termination on February 25, 2005 was an involuntary discharge and thus, an adverse employment action.

IX. The Respondent has established by clear and convincing evidence that the Complainant's employment was terminated for reasons unrelated to his protected activities involving the Palisades Nuclear Power Plant.

Since the Complainant has established he engaged in specific activity protected by the ERA; the Respondent, including its agent J. Daniels, had actual knowledge of the specific protected activity; and the Complainant was involuntarily discharged based at least in part on the decision of J. Daniels after the Respondent had knowledge of the specific protected activity, the Respondent Employer is not liable for the relief to the Complainant under the ERA only if the evidence establishes by clear and convincing evidence that the Respondent would have terminated the Complainant's employment in the absence of the protected activity. 42 U.S.C. §5851(b)(3)(D)

Respondent's counsel argues that the Complainant was terminated for reasons unrelated to complaints/reports protected by the ERA that the Complainant made involving the Palisades Nuclear Power Plant outage work.

a. Complainant's actions prior to his work with the Palisades Nuclear Power Plant.

The evidence establishes that the Complainant was hired by Respondent on July 12, 2004 based on recommendations from a retained recruiter, a letter of recommendation from the Complainant's previous employer, General Electric, and his resume which indicated an engineering background. J. Daniels made the hiring decision with the assistance of Human Resource Manager, B. Weaver. Subsequent to the Complainant's termination and in the course of preparing for litigation of the underlying complaint, Respondent discovered misrepresentations made by the Complainant in his resume and inconsistencies with the perception created by the GE letter of recommendation considered as part of the hiring process. As these misrepresentations and inconsistencies were discovered subsequent to the Complainant's termination, they are not relevant Respondent's reason for termination of employment but are relevant to weighing the Complainant's veracity and statements made under oath in deposition and formal hearing. The Complainant did testify that he had been counseled by his prior employer GE that his performance or conduct had to improve while employed by GE and that the GE letter of reference had been provided after he was hired by Respondent. It was also admitted that the Complainant did not have a minor in mechanical engineering as part of his Bachelor of Science degree from New York Institute of Technology as initially represented to Respondent during the hiring process.

The Complainant reported to the Orlando, Florida office to begin work on July 19, 2004.

The Complainant traveled to Puerto Rico on July 21-24, 2004, with a sales representative, to inspect and assess the condition of two steam turbine generators belonging to the Puerto Rico Electric Power Authority (PREPA). The assessment resulted in a recommendation for work to be performed on the turbine generators and an estimate of the cost for such work which were presented to PREPA on July 30, 2004.

On August 11, 2004 the Complainant prepared three purchase requisitions for work related to the Diablo Canyon Power Plant, Dover, New Jersey. The requisitions requested three weeks of service for blast cleaning, for the removal and installation of bolts by induction heating, and for the services of a generator engineer. The requested services were to begin on October 25, 2004.

The Complainant traveled with another worker to Texas to observe and inspect a suspected malfunction in a turning gear at the Auburndale Power Plant on August 12, 2004. On August 16, 2004, the Complainant submitted a short written report of his observations of the subject turning gear and included a list of questions and requests for documents and equipment specifications that should be presented to the Auburndale Power Plant and the turning gear manufacturer before an action plan could be developed for presentation to Auburndale Power Plant.

b. Complainant's actions at the Palisades Nuclear Power Plant unrelated to his protected activity.

The Complainant was present at the Palisades Nuclear Power Plant from August 22, 2004 through October 24, 2004 as the Day Shift Vibration Engineer.

While onsite the Complainant submitted claims for reimbursement of dry cleaning expenses in addition to accepting the per diem rate paid to employees for food, clothing and phone calls. The Complainant was told by his supervisor J. Daniels that dry cleaning was not a reimbursable expense and not to include such charges on his account. The Complainant disregarded his supervisor's directive and subsequently submitted claims for dry cleaning expenses on two occasions after being told not to do so.

J. Daniels testified that the "customer" (point of contact from Palisades Nuclear Power Plant) expressed concern over issues raised by Complainant directly to Palisades Nuclear Power Plant employees concerning who would make final recommendation on the turbine vibration issues and whether a coupler would be disengaged and/or equipment down time extended. J. Daniels reassured the customer on company engineers making the final recommendations to the customer and that a coupling would not be disengaged. He directed the Complainant on several occasions to make reports and concerns to his shift supervisors and not discuss work-related matters directly with the customer. J. Daniels reported he counseled and mentored the Complainant at the Palisades Nuclear Power Plant on being a team member, taking initiative, and customer sensitivity. J. Daniels classified the Complainant's time at Palisades Nuclear Power Plant as a period where the Complainant alienated other employees, failed to follow direction and failed to exhibit abilities and characteristics desired in a field project manager. He reported that the

Complainant's reports concerning the MSR #9 were considered and treated as the Complainant performing assigned work and not as a separate nuclear safety complaint.

