CASE NO: 2012-ERA-00004

In the Matter of:

STEVEN COULTER,  
Complainant

v.

G.K. ENTERPRISES, et al.,  
Respondents

Appearances:  
Steven Coulter  
Complainant, pro se

Brian S. Schwartz, Esq.  
Klein Dub & Holleb, Ltd.  
For Respondents

Before:  
Paul C. Johnson, Jr.  
District Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 et seq. and its implementing regulations, 29 C.F.R. Part 24 (“the Act” or “ERA”). Complainant Steven Coulter filed a complaint with the Occupational Safety and Health Administration on or about September 17, 2010, alleging that he had been terminated from employment with Respondents because he had raised concerns about Respondent’s nuclear safety program. After investigating, OSHA dismissed the complaint. Mr. Coulter objected to the OSHA findings and requested a de novo hearing before an administrative law judge. On January 15, 2013, I presided over the formal hearing in Chicago, Illinois. The record was held open for the parties to submit written closing briefs. They have done so, and the matter is ripe for decision.

For the reasons set forth below, I conclude that Respondents did not violate the Act when they terminated Mr. Coulter’s employment. Consequently, the complaint will be denied.
Findings of Fact

Background

After serving as a reactor operator in the U.S. Navy, Mr. Coulter received a nuclear engineering degree from Texas A&M University. [Tr. 19.] While pursuing that degree, he obtained licenses as a reactor operator and a senior reactor operator. [Tr. 20.] He started working as a nuclear services manager with General Electric in 1977. [Id.] In the course of his employment, Mr. Coulter received a great deal of training in the nuclear industry. [Tr. 19.]

Mr. Coulter left General Electric in 1999 and went to work for the nuclear power division of Commonwealth Edison, now known as Exelon, where he worked from 1999 to 2003. [Tr. 20-21.] After retiring from Exelon, he worked for additional companies in the nuclear industry until joining Respondent Whiting Corporation (“Whiting”) in 2007. [Tr. 22; RX 1-4.] At Whiting, Mr. Coulter was Vice President and General Manager of the Nuclear Division. [Tr. 23; RX 1-4.] His sales duties in that position included finding opportunities, preparing proposals, negotiating, and delivering or helping to deliver project management. [Tr. 23.] He reported to Bruce Bechtel, Whiting’s Vice President of Operations. [Tr. 23; RX 4.] Mr. Coulter’s second-level supervisor was Jeff Kahn, President of Whiting. [Tr. 23.]

Whiting and Whiting Enterprises are wholly-owned subsidiaries of G.K. Enterprises. [Tr. 24.] When Mr. Coulter worked for Whiting, it consisted of a transportation group and a crane product group. [Id.] He felt that he was hampered in his job because Whiting did not have its own crane design and did not have enough in-house expertise to manufacture a crane design that would meet current standards of the Nuclear Steam Supply System. [Tr. 26.] He believed that because of Whiting’s lack of such capabilities, he was unsuccessful in proposals he made to AREVA, General Electric, Westinghouse, and Westinghouse Toshiba. [Id.] In his opinion, Whiting’s approach was to get the job, and then they would build the necessary crane to perform it. [Tr. 27.]

Eventually, Whiting started trying to get business in making single-failure-proof cranes, which Mr. Coulter described as cranes that are designed such to prevent uncontrolled lowering of loads if one component fails – in other words, cranes that are designed with backup systems to prevent uncontrolled lowering of loads. [Tr. 27-28.] Mr. Coulter referred to several of those contracts as “Vogtle 1,” “Vogtle 2,” and “Savannah River.” The Savannah River contract involved the design and manufacture of a single-failure-proof crane, and began with an engineering study in 2009. [Tr. 30.] The engineering study was due on a specific date and, four days before the due date, Mr. Coulter was advised by Jim Krueger that they would miss the due date. The engineering study was completed two weeks late. [Tr. 28-31; RX 7.]

1 In this Decision and Order, “Tr.” refers to the transcript of the formal hearing, “CX” refers to the Complainant’s Exhibits, and “RX” refers to the Respondent’s Exhibits.
Mr. Coulter raised no any safety concerns with Whiting during the course of his employment, from its beginning until after the receipt of his third evaluation in April of 2010. [Tr. 38.]

Mr. Coulter first raised what he alleges was a safety concern in connection with a project at Florida Power and Light’s Turkey Point plant. That project, which began in early 2009, involved engineering studies for the modification of a 145-ton crane to allow it to lift 180 tons. Shortly before he was terminated in July 2010, Mr. Coulter went to Florida for a meeting with FP&L with the understanding that the project was going to be performed by Whiting. When he arrived, however, he learned that the contract was to be signed by Respondent Whiting Services, LLC (“Whiting Services”). The contract required that “Subcontractor shall have in place a quality management system that complies with the applicable requirements of ISO 9001:2000.” [Tr. 40, RX 6 p. 10.]

