



Issue Date: 22 September 2017

ARB No.: 14-020

Case No: 2013-ERA-00006

In the Matter of:

PERRY ELLIOTT,

Complainant,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

APPEARANCES: Perry Elliott,
Self- Represented Complainant

Tricia Roelofs, Esq.
Regina Koho, Esq.
Attorneys for Respondent

BEFORE: DANA ROSEN
Administrative Law Judge

DECISION AND ORDER

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 24.¹ Per 29 CFR §24.107(a), all proceedings will be held in a manner consistent with the procedural rules and evidentiary rules set forth in federal regulations at 29 CFR Part 18. Those parts of the complaint unrelated to the ERA cannot be addressed in these proceedings.² The formal hearing was held on Wednesday, March 30, 2016, in Knoxville, Tennessee.

¹ Federal Register, Volume 76, pages 2808 to 2826 (January 18, 2011)

² The Complaint contains allegations of violations related to Occupational Safety and Health Act of 1970, Section 11(c). Such Complaints are addressed under a separate appellate process (see 29 CFR Part 1977) and are not part of the current proceeding under the ERA.

Complainant's³ Exhibits 1, 4, 5, 9 through 15, and 17 were admitted into evidence. Complainant withdrew 16, 17, 18, and exhibit 19 was excluded. Respondent objected that they were not relevant, and the objection was sustained.⁴ Respondent's Exhibits 1 through 16, 18 through 20, and 22 through 25 were admitted into evidence. ALJ exhibits 1 – 4 were admitted into evidence. Joint Stipulations of Fact were admitted into evidence. (JX 1). Complainant's affidavit was admitted into evidence. (JX 2). Both Complainant and Respondent submitted post-hearing briefs.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the Parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Complainant and Respondent have stipulated and agreed to issues of fact, and this Administrative Law Judge finds them as fact. (JX 1)

ISSUES

1. Whether Complainant engaged in activity protected under the Act?
2. Whether Complainant suffered an adverse employment action?
3. Whether the protected activity was a contributing factor in the alleged adverse employment action?
4. Whether Respondent would have taken the same adverse action in the absence of the protected activity?
5. Whether Complainant is entitled to damages?

I. APPLICABLE STANDARDS

The Employee Protection section of the ERA provides:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his 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.);

(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;

³ "Complainant" is used in this decision for the proper name of the individual who is the subject of this decision. "Respondent" is used for the name of the Employer Respondent.

⁴ The following abbreviations apply: JX – joint exhibit; ALJX – Administrative Law Judge exhibit; CX – Complainant's exhibit; RX - Respondent's exhibit, TR – Transcript of hearing.

- (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, as amended;
- (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.⁴

The ERA is designed to protect workers who report safety concerns and to encourage nuclear safety generally.⁵ To be protected, the employee's activity must definitively and specifically implicate nuclear safety.⁶

The parties' burdens of proof in an ERA case are set forth in the Act as follows:

- (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.⁷

⁴ 42 U.S.C. § 5851(a)(1)(A)-(F) (2014).

⁵ American Nuclear Resources, Inc. v. U.S. Department of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998).

⁶ Id.; Hoffman v. Nextera Energy, Inc., ARB No. 12-062, ALJ No. 2010-ERA-11 (ARB Dec. 17, 2013), slip op. at 8.

These are the same burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).⁸ In order to prevail in his case, Complainant must show by a preponderance of the evidence that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to the Tennessee Valley Authority (TVA) to show by clear and convincing evidence that it would have taken the adverse action regardless of Complainant's protected activity.⁹ The TVA can prevail if it demonstrates either that Complainant cannot establish one of the three listed elements, or that it would have taken the same action it did regardless of his protected activity.

SUMMARY OF ARGUMENTS

Complainant's Argument - Complainant worked for a contractor at the Watts Bar Nuclear Plant, Tennessee Valley Authority (TVA). Complainant alleges he was retaliated against because he changed contractor's work status to show planning was complete, when it was not complete, so his supervisors could earn a bonus. After working as a contractor to TVA, he was hired by the TVA as a full time TVA employee. Prior to being hired full time, he had 2 arrests for DUI. After he was hired by the TVA full time, he was arrested for driving under the influence when he was driving the wrong way on the highway early in the morning. He was required to self-report all legal actions to the TVA. His unescorted nuclear access authorization was suspended after the DUI. He was required to attend a substance abuse examination by a Tennessee Valley Substance Abuse Expert, Dr. Sowter. During the examination to determine his fitness for duty, and whether his unescorted access to a nuclear facility could be reinstated following the DUI, he told Dr. Sowter that he changed completion documents when he was a contractor, so his supervisors could earn bonuses. He told her that "management giving us the order to cover those documents." Complainant's unescorted nuclear access authorization was not reinstated. Without unescorted access, he was terminated from employment.

Complainant alleged he was retaliated against when his unescorted access to a nuclear facility was not reinstated. Complainant alleged he was retaliated against when as a result of not having unescorted access to a nuclear facility, his job was terminated at the TVA nuclear facility. Complainant alleged that the termination due to his third DUI was a pretext to terminate his employment at the TVA nuclear facility alleging it was in retaliation for his changing work status for bonuses years prior when working as a contractor for the TVA. Complainant alleged it was in violation of the ERA Whistleblower statute.

Respondent's Argument - Complainant was arrested for his 3rd DUI. Under the Nuclear Regulatory Commission Regulations, an employee must show to TVA that he is fit for duty to work in a nuclear facility. The TVA must have a reasonable assurance that the employee does not have issues with alcohol abuse. Under the NRC Regulations, TVA is required to have a substance Complainant's abuse expert independently conduct a fitness for duty examination. This is independent from TVA management. In this case, the fitness for duty examination was conducted by Dr. Sowter. Complainant made statements to Dr. Sowter that he did not have control over his alcohol abuse, and did not give her reasonable assurance that he would not enter

the nuclear plant intoxicated.⁵ Dr. Sowter stated it is not the substance of his statement that he allegedly falsified documents, but his deflection from his repeated alcohol abuse. Several weeks after the interview with Mr. Elliott, Dr. Sowter looked back at his statement that he falsified documents, became concerned, and reported the statement. She reported it to the TVA Office of General Counsel, who reported it to TVA's Office of Inspector General, who investigated. Respondent argued that Dr. Sowter had no reasonable assurance that Complainant did not have an ongoing substance abuse problem, which was the reason his unescorted nuclear access to the nuclear plant was denied. This led to automatic termination because he did not have unescorted access to the nuclear plant. One of the requirements of his job with TVA was unescorted nuclear access. Respondent argued that Complainant was not retaliated against because he allegedly changed documents so managers could earn bonuses in 2010. Respondent argued Complainant was terminated in 2012 for not having the required unescorted nuclear access authorization, due to his 3rd DUI arrest.