The Complainant testified in deposition that J. Daniels directed him to use the chain-of-command to make reports and not to go directly to the customer probably after he inspected MSR #9. He did make verbal end-of-shift reports at daily meetings of Respondent's employees and contractors, held by J. Daniels, by reading from the weekly log he maintained.

c. Complainant's actions after October 25, 2004 return to Orlando, Florida office and prior to the January 6, 2005 performance warning letter.

The Complainant returned to the Orlando, Florida office on October 25, 2004 and performed assigned office work.

The Complainant was tasked to write the final outage report for the Palisades Nuclear Power Plant work performed in September and October 2004. The Complainant was provided a data CD with information concerning the work performed during the outage. On one particular workday the Complainant went to the office of his supervisor, J. Daniels with the data CD; stated that the CD was useless and the data and files he needed for the report were missing; complained about how poor the site clerk was; threw the CD onto his supervisor's desk; and turned to leave his supervisor's office. J. Daniels stopped the Complainant from leaving; verbally counselled him on the inappropriateness of Complainant's actions in an office setting; handed the CD back to the Complainant; and directed the Complainant to contact the site clerk who created the data CD or to seek assistance from the IT section of the company to retrieve the data and files from the CD. J. Daniels described the Complaint as angry at the time and considered Complainant's actions as an example of Complainant's abrupt and unpredictable behavior. There was no contradictory evidence as to the Complainant's conduct involving the data CD resulted in on-the-spot corrective counseling by his immediate supervisor. This presiding Judge also finds that the incident involving the data CD is unrelated to any activity protected by the ERA.

During this period the Complainant separately approached his immediate supervisor J. Daniels; the human resource manager B. Weaver; and a manager at the corporate level in Lake Lucy, concerning an educational assistance form for reimbursement of tuition for a Master's degree. The Complainant falsely represented to J. Daniels that just a signature was required because the tuition assistance had already been approved by human resources; but, J. Daniels refused to approve the request. The Complainant falsely represented to B. Weaver that just his signature was required because the request had already been approved at the corporate level; but, B. Weaver instructed the Complainant that tuition assistance was not given for Master degrees and refused to sign the request. Subsequently, the Complainant present the education assistance form at the corporate level and falsely represented to the corporate level manager that the education assistance form had been approved by B. Weaver; but, the corporate manager did not approve the request and then notified B. Weaver of the Complainant's activities. While B. Weaver classified the Complainant's actions regarding the tuition reimbursement request as "odd behavior" and J. Daniels considered it "the final straw in the misrepresentation of truth" and an indication that the Complainant's behavior was unpredictable, this presiding Judge finds that such activity was a willful attempt initiated by the Complainant to defraud the Respondent, was

conduct adverse to Complainant's credibility, and was a course of conduct unrelated to ERA protected activity warranting a level of disciplinary action on its own.

After learning that the Complainant had used Respondent's FEDEX account to ship personal items, supervisor J. Daniels personally told the Complainant that company policy prohibited the use of the company's FEDEX account for personal business. The Complainant's response was that the use of the FEDEX account was a "grey area." There is no indication that the Complainant continued to use the company FEDEX account for personal business after being told it was against company policy to do so.

d. Rationale for January 6, 2005 performance warning letter.

B. Weaver testified that he had several discussions with Complainant's immediate supervisor J. Daniels and the more senior supervisor R. Innskeep concerning odd behaviors of the Complainant during the short period since being hired. He directed J. Daniels to compile a list of performance concerns regarding the Complainant. He reported they did discuss terminating the Complainant's employment after 5 months but that on paper the Complainant had a good solid background and a recommendation from a competitor as well as the recruiter. He reported that there was a tremendous investment in the Complainant at that point, including a lump sum payment for relocation and moving expenses. They concluded that they should try and turn the Complainant around and he would receive a performance warning letter at that time. B. Weaver testified that the warning letter was composed in human resources based on the outline of concerns supplied by immediate supervisor J. Daniels.