Mr. Coulter described ISO as a program for manufacturing designed to ensure industry-wide quality standards. He communicated to various supervisory and management personnel at Whiting, including Dan Klasel, Mark Kwasny, Karen Whitt, Bill Horwath, and Bruce Bechtel, that he was concerned because Whiting did not have ISO certification but was expected to perform the contract, while Whiting Services, which did have ISO certification, was not qualified to perform the contract. [Tr. 43-47.] Mr. Coulter expressed his concerns within the three-week period before his termination on July 29, 2010. [Tr. 48, 60-61.] At the same time, Mr. Coulter also expressed concerns about the placement of closed water loop systems directly beneath the turbine crane at the Turkey Point plant; his concern was that if the crane failed, its load could “impact” the closed cooling water loop system, which was safety-related equipment. [Tr. 49-50.] He believed that if that accident happened, decayed heat could not be removed and there would be a release of nuclear radiation. 2 [Tr. 50.] According to Mr. Coulter, his major concern was with the requirement to comply with ISO standards. He testified that there is no relationship between ISO and nuclear safety. [Tr. 51-52.] His concern was not that there was in fact a nuclear safety issue, but that “everyone just assumed” that there were no problems without actually inspecting the equipment. [Tr. 53-54.]

Mr. Klasel is vice president and general manager of G.K. Enterprises. [Tr. 80-81.] He led the initial sales efforts when Bechtel, the prime contractor, contacted G.K. Enterprises, and prepared the estimate for the subcontract. [Tr. 82.] The contract was a commercial contract, not a nuclear contract; had it been a nuclear contract, it would have contained an Appendix B or reference to the quality requirements of NQA-1, and neither of those was involved in the contract. [Tr. 83.] Mr. Coulter’s communications with Mr. Klasel were by email; Mr. Klasel informed Mr. Coulter that the ISO requirement was “covered.” [Tr. 61, RX 14.] He responded that way because he had already discussed the issue with Ms. Whitt, and did not want to engage in an argument with Mr. Coulter. [Tr. 86.] Mr. Klasel and Mr. Coulter both went to FP&L for the contract signing, and Mr. Coulter left the meeting after about 20 minutes. At the time, Mr. Klasel did not understand that Mr. Coulter left because of frustration with the ISO issue, but thought he

2 Mr. Coulter did not use the term “nuclear radiation,” but instead analogized what could happen at Turkey Point to the accident at the Daiichi facility near Tokyo, as well as to Chernobyl, where such releases occurred.
left because he had a call in another state. [Tr. 82-83.] Mr. Klasel was aware of the ISO 9001 quality requirement, and addressed it internally with Ms. Whitt. The company transferred Ed Hain and Art Brownell from Chicago to the Monee office and had them trained in the ISO requirements in the same way that every other employee in Monee was trained. [Tr. 83-84, RX 8.] Sonia McKenzie was also trained in ISO requirements at Monee. [Tr. 85, RX 18.] Mr. Klasel and Mr. Coulter discussed the Turkey Point project, but it was not in terms of safety concerns; instead, Mr. Coulter had had some failures in other projects and needed a success, and wanted the Turkey Point project to be a Whiting, rather than Whiting Enterprises, project to improve his performance numbers. [Tr. 85.] Mr. Klasel explained to Mr. Coulter why it was appropriate for Whiting Services to take the contract, and Mr. Coulter did not offer any opposition other than the email discussed above.

Ms. Whitt was, at all relevant times, the risk manager and contract administrator for G.K. Enterprises. [Tr. 67.] In that position, she reviewed contracts – primarily the commercial terms – for compliance with company guidelines, in addition to other duties not relevant to this matter. [Id.] She reported directly to Jeff Kahn, president of G.K. Enterprises. [Tr. 68.] While the contract with FP&L was being negotiated, Mr. Klasel and Ed Hain consulted with Ms. Whitt about the ISO requirement. Ms. Whitt described ISO as a commercial standard that requires the organization to write its procedures, follow its procedures, and prove that it followed its procedures. [Tr. 68-69.] ISO is a commercial business process that has been incorporated in a number of enterprises, not just in the nuclear industry. [Tr. 69, 74-75.] Ms. Whitt reviewed the contract, and determined that Whiting Services did have the ability to meet the ISO requirements of the contract, because the Whiting Services office in Monee was ISO qualified. Thus, transferring personnel from their current division to the Monee office would cause Whiting Services to meet the ISO requirements. [Tr. 70-71.] Whiting Services sent the documentation of their plan to the prime contractor, which expressed no disapproval of Whiting Services’ plan. [Tr. 71-72.] About two weeks after the contract was signed, Mr. Coulter came to Ms. Whitt’s office and asked how Whiting Services could comply with the contract’s ISO certification requirement. Ms. Whitt explained to Mr. Coulter that ISO is concerned with the administration of the quality program, and that the Monee office had the necessary qualification. She told Mr. Coulter that with transfer of personnel to the Monee office and with proper training of those individuals, the ISO requirements would be met. [Tr. 72.] Mr. Coulter did not say anything to Ms. Whitt about nuclear safety, or about NUREG 0612, during their conversation. [Tr. 72-73.] His primary concern was with administration of the contract. [Tr. 73.] Had Mr. Coulter raised any issues regarding nuclear safety, Ms. Whitt would have addressed those concerns because part of her job as risk manager was to address safety issues. [Id.]