TIMELINE OF EVENTS

9/87	DUI
1/11/04	DUI
1/7/12	DUI (RX 2)
1987	Contractor –Complainant hired to work for several nuclear plants as contractor
9/10	Complainant alleges he made document falsification for bonuses while still contractor
9/27/10	Complainant hired by TVA as full-time employee
11/11	Email to Mr. Swafford at TVA regarding alleged falsification for bonuses. No action taken against complainant
1/7/12	DUI (3 rd)
1/9/12	Complainant self-reported legal action, as required for employment with TVA
1/9/12	Dr. Lavin psychology evaluation due to DUI
1/9/12	Dr. Sowter substance abuse expert email recommending suspension of unescorted nuclear access authorization with full determination of fitness
1/9/12	Unescorted nuclear access suspended due to DUI
1/10/12	Nonwork status since unescorted access suspended due to DUI
1/25/12	Employee Assistance Program memo for alcohol abuse
2/2/12	Dr. Sowter TVA substance abuse expert interview and evaluation
2/14/12	Employee Assistance Program memo recommending counseling for alcohol abuse, TVA determines whether Complainant can return to work
2/15/12	Dr. Lavin psychology evaluation
2/16/12	Dr. Sowter email to the Office of General Counsel regarding falsification of documents for bonuses, DUI evidence, lack of trust in Complainant
2/29/12	Office of Inspector General investigation
4/18/12	Unescorted nuclear access authorization denial letter due to alcohol abuse

⁵ Respondent argued that it discovered two separate work e-mails from Complainant, where he wrote that he came to work intoxicated that day. Respondent submitted the emails into evidence.

4/18/12	Notice of termination because unescorted access authorization denied due to alcohol abuse
4/24/12	Complainant requests independent review of unescorted authorization denial
5/10/12	Independent denial review
5/10/12	Denial upheld
5/23/12	Final decision of denial
2012 summer	2 nd Office of Inspector General interview

FINDINGS OF FACT

Complainant Perry Elliott Testimony (TR 30-65)

Complainant testified he started working in 1987 as a contractor for various nuclear plants.

Complainant testified that in 2009, he was a contractor working in the maintenance planning group at Watts Bar Nuclear Plant. In 2012, his supervisor suggested he apply for a job with the Tennessee Valley Authority (TVA). Complainant was hired as a maintenance specialist with the TVA. (TR 30-31)

Complainant testified that on January 7, 2012, he was driving a vehicle, was pulled over by a police officer, and issued a ticket for driving under the influence. Complainant explained he was out with some friends and they went to one bar and then another bar. When he left the bar, he went to check on his boat which had been leaking. He turned the vehicle around intending to go to the boat dock and was “stopped on the way back going to the dock.” (TR 31-32)

Complainant self-reported the illegal action, which was required as a TVA employee. Complainant testified that because of the DUI, he went through TVA required counseling and met with Dr. Sowter, the substance abuse examiner. (TR 32) Complainant testified that he “went to counseling for driving under the influence ticket and in order to get my clearance back and I had talked to the person, I think her name was Haley Foster downtown and I was released to go back to work after I talked to Dr. Sowter.” (32-33)

Complainant testified that his protected activity was when he was told to falsify planning documents for bonuses. He claimed that was protected activity under the ERA. (TR 33) Complainant stated he falsified the documents “while I was still a contractor,” 2 to 3 days before “I joined TVA as a permanent employee.” (34) Complainant testified that in September 2010, there was a big contractor picnic and they “had a big celebration and everybody is all happy we made the planning milestone so they could get their whatever bonus.” (34)

Complainant testified that he met with J. D. Shelton [Special Agent with OIG] and told him that “TVA had ordered me to do this falsification of documents sort of kind of... All I know is he asked me to check it and make sure that they had done their job. I mean, there really wasn’t--- none of it was somewhat legal, but I was just doing what I was told to do that day and they made a joke of it later.” (33)

Complainant testified that in his opinion, he was not terminated because of his arrest for driving under the influence, but was terminated because he reported to Mr. Shelton, the agent with the Office of Inspector General (OIG) (35, 39). "My clearance was revoked which led the next day to them terminating my employment." (35) Complainant testified that he was told the reason for his termination was "that my authorized whatever access, my nuclear clearance had been revoked and that's why they terminated me and access was terminated." (35) Complainant testified he was advised in writing, "They told me in writing that it was because I was somewhat of an alcoholic and didn't belong in their realm of business out there." Complainant testified he believed he was terminated "because I told on them. It's just as simple as that." Complainant testified he told Mr. Shelton, the agent with OIG, that he was told to change the documents to the "proper status," and "if I found some were not changed to the proper status, to change those also" and that is why he feels he was terminated. (36) Complainant testified that

[a]t the time during the outage planning, sometimes we had to change the planning complete even though it wasn't and that was because purchasing could not buy the parts until the work plant was finished. So, we would change the planning complete and they would buy the parts and then maybe we changed it back and maybe we waited on it to come back from engineering. (37)

On cross-examination, Complainant testified that he understood that a requirement of his job at TVA was that he had the ability to maintain unescorted access. (39) Complainant testified that he knew that as a TVA employee, he could report concerns to the Employee Concerns office. He testified that he "did know that" but he was concerned that the issue would be brought to his supervisor, Joe Eskridge, and "I just couldn't turn him in at that time." (39-40) Complainant testified that the alleged document falsification occurred in September 2010 when he was a contractor. Complainant testified that he met with Dr. Sowter 2 years later in February 2012 when he was an employee of TVA. Complainant testified he did not go to Employee Concerns between September 2010 and February 2012. (40) Complainant testified that he was cleared to return to work by Haley Foster, in Chattanooga, Tennessee. He testified she was the only person who told him he was cleared to return to work. (41)

On cross-examination, Complainant testified that he believed that the person responsible for retaliating against him was his manager, Adam Scales. (41) Complainant testified that in November 2011, he sent an email to Preston Swafford, the head of TVA Nuclear. In the email, Complainant complained that TVA managers got bonuses because of a work order cover-up. (43) (Respondent's Exhibit 25, YYYY, page 883 in the center) Complainant testified no activity was taken against him as a result of that email.

Q. Was any employment action taken against you at that time, Mr. Elliott?

A. No, there was no activity against---they didn't send---other than this email, that was all I ever heard from them.

Q. And when you said this email, all I heard from, that is Mr. Swafford's response to you and also Don Jernigan. Who is Don Jernigan?

A. Of course, he was like a vice president down either here in Knoxville or Chattanooga, over all completely TVA in general of the power plant. I'm not real sure of all the power plants or just the nuclear, but I know this Preston Swafford manager, he was over just the nuclear part.

Q. And neither Mr. Swafford nor Mr. Jernigan took any action against you at the time you sent the emails.

A. No, they did not.

Q. Okay and this was before you received your DUI, correct?

A. That is correct. (44)

In the November 22, 2011 email, Complainant stated he was "concerned about our outage planning program here at WBN. [Watts Bar Nuclear]." (CX 1) He stated that Mr. Swafford was in a meeting with Complainant's supervisor Ernie Murphy, several weeks previously. Complainant stated that in that meeting, Mr. Murphy was given a "command order to start an outage planning immediately. He responded swiftly." Complainant stated that he was assigned to work on the outages along with other employees "but since then there have been delays in response to his/your order for supplemental planners." He stated he knew about this only because a longtime friend was offered a job and was waiting for a call back. Complainant stated that "I was in on the order (last outage plan) to cover up a bunch of work orders that were not finished so some managers could get bonus. (Which I am sure you are aware of now). In my book of knowledge that made me a liar and a somewhat a criminal since cover up in our business is really frowned on. But I was a contractor at [the] time I did what I was told." (CX 1)