J. Daniels testified in deposition that the regular font in the warning letter was from the Complainant's job description and the italic type reflected his performance observations of the Complainant up to January 2005. J. Daniels strongly denied that the performance warning was issued because of the Complainant's reports at the Palisades Nuclear Power Plant. He testified at hearing that his observations led him to believe the Complainant lacked field service experience, lacked lead project manager abilities and had to improve his job duty performance. He stated that the Complainant did not raise any safety issues during the January 6, 2005 meeting.

The Complainant testified at the hearing that "whatever they listed [in the warning letter] was not my responsibility ... because I was not the project manager at Palisades." He reported that he told J. Daniels and B. Weaver at the meeting he had no responsibility for the Palisades project, he hunted down people who had left the site without signing off, and that other people had signed off on work projects they didn't do. This is inconsistent with the testimony of J. Daniels and B. Weaver. In deposition he testified B. Weaver and J. Daniels began the conversation that if he could not meet the lower level of responsibility of a vibration engineer he could not become a field project manager. He acknowledged management discussed that his leadership and team building skills were not acceptable. His other comments in testimony appear not to have been made during the January 6, 2005 meeting but rather deal with his perception of why the comments in the warning letter do not apply to him.

e. Complainant's actions after the January 6, 2005 performance warning letter.

Complainant was instructed by his supervisor J. Daniels on how to prepare cost estimates and was assigned to prepare cost estimates involving valves for four projects: Craven County, Carr Street, South Hampton, and Okeelanta. J. Daniels reported the estimates were consistently incomplete and missing expense rates and anticipated man-hours even though such items were added by marking a "button" on the computer forms and the mistakes were repeatedly pointed out to the Complainant. J. Daniels reported that the cost estimate work was very basic work requiring attention to detail and that a junior engineer one or two years out of school would be expected to complete with the same level of instruction. J. Daniels considered the Complainant's problems doing cost estimates as inconsistent with the engineering level, work experience and field work the Complainant claimed as an engineer in his resume. In deposition the Complainant acknowledged that he was assigned work to prepare quotes for turbine outages and it was part of an "overabundance of assignments" being given him; though he testified in hearing that he was assigned diminished work duties like copying instruction books, writing an action item report for the upcoming Gregory outage, and being asked to write quotes.

Complainant was assigned to begin the planning work for upcoming work at the Gregory Power Partners, Texas job site and for the Colver site. The work included obtaining copies of drawings and generating data sheets for the work, among other items. The Complainant was given a list of possible vendors by J. Daniels and was directed to obtain pricing for seven items involved with the Gregory Power Partners spring outage. By e-mail dated January 18, 2005, supervisor J. Daniels directed the Complainant to continue working on the Gregory Power Partners job, to develop an Action Item List using the proposal DOR as a guide, and to discuss the matter with J. Daniels on January 24, 2005. He testified that his instruction to the Complainant was to "start knocking down these items on-by-one." He stated that he did not expect the Complainant to complete every item but to "complete over half for sure." He testified that the list included "all the things you need in preparation for an outage" and was exactly the type of work the Complainant was hired to do. In deposition J. Daniels testified that the Complainant was instructed to complete the action items one by one and he was expected to go and perform the majority of the items on the action list and participate and prepare to go to the Gregory Power Partners site. Late evening on February 14, 2005, the Complainant sent an e-mail to his immediate supervisor, J. Daniels and four other corporate individuals containing his "Gregory Action Item List Updated" which increased the action items to 68 and his comment "I have assigned names to this list, please feel free to make comments and update the information accordingly. The Complainant assigned 23 of the action items to supervisor J. Daniels and the customer as "owner responsibility"; reported he had completed preparing "outage inspection sheets"; reported he was still in progress to "prepare outage drawings"; reported he had completed the "Assembly drawing from MHI for L-0, L-1, L-2 and L-3" though "potential drawing requests to Japan will be arranged by Randy Kingman"; and assigned 40 of the remaining 42 action items to his immediate supervisor J. Daniels together with another supervisor. The Complainant testified that he completed the Gregory Action Item List on February 14, 2005 and would have done some of the other listed items had he been designated the field project manager.

During this period the Complainant was also counselled by his supervisor J. Daniels for attending departmental meetings in the gas turbines department without permission of that department head or himself. J. Daniels reported the gas turbines were not related to the Complainant's area of responsibility and Complainant had other assigned work to complete. He testified he considered these actions "odd behavior" by the Complainant. Complainant testified that he attended the meetings to learn about gas turbines since the Gregory outage involved gas turbines instead of steam turbines.