Mr. Kwasny was at all relevant times the quality assurance manager for Whiting. [Tr. 98-99.] Mr. Coulter expressed concerns to him with regard to the FP&L contract, specifically that it was being handled by Whiting Enterprises rather than by Whiting. The concerns were safety related; however, Mr. Kwasny considered that the contract was not safety related. [Tr. 101-102.] Additionally, the safety concerns were not related to nuclear safety, but were OSHA safety issues. [Tr. 102.] Mr. Kwasny did not report Mr. Coulter’s concerns to anyone at Whiting. [Tr. 103.] In his opinion, Mr. Coulter did not fully understand ISO. [Id.] Mr. Kwasny believed that Whiting’s plan for achieving compliance with the contractual ISO requirements was common in
the industry. ISO training consists primarily of reading assignments, and does not have a required number of hours associated with it. [Tr. 108.]

Mr. Bechtel was at all relevant times the vice president of operations at Whiting. [Tr. 112.] He reported directly to Mr. Kahn, the company president. [Id.] Mr. Coulter approached him about a month before Mr. Coulter’s termination and told him he was concerned about Whiting Services taking on the ISO contract involving FP&L. Mr. Coulter did not say anything about nuclear safety, or about safety at all, during that conversation, limiting it to whether Whiting Services taking on an ISO contract. [Tr. 150-151.] Mr. Bechtel told Mr. Coulter that Whiting Services’ Chicago and Monee offices were part of the ISO program. [Tr. 151.] Mr. Bechtel was aware that both Ms. Whitt and Mr. Klasel were looking at the issue, and he had a high degree of confidence in their decisions. [Id.]

**Performance Issues**

Mr. Bechtel hired Mr. Coulter to work at Whiting in a newly-created position as vice president and general manager of the nuclear division. [Tr. 113, RX 4.] The position was created in order to separate the nuclear business from the commercial business to grow Whiting’s nuclear products market segment. [Tr. 113.] One important function of the new position was to “oversee the development of nuclear customers and products within Whiting Corporation to meet the ongoing market demand of our immediate and potential nuclear customer base….” [Tr. 114, RX 4.] Although he hired Mr. Coulter because of Mr. Coulter’s technical and sales background in the nuclear industry, Mr. Coulter did not meet his expectations. [Tr. 114.] In general, Mr. Coulter required close supervision, failed to complete fundamental tasks or cultivate new projects, did not communicate properly within the organization or to other stakeholders. [Tr. 114-115.] Mr. Bechtel wrote Mr. Coulter’s performance evaluations. His first evaluation, for the period February 5, 2007 to February 5, 2008, reflected an overall rating of 3.2, which was a little above average. His second evaluation, for the period February 5, 2008 to February 5, 2009, reflected an overall rating of 3.1, which was average, or needing some work in some areas. His third evaluation, for the period ending February 15, 2010, reflected an overall rating of 2.8, which was a low rating. [Tr. 37-38, 115-116; RX 1-3.] On the third evaluation, Mr. Bechtel gave Mr. Coulter a score of 1.8 in client focus, which represented a need for significant improvement. [Tr. 116-117; RX 3.] Having poor customer relations is a hindrance to the nuclear division, and could have a large impact on business. [Tr. 117.] During the period that Mr. Coulter reported to Mr. Bechtel, Mr. Bechtel gave him numerous coaching sessions to improve his chances of success and the success of the organization. [Tr. 119.] After receiving the evaluation in April of 2010, Mr. Coulter spoke with Mr. Kahn in April, May, and June, complaining about the review and about his inability to work with Mr. Bechtel. [Tr. 189, 192; RX 5.] Mr. Kahn told Mr. Coulter that he had to work on normalizing his relationship with Mr. Bechtel. [Tr. 193; RX 5.]