In the email, Complainant stated that he was now in-house at TVA and began September 29, 2010. He was concerned about the March 23 deadline and did not want to "start covering up just so bonuses can be made and would like not to work 7-12's and process, to get there." Complainant stated that he is a planner with a few years left before retirement, had been in the business for a long time, and he "really don't like way this is playing out." (CX 1)

Complainant testified that after he was terminated from TVA, he did not look for any other jobs. He stated he worked for 39 years in the nuclear power plant business and wanted to stay in that business and not work in any other kind of job. Complainant testified that he owns a small campground near the Watts Bar Plant servicing contractors. Complainant testified that at the time he was terminated in 2012, he was 60 years old. At the time of the hearing, he was 64 years old, and planned to work until retirement age of 66. (44-46)

On cross-examination, Complainant was asked about Complainant's Exhibit 4, page 3 which was Complainant's brief and response to the Board's February 4, 2014 Order. Complainant testified that on the form, he stated "I have never shown up for work with alcohol on my breath or drinking on the job." (47-48) Complainant testified that was the best of his memory, "still correct." (48) Complainant was asked questions about Respondent's Exhibit 25, ZZZZZZ, page 1035, an email from Complainant's TVA office email. Complainant testified that he sent the

email dated November 19, 2010 which referenced that he came to work drunk but did not remember sending it. (49)

Q. Okay and are you at an email sent from Perry G. Elliott on Friday, November 19, 2010, sir?

A. I'm looking at it.

Q. Okay. Did you send that email?

A. I did send an email.

Q. Do you see the first sentence there that it says, "for first time in my career, I have come to my desk drunk"?

A. I really don't have any memory of doing that.

Q. You do not have any memory of coming to your desk drunk?

A. No. I'm 64 years old and I still—I drink—I know that I still have an alcohol problem and I understand that is something that was going on at that time and I was upset over what was going on around me at work and whether I was over the limit or I did possibly show up, but I don't remember ever showing up to work.

Q. So, you possibly entered the nuclear plant drunk, but you do not remember it?

A. I do not remember ever going in. (49-50)

On cross-examination, Complainant was asked about an email dated Friday, November 19, 2010 sent from his TVA office e-mail address. (Respondent's Exhibit 25, LLLLLLLL page 1090. (52)

Q. This document is an email dated Friday, November 19, 2010, correct?

A. That's correct.

Q. And you sent this email, correct?

A. I sent this email.

Q. And the first sentence of that email reads, "In for eight. Might have been drinking" and that indicates to you that you were in for an 8 hour shift and you may have been drinking, correct?

A. That is what it would imply. (53)

On cross-examination, Complainant was asked about a Monday, November 1, 2010 email referencing drinking alcohol and going to the office sent from his TV work email address. (Respondent Exhibit 25FFFFFFF, page 1041. (50) Complainant testified this was on his office email address. Complainant testified he did not use his office email at home because he did not know how to access it. (51) (RX 25)

Q. And it reads, "What email? Friday night was tough. Just sat there, drank me 4 to 5 stiff drinks, went to Lala land, went out to office. Sent you 2 or 3 emails, best I could remember." Do you recall in November 2010 drinking 4 to 5 stiff drinks and entering the nuclear plant?

A. I did not. That says I was in my office. I have an office at my campground. This has nothing to do with going to work, nothing whatsoever. It doesn't say I was at work at all and I wasn't. I was at my office outside.

Q. Did you have access to your TVA email account from your home office?

A. I probably did, but this is not anything to do with that. It says---

Judge Rosen: I have a question. Sir?

Witness: Yes.

Judge Rosen: Do you have access to your office email from home?

Witness: I could have back then because people did use theirs at home and I never did---personally, I never knew how so I never did, but it was available to get on there and check your email stuff.

Judge Rosen: Thank you for clarifying.

Witness: But this says, "just sat there and drank me 4 or 5 stiff drinks, went to Lala land, went out to office, sent you 2 or 3 emails." I have an office trailer out behind my house where I live and that's where my computer is and that's where I send my own personal emails. I'm not sure how this has anything to do with---I guess it's not something that I wasn't even at work. I was at work when I sent this, but I wasn't at work when I was having my stiff drinks as it says right here.

Q. And do you have any specific recollection of having those 4 or 5 stiff drinks and going to your home office?

A. No, I do not.

Q. So, you don't know whether you were at your home office or your TVA office?

A. It says right there I was at my office. (50-52)

Complainant was asked about other emails that he sent from his TVA email address. (55) Complainant was asked about Playboy centerfolds, from the year 1953 to the year 2006, sexually explicit emails, emails concerning African-Americans, and emails regarding political activity. (53-63) (Respondent's Exhibit 25 BB page 551, Respondent's exhibits 25 NN page 641, Respondent's Exhibit 25 WW page 662, Respondent's exhibits 25 BBB page 688, Respondent's Exhibit 25 YYY page 779, Respondent's Exhibit 25 KKKKK page 910, Respondent's Exhibit 25 JJJJ page 909). Complainant testified they were jokes, and it could be considered offensive.

Adam Scales Declaration, January 9, 2013 (Complainant's Exhibit 11)

On January 9, 2013, Adam J. Scales signed a declaration. He stated he was employed by the Tennessee Valley Authority as the work control manager at the Watts Bar Nuclear Plant and had worked there since 2006. He declared he read the October 18, 2012 case activity worksheet and Complainant's November 16, 2012 email. He stated "I have personal knowledge of the matters stated herein."

Mr. Scales stated a computer system tracks scheduling of work orders, he did not instruct Complainant to change work orders, and Complainant did not change the status of work orders between September 23 and October 2, 2010.

Mr. Scales declared the Complainant worked under his supervision. In the summer and fall 2010, they were preparing for outages scheduled for spring 2011. Milestones were in place, including planning of work orders in September 2010. All employees were stressed the importance of the milestone and they were asked to work overtime.

Mr. Scales stated that he

did not instruct Mr. Elliott or anyone else to change the status of any incomplete WOs to 'planning complete' status or to falsify any TVA records. Contrary to Mr. Elliott's assertion, meeting outage milestones, including the completion of outage WO planning, were not criteria for management bonuses.

Mr. Scales stated that TVA uses a computer database for tracking and scheduling nuclear plant work including that at the Watts Bar Nuclear Plant. The computer database indicates when the work order is created, follows it through planning, and a review, testing and closure. He explained that

[w]hen a maintenance specialist works on a WO, the employee changes the status of the WO in Maximo [computer database program] as it progresses through various stages, such as single but 'New,' 'In Planning,' 'Planning Complete,' and 'Approved for Work.' I have reviewed the status changes made by Mr. Elliott on WOs in Maximo and Mr. Elliott did not change the status of any debt he owes in Maximo to 'Planning Complete' between September 23 and October 2, 2010. (CX 11)

On Wednesday, July 10, 2013, an email was distributed regarding Watts Bar leadership changes. Employees were advised that Mr. Scales had retired. (CX 15)

Jeffrey Scott Boggess, Coworker (TR 66)

Mr. Boggess testified at the hearing on behalf of the Complainant. He testified that in 2010, he was working for the Tennessee Valley Authority, Watts Bar Nuclear Plant, as a mechanical planner. (TR 66-67) Mr. Boggess testified about the September 2010 alleged falsification of outage work orders and the picnic at the Watts Bar Dam celebrating on-time completion. Mr. Boggess testified that he recalled that time period. They worked a lot of overtime to meet that milestone, and they worked 6 to 12 hour shifts to meet the milestone to get the outage work orders. (TR 68) Mr. Boggess testified that Adam Scales was his supervisor's supervisor. (69) Mr. Boggess agreed that:

Q. Would it be safe to say that the planning manager, Adam Scales, would have known the order for that falsification had taken place because he was authorizing even more overtime trying to get them done. Would that be correct?