J. Daniels reported that the Complainant had been assigned pre-outage work for the Colver outage to pull drawings and prepare data sheets. He reported that as of the February 25, 2005 termination meeting the Complainant had failed to perform any of the assigned Colver outage work.

f. February 25, 2005 termination.

The Complainant met with B. Weaver on February 25, 2005. During this meeting the Complainant was given a written termination letter. The termination letter reminded the Complainant that on January 6, 2005 he had been warned that his job performance must improve to an acceptable level or he would be subject to immediate termination of employment. The letter noted that the Complainant had been tasked with performing work in preparation for an upcoming outage and that his work had been unacceptable such that another person had to be assigned to complete the work. From the evidence of record, this project assignment involved the Gregory Power Plant spring outage. The letter also noted that the Complainant had been assigned to prepare cost estimates for future work and that even when his manager informed him of errors in the work, the Complainant continued to repeat those errors. The letter stated that based on the above, the Complainant's employment was terminated effective February 25, 2005.

The Complainant testified he was told in the termination meeting that his Gregory Action Item List was not well received by management because he had been assigned to resolve the action items and had merely reassigned the items to his superiors. He stated he put management names next to action items because he considered he did not have authority to do those items since he had been told he would not be the field project manager at the Gregory Power Partners spring outage where some items would be done onsite.

J. Daniels testified in deposition that after the warning letter, the Complainant's performance on work assignments, including the Gregory Action Item List, was considered and the conclusion was made that hiring the Complainant had been a mistake.

Human Resource Manager, B. Weaver testified that during the termination meeting the Complainant did not raise any safety or retaliation issues. The Complainant gave B. Weaver two notebooks saying they belonged to the company and then "pretty much left the building."

- g. The Respondent established by clear and convincing evidence that the Complainant's employment was terminated for failure to perform assigned work at an acceptable level.

After deliberation on all the evidence of record and considering the credibility of all the witnesses, this presiding Judge finds that the Complainant demonstrated a sustained level of work performance and personal conduct that brought into question his professional experience, his ability to interact with others in the work environment, and his personal integrity such that human resources was consulted for guidance on addressing the Complainant's poor performance in light of Complainant's resume and recommendations. This concern was raised by the Complainant's immediate supervisor J. Daniels and his supervisor R. Innskeep to Human Resource Manager B. Weaver. The discussions between human resources and Complainant's supervisors resulted in the January 6, 2005 meeting with Complainant during which time the warning letter was delivered with specific performance shortfalls identified to job performance standards. None of the Complainant's protected activity under the ERA were contributing factors to the warning letter. The warning letter and meeting were directed to the goal of "turning the Complainant around" so that he would improve his overall performance, work up to his perceived potential, and the Respondent would salvage the monetary investment made in the Complainant.

Following the January 6, 2005 warning letter, the Complainant was assigned three groups of tasks to complete.

- (i) He was assigned to prepare cost estimates for valve work at four different locations. His work required review and direction from his supervisor on how to make revisions, but still resulted in the Complainant repeating the same errors in the work. The cost estimating work was described as a routine assignment that a much junior engineer would have been able to complete without repeated errors if given the same instructions.
- (ii) He was assigned to pull drawings and prepare data sheets for work to be performed as part of the Colver outage. By the time he was terminated on February 25, 2005, the Complainant had not performed any of the assigned work.
- (iii) He was assigned to prepare the Gregory Power Partners Action Item List using a DOR as a starting point. The action item list contained 68 action items. The Complainant was directed to complete as many action items as possible prior to the actual outage work and was reasonably expected to address each item one-by-one and to complete more than half the action items by obtaining necessary drawings, preparing data collection sheets, and arranging for necessary tools and services to be present at the outage site at the anticipated time. Late in the evening of February 14, 2005, the Complainant reported he had completed the Action Item List assignment. However, the Complainant had taken action on only three of the 68 action items, completing one. The Complainant reassigned almost all the remaining action items to his immediate supervisor J. Daniels to complete. The Complainant's action demonstrated clear non-performance of assigned duties, contempt toward his managers, and total disregard of the performance warning / counseling given just four weeks earlier as well as the project guidance given by J. Daniels on January 24, 2005.