In October of 2009, Mr. Coulter requested that Jim Krueger, an employee who reported to Mr. Coulter, roll over five days of vacation time from 2009 to 2010 due to a heavy departmental workload. [Tr. 120, 124; RX 9.] According to the Whiting employee handbook, rolling over more than two days of vacation time from one calendar year to the next requires the approval of the department head and of the president of the company. Mr. Coulter did not obtain approval from Mr. Bechtel or from Mr. Kahn. [Tr. 121-122, 175, 190.] Mr. Bechtel questioned
Mr. Coulter about the issue by email, and Mr. Coulter responded that he had discussed the rollover with Mr. Kahn, Laura Teggelaar (human resources manager for G.K. Enterprises), and Mr. Krueger, and that they did not think it would be a problem as long as the issue was handled formally. [Tr. 125; RX 9.] He also spoke with Ms. Teggelaar and represented to her that he had spoken with Mr. Kahn and Mr. Bechtel about rolling over Mr. Krueger’s vacation time. [Tr. 175.] The issue was not handled formally, however, and Mr. Bechtel determined that Mr. Kahn had not approved the rollover. He considered the rollover a violation of company policy. [Tr. 122-123, 125.] Compounding the issue was that Mr. Coulter took vacation time at the time he asked Mr. Krueger not to take it, even though he had asked Mr. Krueger to defer his vacation based on the departmental workload. [Tr. 124; RX 10.] Mr. Bechtel considered it poor leadership for Mr. Coulter to do so. [Tr. 124; RX 11.] Mr. Coulter left on vacation on October 16, 2009; on the afternoon of October 15, he sent an email notice reminding company personnel that he would be gone, ending the email with “Have fun. I know I will.” [Tr. 124; RX 10.] The email did not “set well” with Mr. Bechtel, because Mr. Krueger would see it and know that his supervisor was taking vacation during a period of supposedly heavy workload. Further, Mr. Bechtel interpreted the final sentences as sarcastic. [Tr. 124.] In addition, Mr. Coulter had not informed anyone at Whiting that he intended to go on vacation on October 16, 2009, and he in fact went into a negative leave balance when he did so. [Tr. 176.] He asked to meet with Mr. Coulter on the following day, but Mr. Coulter had left on his vacation. [Id.] While Mr. Coulter was on vacation, Mr. Bechtel discovered that he had been assigning a significant amount of the departmental workload to Mr. Krueger while Mr. Coulter was on vacation or doing other things. He found a change order that had been submitted in August and had not been acted upon. [RX 11.]

Mr. Bechtel met with Mr. Coulter on October 26, 2009 regarding the vacation rollover issue, in order to conduct a coaching session. [Tr. 125-126, RX 11.] He discussed the possible perception of Mr. Coulter’s actions as manipulating the rollover policies for his own benefit. He also discussed the fact that Mr. Coulter’s statements that he had discussed the employee’s rollover with Mr. Kahn and Ms. Toggelaar implied that he had obtained their approval, when Mr. Bechtel knew that he had not. [Tr. 125, RX 11.] Mr. Bechtel further raised the issue that Mr. Bechtel had inappropriately copied Ms. Whitt on his email requesting the employee to roll over his vacation time. [RX 11.] Mr. Bechtel focused on issues of judgment and integrity. [Id.] Mr. Coulter reacted badly to the coaching session, becoming angry, frustrated, and defiant, and saying he did nothing wrong. He accused Mr. Bechtel of questioning his integrity and told Mr. Bechtel that he would submit his resignation the next day. [Tr. 126-127, RX 11.] After speaking with Mr. Kahn and Ms. Teggelaar, Mr. Bechtel met again with Mr. Coulter on the same day and again on the following day. He told Mr. Coulter that he was a valuable member of the corporate team, but that Mr. Coulter needed to improve some performance issues. He explained his expectations going forward, and Mr. Coulter showed some contrition and agreed to try to work on rehabilitating himself. [Tr. 128.] He withdrew his resignation. [Id., RX 11.] According to Mr. Bechtel, however, Mr. Coulter’s performance did not improve after the October 26 and 27 discussions. [Tr. 128.]

Mr. Coulter was involved with a Whiting contract at the Savannah River plant. Mr. Bechtel, as part of his duties, loaded due dates for customers into the master schedule for the project, updating them weekly. [Tr. 129.] On January 19, 2010, four days before the due date for the project, Mr. Coulter sent Mr. Bechtel an email telling him for the first time that the company
would not meet the due date. [Tr. 130; RX 7.] Mr. Bechtel told Mr. Coulter that he expected the project would be completed by January 25 or 26, but it was not completed until early February. [Tr. 131.] On January 28, 2010, during the course of the Savannah River project, Vicki Patton, a representative of the customer, complained to Mr. Kahn that she could not get answers about the project from Mr. Coulter. [Tr. 132, 185-187; RX 12.] Ms. Patton told Mr. Kahn that Mr. Coulter had promised to get a project to her by the previous week, but had not done so. [Tr. 187.] She told Mr. Kahn that Mr. Coulter had then promised it to her by January 29, and that she had been trying to reach Mr. Coulter but he was not returning her calls. She then called Mr. Krueger, who had told her it would not be done by that date. [Tr. 187-188.] Also during the course of that project, Mr. Klasel was called by an engineer from Reactor L, who expressed frustration that he could not get a report from Whiting that was being handled by Mr. Coulter. [Tr. 86.] After Mr. Coulter was terminated, Whiting has done no more work with Savannah River. [Id.] Savannah River has not called Whiting for work, and will not return Whiting’s calls, even though Savannah River had been a Whiting customer since 1947. [Tr. 87, 187.] Mr. Kahn characterized Mr. Coulter’s performance on the Savannah River contracts as a failure to communicate honestly with the customer. [Tr. 188.] Mr. Coulter told Mr. Kahn that he had given Ms. Patton the date of January 29 just to “buy time,” knowing that the project would not be completed by that date. [Id.] In Mr. Kahn’s opinion, that type of behavior violates the integrity standards he wants the company to have with its customers, and had Mr. Coulter been forthright with the problems earlier, the company could have devoted more resources to it. [Id.] Mr. Kahn brought up the issues with Savannah River when Mr. Coulter approached him after receiving his April 2010 performance evaluation, and Mr. Coulter told Mr. Kahn that Savannah River was “okay” with the delays. Mr. Kahn knew that Savannah River was not “okay” with the delays because they complained directly to him, the company president, about them. [Tr. 189.]