A. Yes. (68-69)

Mr. Boggess testified that Anthony Hooks, Radiation Protection Manager, was still employed at Watts Bar at the time of the hearing. (69-70)

Mr. Boggess testified that he was Complainant's coworker and worked at the same level. Mr. Boggess testified that he was not Complainant's supervisor. Mr. Boggess testified that "the times that I worked with Mr. Elliott, he was competent. He was a hard worker. He was always at work when you needed him." (70)

On cross-examination, Mr. Boggess testified that in September 2010, the time referenced by Complainant, he did not himself falsify any TVA records. Mr. Boggess testified he was not asked to falsify any TVA records. Mr. Boggess testified he is still employed at TVA. (71)

Jeffrey Dale Shelton, Investigator, Office Of Inspector General (OIG) (TR 72)

Mr. Shelton testified at the hearing that he works for the Inspector General's Office for the Tennessee Valley Authority. In 2010, he worked for the Inspector General's Office, Tennessee Valley Authority, as a Senior Special Agent. His job duties are to "investigate criminal violations, administrative issues, civil issues as well, looking at anything that touches TVA." His office is located in Chattanooga, Tennessee. Though he visits the Watts Bar Nuclear facility frequently, he testified that the Office Of Inspector General is not affiliated with the Tennessee Valley Authority. "It's completely separate, ma'am. It's independent created by Congress." (73)

On cross-examination, Mr. Shelton was asked how the Inspector General decides to conduct its investigation. He testified that when people make complaints to his office, they address each complaint though they all differ. Some complaints are referred to management, some complaints

are referred to inspections, and other complaints are handled by his investigative division. Mr. Shelton testified that he is required to address each complaint received by the Inspector General's office and "each and every one gets addressed." (81) He testified that the TVA has no influence over the investigation because "we are independent. They can't influence what we do." (82)

Mr. Shelton testified he interviewed Complainant two times about his alleged falsifying records. The first interview was February 2012 and the second interview was Summer 2012.

Mr. Shelton testified regarding the Complainant's allegations. He stated he was contacted by Nuclear Access, told the Complainant made a statement having to do with falsification at the Watts Bar nuclear facility, and after he received the information, he went to Complainant's house with another agent. He testified that Nuclear Access is the group that contacted the Office of Inspector General about Complainant's allegations. (82)

Mr. Shelton testified that he remembered the February or March 2012 interview with the Complainant where Complainant told he falsified records. He testified that he remembered Complainant's explaining to him the process of moving work orders, that had not been completely planned, into being planned. During the second interview, Complainant provided names of other people he thought had also falsified records. (74)

Mr. Shelton testified that he interviewed 2 individuals, Richard Elliott (different from the Complainant) and Richard Johnson. He stated that after interviewing them, "I made a notification to TVA's Nuclear Access advising Nuclear Access what I've been told by those men." (80)

Mr. Shelton testified regarding the notes he took during his interviews with Complainant. (Respondent's Exhibits 37 and 83) Mr. Shelton testified that his first interview was on February 29, 2012. (Respondent Exhibit 37, page 1) Mr. Shelton testified regarding his second interview with the Complainant. (Respondent's Exhibit 39) While the report was undated, he testified the second interview was the end of the summer of 2012. (83-84) Mr. Shelton testified that during his investigation of these allegations, he communicated with Nuclear Access "concerning Perry Elliott and his admission of falsification of the work orders and also with the other Elliott, the other Elliott [Richard]." (84) He stated that Mr. Johnson also made "the same communication to Nuclear [Access] about those 2 individuals as well." (84)

He testified that he contacted Nuclear Access because of trustworthiness and reliability. "If I have information that a person or persons are falsifying work documents at the nuclear plant, I contacted Nuclear Access and provide them with that information." (85) He testified that Nuclear Access handles the unescorted access at the nuclear plants. They determine who is given access and who is not. (85) Mr. Shelton testified that he contacted Nuclear Access after he spoke with Complainant "and learned that he had admitted to me that he had falsified those documents. I contacted them then." (86) Mr. Shelton testified that he wanted to reinterview the Complainant to obtain more information from him. "I wanted to find out who else had falsified documents and who all was involved in this." (86)

Mr. Shelton testified regarding an email he sent to Melissa Gail Ansel, who works with TVA's Nuclear Access. (Respondent's Exhibit 20, page 416-417) (86-87) He stated that he contacted her after he interviewed Richard Elliott and Richard Johnson. He stated that in the email, "I'm communicating to her what those men told me they had done and it had to do with what I thought impacted their trustworthiness and reliability. So, I relayed that information on to Nuclear Access." (87)

Office Of Inspector General Record Of Interview, February 29, 2012 (RX 7)

Per their report, investigators from the Office of Inspector General, Tennessee Valley Authority interviewed Complainant on February 29, 2012. Special agents Shelton and Haga advised Complainant they were meeting with him concerning his issues that took place at the Watts Bar Nuclear Facility (WBN). Complainant stated that he was working as an outage planner contractor for the Johnson Service Group at Watts Bar Nuclear Plant in 2010. As a contractor, he felt "pressure/asked to make false entries into TVA's computer system to make it appear as if 'work had been planned.'" Employees were asked to electronically move the work category into "planning complete." Complainant stated this was done to meet milestones for the outage planning. Complainant told the special agents that "TVA knew we were not going to make the deadline so they asked us to go in and make it look like we made it." Complainant said he followed what was asked of him and moved 3 or 4 to "planning complete" even though they were not complete. The interview report showed that Complainant stated "he did so when he knew it was wrong to do it. He did it due to the pressure from above him." Complainant said that the TVA employee sitting next to him, refused to do it. Complainant advised the special agents he did this "because he was a contractor and felt like he had to do it." (RX 7-80, 81)

Melissa Gail Ansel, Manager of Nuclear Access Services (TR 88)

Ms. Ansel testified at the hearing that she is Manager of Nuclear Access Services at TVA. Her job responsibilities are to "certify, maintain, suspend, deny unescorted access to nuclear power plant." (88-89) She testified that the unescorted access allows an individual to go "inside the protected vital areas of the plant where safety sensitive equipment is." (89)

She administers the access authorization program "to provide reasonable assurance that the people that have access to nuclear power plants are trustworthy and reliable." (89)

She testified there is a fitness for duty program regarding access at the Tennessee Valley Authority. This program "is to provide reasonable assurance to people that enter the protected area and are granted access, are not under the influence of any substance, legal or illegal or physical or mental impairment." (89)

Ms. Ansel testified how an individual gets unescorted access. She testified that "you have to be requested for access. You complete an application, a personal history questionnaire. We conduct the background investigation, psychological evaluation, drug and alcohol test, and fingerprint check." (90)

Ms. Ansel testified that an employee may have to be evaluated regarding his fitness for duty. “It could be for reporting illegal action or for adverse behavior or anything like that.” She testified that if a Tennessee Valley Authority employee with unescorted access self-reports illegal action, then he would be referred to substance abuse for an evaluation. “The Nuclear Access Services would pull their security file to see if they have any previous history and if they did and it was a substance related issue, then we would refer it to our substance abuse expert for an evaluation.” (90)

Ms. Ansel testified that the substance abuse expert evaluates the employee to determine whether or not they are fit for duty at the nuclear power facility. (TR 90)

She testified that the manager of Nuclear Access Services makes the final determination whether or not to reinstate an employee’s unescorted access after he has been suspended after a self-reported illegal action. She testified that at the time of the hearing, she was that individual. She testified that at the time that Complainant’s unescorted access was denied, Ronald Casey was the manager of the Nuclear Access Services. (TR 91)

Ms. Ansel testified that for the final determination as to whether unescorted access can be reinstated, the manager of Nuclear Access Services relies upon the “opinion of the substance abuse expert.” (91) She testified the employee’s manager has no input.