The evidence establishes that the Complainant was essentially a non-functioning employee after counseled and warned to improve his performance in five essential functions of his position including the ability to multi-task and complete assignments in a timely manner. By his actions following the January 6, 2005 counselling / warning meeting the Complainant demonstrated that he could not complete assignments in a timely manner, could not multi-task, and could not support the team effort required of his position.

When given the opportunity to follow directions, to complete the work assigned within his position, to demonstrate improved job performance, the Complainant affirmatively demonstrated he was essentially a non-functioning employee.

After deliberation on all the credible evidence of record, this presiding Judge finds that the Respondent has established by clear and convincing evidence that the Complainant's termination of employment was for good cause unrelated to any protective activity under the ERA.

X. The Complainant is not entitled to relief under the ERA based on his June 26, 2005 complaint.

In that the Respondent has established by clear and convincing evidence that the Complainant's termination of employment was for good cause unrelated to any protective activity under the ERA, pursuant to 42 U.S.C. §5851(b)(3)(D) the Complainant is not entitled to any relief under the ERA and his complainant must be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the administrative file and evidence submitted by the Parties, this Administrative Law Judge enters the following:

1. At all times relevant to this proceeding, the Respondent was an employer within the meaning of the Energy Reorganization Act of 1974, as amended.
2. The Complainant was hired by Respondent on July 12, 2004 for the position of Field Project Manager.
3. The Complainant was assigned onsite for Respondent's clients at the Palisades Nuclear Power Plant on August 22, 2004 in the position of Mechanical Engineer – Vibration / Day.
4. The Complainant last worked at the Palisades Nuclear Power Plant on or about October 25, 2004.
5. The Complainant resumed work at the Respondent's Orlando office on or about October 25, 2004.

6. The Complainant received a warning letter regarding performance deficiencies from Respondent's Human Resource Manager, Bailey Weaver, and supervisor, John F. Daniels, on January 6, 2005.
7. The Complainant's employment with Respondent was terminated on February 25, 2005.
8. The Complainant's annual salary at the time of employment termination was \$75,010.00.
9. During the time of Complainant's employment with Respondent, Respondent was in the business of inspecting and performing periodic maintenance on turbines and generators in both nuclear and non-nuclear facilities.
10. John F. Daniels, as Respondent's Operations Manager for Steam Turbine Services, was the Complainant's immediate supervisor while Complainant was employed by Respondent.
11. George Tidwell served as Field Project Manager for work performed at the Palisades Nuclear Power Plant while the Complainant was assigned onsite work at the Palisades Nuclear Power Plant.
12. A degree conferred upon the Complainant by the New York Institute of Technology was a Bachelor of Science degree with a major in computer science.
13. The Bachelor of Science degree conferred upon the Complainant did not include a minor in mechanical engineering.
14. The Complainant established by a preponderance of the credible evidence that he engaged in protected activity by review and correction of pre-implementation work packages involving equipage at the Palisades Nuclear Power Plant between August 22, 2004 and September 2, 2004.
15. The Complainant failed to establish by a preponderance of credible evidence that he engaged in protected activity involving alleged "deficiencies on Mitsubishi Power Systems process" at the Palisades Nuclear Power Plant.
16. The Complainant failed to establish by a preponderance of the credible evidence that he engaged in protected activity involving alleged inappropriate work practices endorsed by Mitsubishi Power Systems at the Palisades Nuclear Power Plant.
17. The Complainant established by a preponderance of the evidence that he engaged in protected activity by reporting concerns involving moisture separator reheater (MSR) #9 at the Palisades Nuclear Power Plant.
18. The Complainant failed to establish by a preponderance of credible evidence that he engaged in protected activity by making a spare parts list to include in the final outage report.

19. The Complainant has established by a preponderance of the evidence that the Respondent had actual knowledge that the Complainant engaged in protected activity by changing procedural steps in specific pre-implementation work packages involving equipment at the Palisades Nuclear Power Plant.
20. The Complainant has established by a preponderance of the evidence that the Respondent had actual knowledge of the Complainant's protected activity involving moisture separator reheater #9.
21. The Complainant suffered an adverse employment action when his employment was terminated on February 25, 2005.
22. The Respondent has established by clear and convincing evidence that the Complainant's employment was terminated for reasons unrelated to his protected activities involving the Palisades Nuclear Power Plant.
23. The Complainant is not entitled to relief under the ERA based on his June 26, 2005 complaint.

ORDER

It is hereby ORDERED that **Complainant's June 26, 2005 complaint under the ERA is DENIED.**

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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, NW, 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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages. With your supporting legal brief you may also submit an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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.