In December of 2009, Whiting had the opportunity to respond to a request for information from the Arizona Public Services Corporation, involving a contract for three single-failure-proof trolleys and an electrical control modernization. [Tr. 133.] The potential contract was a significant one for Whiting, as it could have represented 40-50% of the company’s annual revenues and may have resulted in a long-term relationship with the customer. [Tr. 134.] Mr. Coulter’s role was to communicate within Whiting with all the divisions that may have been involved in fulfilling the contract, obtaining information and estimates from them, and to map out a game plan for submitting a proposal to the customer. [Tr. 134-135.] Instead, Mr. Coulter created a lot of confusion and ended up creating a high-level document rather than a detailed proposal. [Tr. 135.] At one point, Mr. Coulter approached Mr. Kahn about partnering with Aseeco, a competing crane company, to meet an equipment requirement of the proposal, and Mr. Kahn said it was worth talking about along with Mr. Bechtel. [Tr. 137, 191.] Mr. Coulter than represented to Mr. Klasel that Mr. Kahn had given him the “green light” to partner with the competitor, when Mr. Kahn had not done so. [Tr. 137.] Mr. Bechtel and Mr. Kahn considered that representation to be an integrity issue, and was an illustration of Mr. Coulter’s lack of forthrightness, which he considered to be a pattern. [Tr. 137, 191.] When Mr. Bechtel asked Mr. Coulter whether the customer wanted an information request or a detailed proposal, Mr. Coulter responded that it was an information request. However, at about the time Mr. Coulter was terminated, the customer called Whiting to discuss Whiting’s “bid,” which surprised Mr. Bechtel. He said he had been told that the customer was seeking information, but the customer said that the project was a “go.” [Tr. 136.]
Additionally, Mr. Klasel received a call from Armando Coco of Exelon, another customer, regarding the project for the design of single-failure-proof cranes. Mr. Coco said that he wanted to speak with Mr. Coulter’s boss, because he was having some difficulties with Mr. Coulter. Mr. Klasel gave Mr. Coco the phone number for Mr. Bechtel, and Mr. Coco called Mr. Bechtel. [Tr. 138.] Mr. Coco told Mr. Bechtel that he was livid over his dealings with Mr. Coulter, because Mr. Coulter changed his approach to the project after Mr. Coco had gained approval for his earlier approach up through his own management chain. [Tr. 138.] He said that Mr. Coulter was having a “meltdown.” [Id.] Mr. Coulter later told Mr. Klasel that Mr. Coulter had told Mr. Coco that his contact with Mr. Bechtel had cost Mr. Coulter “tens of thousands of dollars.” Mr. Coco again said that he thought Mr. Coulter was “melting down.” [Tr. 88.] Mr. Klasel regarded Mr. Coulter’s comments to Mr. Coco as highly unprofessional, and passed them on to Mr. Bechtel. [Tr. 89.]

On a Friday afternoon in July of 2010, after Mr. Coulter had expressed his concerns regarding the ISO requirements of the FP&L contract to various people at Whiting, Mr. Bechtel tried to reach Mr. Coulter, but Mr. Coulter was not at work. Mr. Bechtel realized that Mr. Coulter had been unavailable on another recent Friday afternoon, and decided to check Mr. Coulter’s time and attendance. On July 19, 2010, he printed a spreadsheet showing the times Mr. Coulter had reported to and left the office since April 5 of that year. [RX 13.] The times were generated from the automated security system at Whiting’s office, which records each time that an employee swipes a card for entry or exit. [Tr. 142.] The spreadsheet shows that Mr. Coulter frequently arrived at the office after the normal starting time of 8:00 a.m., and frequently left the office at midday, particularly on Fridays. [RX 13.] Mr. Coulter was expected as part of his job duties to attend a daily sales meeting at 8:15 a.m., but arrived too late to do so on many occasions. [Id.; Tr. 143.] After reviewing the spreadsheet, Mr. Bechtel decided to have another coaching session with Mr. Coulter. [Tr. 144.] He met with Mr. Coulter and told him that there were some issues with his attendance, and Mr. Coulter responded positively and offered to take some vacation time. He also said that he had worked some other hours in lieu of the time that did not show up on the spreadsheet. [Id.] Mr. Bechtel told him he did not need to take any vacation time, but that he needed to record his time properly. Mr. Coulter said he would make the changes. [Tr. 144-145.] Mr. Bechtel then met with Mr. Coulter a second time because he did not follow Mr. Bechtel’s instructions on how to complete his time sheet. [Tr. 145.] At this second meeting, Mr. Coulter became argumentative and defiant, refusing to follow the fundamental business practices as set out by Mr. Bechtel. [Id.]