Q. And what type of input does an employee’s manager have on the manager of Nuclear Access decision whether to reinstate or not?

A. None. (TR 91)

After an employee’s fitness for duty review and there is a denial of unescorted access, he receives a letter from the manager of the Nuclear Access Services. He is given his appeal rights regarding the decision. The employee can submit other information which is provided to an independent reviewer “that’s independent of our office for their final review.” (92)

Dr. Brenda Sowter, Senior Physician TVA, Medical Review Officer For Substance Abuse Expert (TR 93) CV (RX1)

Dr. Sowter testified at the hearing that she is the senior physician overseeing Tennessee Valley Authority Medical Department, called the Employee Health Services. She oversees medical professionals. She is the medical review officer for Nuclear Services regarding their fitness for duty program and is their Substance Abuse Expert also known as SAE. (93) Her office is in Chattanooga, Tennessee in an office building, not at the Watts Bar Nuclear Plant. (95)

Dr. Sowter testified that she has been a physician since 1990. She testified “I have been involved in drug and alcohol substance abuse in all facets” which included inpatient detox, outpatient, hospital outpatient, jail system providing detox, medical director inpatient psychiatric drug and alcohol abuse center, and as medical examiner for drug and alcohol abuse death. (96)

Dr. Sowter testified regarding fitness for duty. She testified that when there is a self-report from an employee, a positive drug test, or any issue relating to the fitness for duty program, she evaluates from a substance abuse perspective. (94) She testified that the substance abuse expert “would be an individual that would evaluate the fitness for duty of an individual that is either self-reported or has had some issue that makes that fitness for duty be in question.” (94)

Dr. Sowter testified regarding unescorted access. She testified that in a nuclear facility, in order for the employee to have unescorted access, the employee has “to maintain their fitness for duty.” She testified that the fitness for duty requirements include that an employee “cannot be under the influence of either of those substances [alcohol or substance abuse] while performing duties at the nuclear plant or inside their protected area.” (94-95)

Dr. Sowter testified regarding reasonable assurance. She testified that

acting as the substance abuse expert when I’m evaluating a fitness for duty issue, I have to have based on the code of regulation, I have to have a reasonable assurance there is not an ongoing drug or alcohol issue for me to have a favorable decision. (95)

Dr. Sowter testified regarding favorable decision. She stated that a favorable decision is “that I feel that my recommendation could be to access, to reinstate their unescorted access.” (95)

Dr. Sowter testified that Tennessee Valley management has no input in her fitness for duty determinations in her capacity as Substance Abuse Expert. “None whatsoever.” (95) She testified that TVA management does not have the expertise to make the assessment and she must remain neutral.

Well, the regulation is that the substance abuse expert has a reasonable assurance. I have to have the credentials in order to make that and to perform the interview, to gather the data, to interview the individual with the issue and come to a conclusion. That is a highly specialized area. They do not have that kind of knowledge. That is why they employ a substance abuse expert and I have to be free to make the proper decisions based on the knowledge that I have, the experience that I have, and the data that I gather and the knowledge that I gather through interviews. (96)

Dr. Sowter stated she is familiar with Complainant. “It was a fitness for duty issue where it was a self-report of a DUI and from there, the recommendation was made to suspend his unescorted access and do a complete determination of fitness.” (97) Based on information received, Dr. Sowter makes the recommendation to suspend or not suspend the unescorted access.

Q. Who made the decision initially to suspend his access?

A. That information, it comes about through collection of any history once an individual self-reports. The access services group will hold their security file and provide me any history of any previous drug or alcohol issues and then I make a

recommendation to either suspend or not suspend the unescorted access and perform a determination of fitness. (97)

Dr. Sowter referenced the email where she “recommended to Access Services to suspend Mr. Elliott’s unescorted access and perform a complete determination of fitness.” (98) (RX 2, tab 2, page 21, middle page number)

She testified that Adam Scales is in management with TVA Watts Bar Nuclear Plant but she does not know him personally. (RX 2, tab 2, page 20, letter from Mr. Scales) She testified he had no input in her decision to suspend unescorted access. (98-99)

Q. Do you know anything of him in relation in terms of his relation with Mr. Elliott?

A. No.

Q. Okay. Did Mr. Scales have any input into your recommendation to suspend Mr. Elliott’s access?

A. No. (98)

Dr. Sowter had no knowledge as to why Mr. Scales wrote his letter. (RX 2, tab 2, page 20 Scales letter) She had spoken with Mr. Scales through telephone conversations, not in person, and would not recognize him.

Q. And did you ever meet him in conjunction with your recommendation that you terminate Mr. Elliott’s access?

A. Oh, no.

Q. Did you ever speak with him about your decision to suspend Mr. Elliott’s access?

A. No. (99)

Dr. Sowter testified that prior to recommending that Complainant’s unescorted access be suspended, she proceeds through “a lot of steps before.” She testified that

it comes to me to perform an interview and gather the data and information from the individual to come to the conclusion, do I have or have not a reasonable assurance if there is an ongoing drug or alcohol issue.

She interviewed Complainant. The interview involved Complainant coming to her office to meet with her. Dr. Sowter described the process. She types the interview notes “to get the very specifics down so that it is accurate.” During the interview, they stop and discuss, and she takes detailed notes “pertaining to whatever it was the precipitating event specifically and then history

surrounding that issue.” She also questions whether there are medical issues or other substance abuse issues. She testified that in Complainant’s case, they specifically discussed the DUI and in the history of his alcohol use. (TR 100)

Dr. Sowter discussed her substance abuse expert report. (100, RX 2, pages 12 and 13) She testified she typed notes during her interview with Complainant. (101)

She testified regarding his demeanor during their meeting.

Well, initially, it starts out pretty general and when you get the specifics, most individuals are able to relate the specifics of what was the precipitating event and in his case, it was the DUI... He did not want to talk about the specifics of alcohol. At one point, that caused an escalation and agitation in my opinion to the point that he felt--he responded, I should say, that “I don’t understand why I have to sit here discussing my DUI when this has happened” and it was an offhand comment and this that he was describing to me was falsifying records at Watts Bar Nuclear Plant. I tried to center him back to what my purpose is, which is the DUI and the alcohol. That wasn’t very successful and in the course of that, I do explain that it is important that we discuss this nature because you hold unescorted access at a nuclear plant. You do not bag groceries at a grocery store.... He did not feel he should have to be sitting there discussing his DUI with me when this occurred after hours and when this other issue had been going on what I gathered prior to this. (101-102)

She stated the other issue was “the falsification of records.” (102)

Dr. Sowter testified regarding Complainant’s statement regarding falsification of documents during his interview. She testified that is not uncommon for an individual to “deflect” that the cause of the problem is something else. Dr. Sowter testified this is common behavior. (106)

Well, initially, which is not uncommon having a lot of experience in this area, it did not raise a lot of red flags initially because there is often a behavior pattern to deflect away from I might really have this problem. This individual might have this problem so they want to deflect in it. It is everything else causing the issue. It could not possibly be that I have a drug or alcohol issue. So, this pattern of behavior was falling into what is very common and that is why I was redirecting and trying to say, ‘this is why we have to do this. This is why you hold unescorted access. Not working in a grocery store.’ This is why I kept trying to drive back to what is going on so I could determine, is there an ongoing drug or alcohol issue or is there not and during that time, that is when that escalation occurred, this offhanded comment occurred and the rest ensued. (107)

Dr. Sowter testified that she frequently uses the grocery store versus nuclear plant analogy.

I say this numerous times repeatedly in many, many determination of fitness as an explanation of why we have to go through this process because no one likes to go

through the process. They are a bit agitated or sometimes extremely agitated and I tried to explain if you had a job where you are bagging groceries in a grocery store, we would not be having this discussion, but you do not do that. You work at a nuclear plant. (114)

Dr. Sowter testified that following the interview, she noted he “was talking about falsifying records in a nuclear plant” so she discussed it with the Access department. (107-108) She testified that with the discussion of falsification of documents,

there may be a concern. I don’t know what he is talking about. I don’t know what it could impact, but the greater good of public safety had to rear up and from there, I actually talked to Access manager. They have a lot of experience as well and I cannot take this information to just anyone because of the confidentiality. So, it only could be within the realm of fitness for duty and access department and I said I have information and I would have to divulge this information which could potentially be saying I’m breaching confidentiality, but I feel that it is important that someone investigate to see what is going on and from there, they recommended that, and I eventually called the Office of General Counsel and said, “I feel I have information” and I only felt comfortable divulging that to an attorney. (108)

Dr. Sowter spoke with Ed Vigluicci, the head of the Office of General Counsel at that time. (108) Dr. Sowter referenced the email that she sent to Mr. Vigluicci memorializing the conversation (109, RX 2, page 11). Dr. Sowter testified and summarized her email where she concluded this was deflecting behavior pattern to distract from the “true alcohol or drug issue, and was spoken by Complainant as an offhanded comment because it was made in that fashion and it was made in the heat of the moment.” (110) Dr. Sowter summarized further that she was advising Mr. Vigluicci because she

concluded that it does reflect on Mr. Elliott’s trustworthy and reliability as I have the knowledge of that as well and that is part of the criteria to maintain unescorted access and the reliability of admission of his performance. (110)

Dr. Sowter further summarized that with the knowledge obtained during the interview, both she and the psychologist

can only come to a denial as reinstatement of his unescorted access as a conclusion to that—my interview and potentially the psychologist’s as a determination of fitness because of the concerns with not only the allegations of falsifying, but that reflects on the whole interview and my gathering the data about his drug and alcohol and I cannot come to a reasonable conclusion that there is not an ongoing drug or alcohol related issue which is my specific role. (110)

She stated that Mr. Vigluicci initiated the Office of Inspector General investigation (OIG). (113) She testified that in response to her reporting to the OIG, Tennessee Valley Authority management did not take any action against her. “No, none whatsoever.” (113)

Dr. Sowter was advised by Access Services to not render a final decision until they could investigate the falsification of documents allegations. She acknowledged that “while the determination of fitness is very important and it is an individual’s livelihood because of the unescorted access determination, there was a bigger concern with general public safety because of it being a nuclear plant.” (111) Dr. Sowter testified that she was to delay deciding regarding Complainant’s fitness for duty pending the Office of Inspector General investigation. (112)

She testified she already had enough information following the interview that “trustworthy and reliability was an issue” such that “I felt I had all the information I could get that would tell me I could not render a recommendation to reinstate his unescorted access.” (112)

Dr. Sowter reiterated that management “played no role whatsoever” in her decision not to reinstate Complainant’s unescorted access. (112)

Dr. Sowter stated that there have been other employees that she has denied unescorted access for substance abuse concerns. (112)

In her email, she stated that this was behavior pattern of a person trying to deflect from a true alcohol or drug issue.

Dr. Sowter testified regarding Dr. Patrick Lavin, PH.D. psychologist. (103, RX 2, pages 16 and 17) She testified he is a contractor who evaluates determination of fitness from a psychological point of view.

In this case, he is a contractor for TVA and if a determination of fitness is needed, he evaluates the psychological aspects of that determination of fitness, revealing the psychological testing results and interviewing, also gathering data and making a determination. In this case, the determination is, is there reasonable assurance of trustworthy and reliability with the individual. (104)

Dr. Sowter testified these are 2 separate determinations with 2 separate functions. She testified that Dr. Lavin has even more training as a psychologist regarding substance abuse.

Therefore, he can have the training and oftentimes has the knowledge of drug and alcohol abuse as much or more than I may have and I, in turn, have the knowledge working in the industry of the need for trustworthy and reliability. (104)

Dr. Sowter testified that they perform separate functions but gather information and review to ensure the information is correct. She testified “we will collaborate to see where your decision is going and vice a versa.” (104)

Dr. Sowter testified that both the psychologist and the substance abuse expert are required to make a separate determination of fitness for an employee’s unescorted access to be reinstated.

(105) She stated that both the psychologist and the substance abuse expert must approve for the employee to return to work. (105)

Dr. Lavin's recommendation remained pending, following Dr. Sowter's "concern about trustworthy and reliability...." (106)

Dr. Sowter testified that as a substance abuse expert, she was tasked to evaluate regarding alcohol and substance abuse and fitness for duty. As part of that, she did not review Complainant's personal work file from the Watts Bar Planning Group. (114) She testified she is not aware of his performance appraisals for his annual work review. (115) Dr. Sowter testified that when she

renders a recommendation not to reinstate, I only recommend and then Access Services acts upon that recommendation and does not reinstate the unescorted access, depending on what has transpired previously or what the situation is, it can be many things. (116)

She testified that Haley Foster worked for Horizon Health, who handled the contract for the Employee Assistance Programs (EAP). (102, RX 2, page 15) Dr. Sowter testified that the EAP provided counseling services generally. (103)

Ms. Foster had no input in denying Complainant's access or its reinstatement.