When conducting a merit review in March or April of 2010, before Mr. Coulter expressed his concerns to Mr. Bechtel regarding the ISO requirements of the FP&L contract, Mr. Bechtel decided not to award Mr. Coulter a merit increase. [Tr. 140.] He made the decision based on the issues involved with the October coaching session and Mr. Coulter’s lack of progress thereafter. [Tr. 141.]
Termination

After his discussions in July with Mr. Coulter, Mr. Bechtel made the decision to terminate Mr. Coulter’s employment. [Tr. 145-146.] The reason for the decision to terminate Mr. Coulter was not the time and attendance issues themselves, but Mr. Coulter’s argumentative and defiant response to Mr. Bechtel when he tried to coach him about them. [Tr. 146-147.] Mr. Bechtel spoke with Ms. Teggelaar about Mr. Coulter’s time and attendance problems, and he called Mr. Kahn who was, at that time, traveling in China. [Tr. 146, 178; RX 8.] Ms. Teggelaar believed that the decision to terminate Mr. Coulter was well-considered, based on his violation of company policies and integrity issues. [Tr. 177-178.] When he called Mr. Kahn, Mr. Bechtel informed Mr. Kahn of his two meetings with Mr. Coulter concerning the latter’s time sheets, and Mr. Coulter’s unsatisfactory response to him. He told Mr. Kahn that Mr. Coulter’s refusal to accept feedback, and the associated communications, were a continuation of his performance pattern dating back to October of 2009. [Tr. 146, RX 8.] He believed that Mr. Coulter’s attitude showed that Mr. Coulter “feels he can work under his own guidelines.” [RX 8.] In addition, Mr. Bechtel told Mr. Kahn that Mr. Coulter had had Amy Pickens complete his expense reports, which Mr. Bechtel considered “unacceptable under any circumstances.” [Id.] After Mr. Kahn returned from China, he, Mr. Bechtel, and Ms. Teggelaar met to discuss Mr. Coulter. Mr. Bechtel told the others that the subjects outlined in his telephone call and email to Mr. Kahn were a continuing pattern in Mr. Coulter’s performance, showing disregard for company policy, not being open to feedback, and defiance. [Tr. 148.] The three individuals involved in the discussion did not talk about Mr. Coulter’s concerns about the ISO requirements of the FP&L contract, and they were not considered. [Tr. 151, 179.] The decision was made to terminate Mr. Coulter and, on July 29, 2010, he was terminated at a meeting with Mr. Bechtel and Ms. Teggelaar. [Tr. 149.] He was informed that the company had “decided to go in another direction,” and was handed an agreement to sign. Ms. Teggelaar escorted Mr. Coulter to his office to pick up his personal belongings, and then out the door. [Tr. 56, 149.] When he was informed that his employment had been terminated, Mr. Coulter did not make any reference to the ISO requirements of the FP&L contract or any other safety concerns. [Tr. 179.]

During his employment with Whiting, Mr. Coulter was given annual performance evaluations, which were supposed to take place on or about his anniversary date with the company. His first two evaluations were fairly close to his anniversary date in February, but his third and last evaluation was about two months late. [Tr. 34.] His first evaluation, for the period February 5, 2007 to February 5, 2008, reflected an overall rating of 3.2. His second evaluation, for the period February 5, 2008 to February 5, 2009, reflected an overall rating of 3.1. His third evaluation, for the period ending February 15, 2010, reflected an overall rating of 2.8. [Tr. 37-38; RX 1-3.] Mr. Coulter had not raised any safety concerns with Whiting during the course of his employment, from its beginning to the receipt of his third evaluation. [Tr. 38.]

After Mr. Coulter’s termination, Whiting’s nuclear business almost tripled. [Tr. 90.]
Conclusions of Law

In a case under the ERA, a complainant must demonstrate by a preponderance of the evidence that his or her protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. See 42 U.S.C. § 5851(b)(3)(C); Speegle v. Stone & Webster Constr., Inc., ARB No. 11-029-A, ALJ No. 2005-ERA-6, at p. 9 (ARB Jan. 31, 2013); Kester v. Carolina Power & Light Co., ALJ Case No. 2000-ERA-031, ARB Case No. 02-007, at p. 7 (ARB Sept. 30, 2003) (citing Dysert v. Sec’y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997)). That is, the complainant must prove by a preponderance of the evidence that (1) complainant engaged in protected activity under the ERA, (2) that the employer took adverse action against the complainant, and (3) that the protected activity was a contributing factor in the adverse action. Hoffman v. NextEra Energy, Inc., ARB No. 12-062, ALJ No. 2010-ERA-011 at p. 5 (ARB Dec. 17, 2103); Kester, ARB Case No. 02-007, at 3. If a complainant meets this burden, the employer can nevertheless avoid liability if it can demonstrate by clear and convincing evidence that “it would have taken the same unfavorable personnel action in the absence of [the employee’s protected activity].” 42 U.S.C. § 5851(b)(3)(D).