Q. Did Ms. Foster at the employee assistance program have any say in whether Mr. Elliott's access would be reinstated?

A. No, none whatsoever. (102-103)

Dr. Sowter testified that Ms. Foster, working with the EAP, facilitates the recommended needs of an employee. This can include an evaluation for inpatient drug or alcohol treatment, partial inpatient hospitalization, outpatient, or drug and alcohol counseling and education. "She facilitates getting all of those---whatever we recommend or whatever is needed performed." (103)

Kimberly Dawn McCormick, Human Resources Manager at Watts Bar Nuclear Plant, Tennessee Valley Authority (119)

Ms. McCormick testified that she is the Site Human Resources Manager for the Tennessee Valley Authority at the Watts Bar Nuclear Plant. She has 15 years experience in human resources and a Bachelor's degree in science and business administration, concentrating in human resources. (120) Duties include dealing with performance management, implementation and guidance of policies and procedures, grievances, employee discipline policies, and manager and employee general guidance. (121)

Ms. McCormick testified regarding the Tennessee Valley Authority employee discipline policy dated July 28, 2014. (121, RX 14, page 342) Ms. McCormick testified that a copy of the TVA

discipline policy is made available to all Tennessee Valley Authority employees as it is posted on their Insidenet. This is where the employees find policies and procedures. (122) She testified that it provides guidance regarding use of the company computer and email. She testified that appendix B, provides a summary of all offenses under the disciplinary guidelines, and that page 353, number 37 deals with “violation of Cyber Computer Security Policies And Procedures.” (123) She testified that it includes employee’s use of email, but also involves other violations. She testified that “depending on the content or the frequency. It would also apply to number 10 on page 352, misuse of government property, number 1, misuse of work time, number 14, political activity, number 24, violation of equal opportunity policy or remedial actions.” (123) She stated that the equal opportunity policy ensures that the work environment is “free of harassment, intimidation, whether it is direct or indirect and it can, in the form of various things. It could be emails, it could be jokes,... If you send emails or your computer is used, it pertains to any of these things. It could violate that.” (123-124)

Ms. McCormick testified regarding Respondent Exhibit 25, which was a series of emails from Complainant’s TVA email address. She testified she first became aware of them in August 2015. She was provided emails by counsel for the Respondent. She testified that had the Complainant still been employed by the Tennessee Valley Authority, he would have been terminated. “Based on the quantity, the length of time and the content, we would have moved to terminate Mr. Elliott.” She testified that Complainant’s emails from his work computer violated number 37 because they were racist, sexist, disrespectful, misuse of work time, content, and length of time of over a year and a half of excessive use. (125)

Ms. McCormick testified that Complainant would have been terminated versus receiving a written warning or lesser form of discipline, based on the volume, length of time, and the content of the emails Complainant sent from his work computer. She stated this is based on appendix B, page 367, violation of the cyber security policies and procedures. (126) Ms. McCormick testified that it would be based on appendix B, page 367,

number 6, promoting, supporting or endorsing political or religious beliefs, number 7, sending or accessing email, instant messages or other communications, images, files, programs containing offensive or harassing statements, hate speech or sexually explicit material including comments based on race, national origin, sexual orientation, age, disability, religion or political beliefs, again the content of these emails hit a lot of these areas pretty consistently in the violations that you can consider under the policy, it is going to range based on the offensiveness of the material and the frequency of the access and given the fact that it was over a year and a half of time and the content. That would be the basis for the termination. (TR 127)

She testified that the policy provides factors for consideration when determining discipline for email use. (TR 128, appendix B page 368)

Ms. McCormick was asked on cross-examination about Complainant’s emails during the 15 months he worked for the Tennessee Valley Authority. The cross-examination question stated that Complainant worked 20 years as a contractor and then 15 months for the Tennessee Valley

Authority. (TR 128-129) Ms. McCormick responded she could not answer why his work e-mails had not been accessed and reviewed previously because she did not “have material or have a history to be able to speak to it.” (TR 129-130)

Arrest Report DUI (RX 2, 23)

On January 7, 2012, Complainant was driving on the wrong side of the road on the highway at approximately 2:20 a.m., and was arrested for driving under the influence. He was pulled over by a police officer on patrol and charged with driving under the influence and violation of implied consent. He took a field sobriety test and did “poorly.” He refused to take a breath or blood test. He was brought to jail at approximately 3:02 a.m.

Deputy Payne wrote in the narrative of the arrest report:

On the above date while on patrol on Highway 68, a tan GEO passed me on the wrong side of the road. I caught up with the vehicle... I turned on my lights and the vehicle made a wide return almost going out of the road onto New Lake. The driver of the vehicle was a Perry Elliott. Mr. Elliott had a strong odor of alcohol coming through the window as I talked to him. I asked Mr. Elliott to step out of the vehicle and as he did he was very unsteady on his feet. I asked Mr. Elliott if he had been drinking. He stated that he had at Joker’s bar. I then asked Mr. Elliott if he had any disabilities that would stop him from doing some sobriety tests. Mr. Elliott stated no and he did them poorly. I asked Mr. Elliott if he would consent to a breath or blood test at the jail. He stated no.

Complainant’s Reporting Of Legal Action (RX2-22)

On January 9, 2012, Complainant completed a reporting of legal action form submitted to Nuclear Access Services. He reported that on January 7, 2012, he was charged with DUI and consent to test. He stated the dispositions were pending.

Suspension After Self-Report , January 9, 2012 (RX 2-21)

On January 9, 2012, Dr. Sowter sent an email to Carol Wilson regarding “Perry Elliott self-report today of DUI.” She stated, “As we discussed, I recommend suspension of Mr. Elliott with subsequent full determination of fitness.”

Unescorted Access Authorization Suspended Letter, January 9, 2012 (RX 2-20)

On January 9, 2012, Adam Scales, Director Of Work Control, Watts Bar Nuclear Plant, wrote Complainant advising that his unescorted access authorization clearance had been suspended due to his charge of driving under the influence. Mr. Scales advised Complainant that

your unescorted access authorization (UAA) clearance has been suspended by the Manager, Nuclear Access Services. In order to have your UAA clearance

considered for reinstatement, you must successfully complete a FFD [Fitness for Duty] evaluation in accordance with NPG policies and procedures.

Effective January 10, 2012, you are being placed in a nonwork and non-pay status until further notice.... Having and maintaining your UAA is a requirement of your position in nuclear power.

Any violations of NPG FFD policies and procedures will result in further disciplinary actions.

Dr. Patrick Lavin, Ph. D. Psychologist, January 9, 2012 and February 15, 2012 (RX 2-16, 17, 18)

Dr. Lavin performed a psychological assessment for TVA Access Services. On January 9, 2012, he administered psychological testing to Complainant at the Watts Bar Nuclear Plant. On January 11, 2012 and January 27, 2012, he also conducted psychological interviews. He drafted a report of psychological assessment on February 15, 2012 and an amended report on February 16, 2012. He amended the Report Of Psychological Assessment For TVA Access Services after it was learned that information regarding trustworthiness arose and it was changed to incomplete status pending fitness for duty determination.

In his February 15, 2012 report, he stated that the “assessment was intended to reevaluate the above employee’s psychological qualifications for unescorted access authorization as requested by TVA Nuclear Access Services. Reevaluation request was prompted by the employee’s self-report of having recently been arrested on a charge of DUI. Reevaluation was conducted in order to assess qualifications for psychological clearance in accordance with 10 CFR 73.56.” Dr. Lavin stated the assessment was based on his review of the Minnesota Multiphasic Personality Inventory (MMPI-2), clinical interviews with Complainant, telephone interview on January 25, 2012 with his supervising manager, Mr. Scales, information and opinion from the employee assistance program, in the letters dated January 25, 2012 and February 14, 2012 from Haley Foster, telephone conversations with Ms. Foster on February 8, 2012 and February 14, 2012 and telephone conversations on February 6, 2012 and February 14, 2012 regarding fitness for duty assessment case status. He recommended unescorted access authorization. (RX 2-17).