Mr. Coulter Did Not Engage in Protected Activity

Under the ERA, protected activities include notifying an employer of an alleged violation of the ERA, refusing to engage in any practice that is unlawful under the Act, commencing or causing to commence a proceeding under the ERA, and testifying, participating or assisting in any manner in such a proceeding or in any other action to carry out the purposes of the ERA. 42 U.S.C. §§ 5851(a)(1)(A)-(F); 29 C.F.R. §§ 24.102(a) and (c). In addition to a formal complaint, an ERA protected activity includes an informal complaint about nuclear safety or a violation of the Act which implicate safety “definitively and specifically.” Consequently, the ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. Stone & Webster Eng’g Corp. v. Herman, 115 F.3d 1568, 1571 (11th Cir. 1997); Amer. Nuc. Res., Inc. v. U.S. Dep’t. of Labor, 134 F.3d 1291, 1295 (6th Cir. 1998). Additionally, the complainant must actually believe a violation has occurred and his belief must be objectively reasonable. Melendez v. Exxon Chemicals Americas, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. 25 (ARB July 14, 2000). While it doesn’t matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations of [the Act].” See Minard v. Nerco Delamar Co., 1992-SWD-00001, slip op. at 8 (Sec’y Jan. 25, 1995). The subjective belief of the complainant is not sufficient. Kesterson v. Y-12 Nuclear Weapons Plant, 1995-CAA-00012 (ARB Apr. 8, 1997). The reasonableness of the complainant’s belief regarding statutory violations by an employer is

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to be determined on the basis of the knowledge available to a reasonable person, with the complainant’s training and experience, under the same circumstances. Melendez, ARB No. 96-051, slip op. at 27.

In this case, Mr. Coulter alleges that he engaged in protected activity when he expressed concerns to several supervisors and managers at Whiting over the ISO requirement in the FP&L contract. For the reasons set forth below, I conclude that his concerns were not related to nuclear safety, and that he therefore did not engage in protected activity.

The FP&L subcontract between Whiting Enterprises and Bechtel for work at the Turkey Point plant required Whiting Enterprises to “have in place a Quality Management System that complies with the applicable requirements of ISO 9001:2000.” [RX 6, p. 10.] That requirement means that Whiting Enterprises was required to write its procedures, follow its procedures, and prove that it followed its procedures. It is a process requirement that is not limited to the nuclear industry, but is used across multiple industries. It does not relate to nuclear safety, or to any kind of safety concern, nuclear or otherwise. Additionally, the contract involved was a commercial contract, and not a nuclear contract, as it did not contain any of the standard terms that are contained in nuclear contracts. Finally, Respondents have established that Whiting Services, the actual signatory on the contract, did in fact have certification that it met the ISO requirement of the contract. [RX 15, 17, 18.] Thus, even if Mr. Coulter believed that a failure to comply with the ISO requirement implicated nuclear safety, his belief was objectively unreasonable.

I find, however, that Mr. Coulter did not subjectively believe that the ISO requirement involved nuclear safety. He raised his concerns within Whiting to Dan Klasel, Mark Kwasny, Karen Whitt, Bill Horwath, and Bruce Bechtel. He did not mention any safety concerns when he spoke with Mr. Klasel, Ms. Whitt, Mr. Horwath, or Mr. Bechtel. He did mention a safety concern when he spoke with Mr. Kwasny, but his concern was with general workplace safety, and not with nuclear safety. Furthermore, he made it clear to Mr. Klasel that he wanted the Turkey Point project to be a Whiting, rather than Whiting Enterprises, project in order to improve his performance numbers after some performance failures. Finally, when asked at the hearing what the connection was between ISO and nuclear safety, Mr. Coulter replied, “None.” [Tr. 52.] I find that Mr. Coulter’s references to Chernobyl and the Fukushima nuclear plant disasters were made in an after-the-fact attempt to turn his concern over credit for the contract into a nuclear-safety issue, and he did not have those incidents on his mind when he expressed his concerns over the ISO requirement.

Based on the foregoing, I find that Mr. Coulter did not raise a nuclear safety concern when he questioned various individuals at Whiting about the ISO 9001 contract requirement. The requirement is not related to nuclear safety, and Mr. Coulter did not have an actual or objectively reasonable belief that it is.

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4 In his written post-hearing brief, Mr. Coulter points to a different contractual requirement, compliance with NUREG 0612, to show that his concerns were related to nuclear safety. There is no evidence, however, that he raised any concerns over Respondents’ ability to comply with that requirement.
Mr. Coulter Suffered an Adverse Employment Action

There is no dispute that Mr. Coulter was terminated from employment with Whiting, and therefore suffered an adverse employment action. I so find.

Engaging in Protected Activity Was Not a Contributing Factor in the Decision to Terminate Mr. Coulter

Because Mr. Coulter did not engage in protected activity, he cannot establish that engaging in protected activity contributed to the decision to terminate him. I find, therefore, that he did not meet his burden to show that it did.

Even if his expressed concerns over the ISO provision of the FP&L were considered to be protected activities, I find and conclude that his expression of them did not contribute to the decision to terminate his employment. Mr. Bechtel testified persuasively about Mr. Coulter’s declining performance and his lack of candor with customers and within the company. He also testified credibly that the impetus for his review of Mr. Coulter’s time and attendance records was that Mr. Coulter was not present on a Friday afternoon when Mr. Bechtel was looking for him, and that Mr. Bechtel recalled that Mr. Coulter had been absent on a Friday afternoon before. I credit Mr. Bechtel’s testimony that he proposed Mr. Coulter’s termination because of Mr. Coulter’s failure to follow Whiting’s business practices, and his argumentative and defiant responses to attempts to correct his conduct, for the nine months prior to his termination. I also credit Mr. Kahn’s testimony that he concurred with Mr. Bechtel’s opinion of Mr. Coulter’s performance and integrity issues, and that Mr. Coulter’s concerns about the ISO requirement of the FP&L contract played no role in Mr. Kahn’s decision. I credit Mr. Bechtel’s, Mr. Kahn’s, and Ms. Teggelaar’s testimony that they did not discuss or consider Mr. Coulter’s concerns over the ISO contract when they agreed that he should be terminated.

Respondents Would Have Terminated Mr. Coulter When They Did in the Absence of His Concerns Over the ISO Provision

If a complainant makes out a prima facie case of a violation of the ERA, the employer nevertheless may not be found liable if it shows by clear and convincing evidence that it would have taken the same adverse action even in the absence of protected activity. Although I have found that Mr. Coulter has not made out a prima facie case, I will, out of an abundance of caution, address whether Respondents have met that burden.

Beginning in October of 2009, Mr. Coulter was counseled on several occasions by his immediate supervisor, Mr. Bechtel, about his performance and integrity issues. Those issues would be problematic in any employee, but are clearly unacceptable in a senior manager. In October of 2009, Mr. Coulter violated company policy by approving a vacation rollover for his subordinate employee without first obtaining the permission of the company president. When Mr. Coulter testifies that he did not express those concerns to Mr. Kahn, and there is no evidence that anybody else did.

Mr. Coulter argues that as the department head, he had the authority to approve the vacation rollover and that Mr. Bechtel did not need to be involved; and therefore, he did not violate company policy. To the contrary, that policy...
questioned about the rollover, Mr. Coulter implied to company personnel that he had obtained the approval of Mr. Bechtel and Mr. Kahn, but he had not. When he was counseled by Mr. Bechtel over his failure to follow policy, Mr. Coulter became angry and defiant and threatened to resign, claiming that Mr. Bechtel was questioning his integrity. Mr. Bechtel had reason to do so, based on Mr. Coulter’s implication that he had obtained approval from the appropriate quarters for the vacation rollover. Ultimately, Mr. Coulter was persuaded not to resign. However, his internal and external communications regarding company projects remained problematic. Of particular concern was his admission that he gave a customer a project completion date he knew he could meet, simply in order to “buy time.” His conduct in that regard again gave his superiors reason to question his integrity. They were reasonably concerned that he was not an effective company representative, and their concerns were borne out when they lost a customer who had been with the company for almost 65 years. Respondents had further reason to question Mr. Coulter’s integrity when Mr. Bechtel discovered his long pattern of coming to work late and leaving early. Although Mr. Coulter hinted through questions at the hearing that he could have been working off site, he never made any such claim either to Mr. Bechtel or in his hearing testimony. Mr. Bechtel engaged in numerous coaching sessions with Mr. Coulter to correct his behavior, but Mr. Coulter became angry and defiant, and his conduct did not improve.

In addition, Mr. Coulter’s evaluations deteriorated over time. Although he argues that his overall rating did not fall much, from 3.2 to 2.9 over time, individual marks within his evaluations did decrease significantly. For example, his grade for “client focus” deteriorated from 3.0 in his first two evaluations to 1.8 in his last. His grade for “communications” fell from 3.0 in his first evaluation to 2.25 in his second and 2.0 in his last. His grade for “judgment/decision making” fell from 3.5 in his first two evaluations to 2.25 in his last. His grade for “leadership” fell from 3.0 in his first two evaluations to 2.0 in his last.

Based on Mr. Coulter’s documented decline in performance, his lapses of integrity, and his poor response to his employer’s attempts to help him improve persuade me that Respondents have shown by clear and convincing evidence that he would have been terminated even in the absence of his having expressed concerns over the ISO term in the FP&L contract.

**Conclusion**

Although Mr. Coulter was terminated from his employment, he has failed to show that he engaged in protected activities or that doing so contributed to the decision to terminate him. Assuming that he has so shown, Respondents have proven by clear and convincing evidence that they would have terminated his employment even in the absence of such activities.
ORDER

Based on the foregoing, IT IS ORDERED that the complaint in this matter is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

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.