On February 16, 2012, Dr. Lavin amended his report and recommendations. He added that he had conversations on February 6, 2012, February 14, 2012, and February 16, 2012 regarding fitness for duty status with the Tennessee Valley Authority occupational physician, Dr. Sowter. He stated that during the February 16, 2012 conversation with Dr. Sowter, she stated she had new “information pertinent to trustworthiness issues.” As a result, he amended the report that unescorted access authorization should be reclassified to “incomplete status pending fitness for duty determination by the Medical Review Officer (MRO) (SAE) and the Substance Abuse Expert.” (RX 2-16)

Substance Abuse Expert Report, February 2, 2012 (RX 2-12-13)

On February 2, 2012, Dr. Sowter wrote a Substance Abuse Expert (SAE) report. She stated that there was a “face to face for DOF [determination of fitness] of self-report of a DUI on 1/7/12, reported 1/9/12. Badges suspended on 1/9/12; psychological evaluation 1/27/12.”

Dr. Sowter wrote down the conversation in the “details of event” section of her report. Complainant reported that he had 3 DUIs which included the present in 2012, 12 years prior, and 25 years prior.

[Complainant] states on 1/6/12, he worked from 6:30 a.m. until 1500, and then went home... Went to a first bar around 7-8 p.m.... States at the bar he had 3 cocktails (bourbon and diet Mountain Dew) and then left around 10:30 p.m. States he then went to another bar called Jokers and arrived around 10:30-11 p.m. States he had around 1 ½ of multiple beverage cooler... States he stated they are waiting on people that said they were coming and did not show up.... Stayed there until somewhere after 1:30 a.m.

Complainant reported that he left the bar, was on his way home, decided to go check on his boat, “County police sitting on the side in a grocery parking lot and states when he passed, he saw the lights flashing behind him. States when he saw the police, he looked ahead and saw he was driving on the center line and he believes this is why they came after him to check on him.”

Dr. Sowter reported that Complainant said the police officer asked him to get out, perform a field sobriety test, and said the officer wrote he “did poorly” on the ticket. Complainant told Dr. Sowter that he was going to be arrested for driving under the influence. He was asked to perform a broad alcohol test and Complainant said, “no, not until we got to the police station.” Dr. Sowter asked Complainant if he did the blood alcohol test and he replied “no.” Complainant stated his reason was because he had nothing to eat all day. (RX 2-12)

Dr. Sowter asked Complainant if he had any other legal issues with drinking and driving. Complainant reported that he has 3 others. One was 12 to 13 years prior to the 2012 interview when his sugar got low when he “set out on a long trip in the middle of the night.” Complainant admitted that at that time, he had been drinking and had 4-5 drinks at his house. Complainant stated that when he went on his trip, he left his house “and started driving and he was going to Waycross, Georgia, ‘in the little functioning part of his brain.’ ” Complainant advised that he had another DUI 25 years prior to the 2012 interview. Complainant reported to Dr. Sowter he does not drink daily but he does “go out, drinking and driving home as a history/common.” (RX2-13)

Attached to Dr. Sowter’s report were her notes from conversations with Dr. Lavin regarding the Complainant. In the report, Dr. Sowter noted Dr. Lavin’s conversation with Complainant regarding his DUI in 2012. Dr. Sowter wrote that Dr. Lavin stated “over user of alcohol” based on physical appearance. Dr. Sowter wrote that Dr. Lavin told her that Complainant felt he was “being made to feel like a bank robber.” Dr. Lavin noted that Complainant’s supervisors gave him good reports. Dr. Lavin indicated he told Complainant that he was not giving an opinion

until meeting with MRO/SAE. Dr. Lavin indicated the Complainant was not “a happy camper” for having to go through the process. Dr. Sowter wrote that “Dr. Lavin’s take is that he feels he will be returned to work. He even stated to Dr. Lavin that he had talked to ‘others who have gone to EAP.’ Dr. Lavin feels he does not seem to get the point that his actions have caused all of this.” (RX 2-14)

Horizon Health Employee Assistance Program Services, January 25, 2012 and February 14, 2012 (RX 2-19)

On January 25, 2012, Haley Foster, Management Resource Consultant, Organizational Risk Management Center, Horizon Health Employee Assistance Program (EAP) Services, wrote a memorandum regarding Complainant, and his ability to perform his job. Ms. Foster wrote that Complainant met with a licensed clinical social worker in their group for an assessment to determine whether substance abuse was “present that would interfere with his ability to perform job duties.” She wrote that “it does not appear that Mr. Elliott is unable to perform job duties.” However, the licensed clinical social worker recommended that Complainant “would benefit from additional services to address substance abuse education and stress management skills.”

Ms. Foster recognized that the Tennessee Valley Authority makes the decision whether or not Complainant can return to work. “The decision to return Mr. Elliott to work is a decision made by TVA based on internal policy and procedures. However, the EAP has no concerns regarding return to work.”

On February 14, 2012, Ms. Foster wrote a second memorandum regarding Complainant’s DUI, and recommended individual counseling, and again stated that TVA determines whether Complainant can return to work. She stated that Complainant was referred to the employee assistant program due to his DUI, met with a licensed clinical social worker, and they recommended that Complainant participate in individual counseling with the social worker “for a minimum of one time per month for a minimum of 6 months.” She also stated that “the decision to return Mr. Elliott to work is a decision made by TVA based on internal policy and procedures.” (RX 2-15)

Dr. Sowter Email To Edward Vigluicci, Assistant General Counsel, Nuclear Licensing, February 16, 2012 (RX 2-11)

On February 16, 2012, Dr. Sowter sent an email to Edward Vigluicci regarding the Complainant. Ms. Ansel, manager Nuclear Access Services, was copied on the email. She referenced their earlier conversation stating that this email documented statements made by Complainant during her interview with him for the determination of fitness in her capacity as medical review officer and substance abuse expert. She stated this conversation was to make the “final determination to reinstate his unescorted access.” She advised Mr. Vigluicci about 2 statements Complainant made to her. One dealt with a medical issue and the other was his being asked to cover up work orders as a contractor so that others could get bonuses. She perceived them as statements to deflect

away from his alcohol abuse issues. She asked that the statements be investigated since they address assessing Complainant's lack of trustworthiness and reliability.

In the email Dr. Sowter stated:

The other statement was in reference to him being 'asked to cover up work orders when he was a contractor so it would look like the job was done earlier to improve the incentive plans and bonuses,' as I documented in my notes. Initially, as I stated above, this appeared to be part of a common ploy by individuals with alcohol/drug issues; however, in light of recent information that has come to my attention, the behavior of Mr. Elliott and his cavalier behavior during the interview may have been foundation and, thus, I have sought your advice today. He further stated in this interview that he did do what was asked of him and eluded that because of this history he related, he felt he should not be 'grilled about his alcohol when this was going on and is worse than the DUI.'

Dr. Sowter stated,

While experience has shown that many erratic statements can and are made when an individual is trying to avoid scrutiny with alcohol or drug issues, the recent information that came to my attention today now reflected this statement as potential allegations that merit investigation as well as reflecting upon Mr. Elliott, his lack of trustworthiness and reliability with his admission of performance. Therefore, we are directed toward denial for reinstatement of his unescorted access as conclusion to his Determination Of Fitness and any subsequent investigation into his allegations, I will leave to your direction. (RX 2-11)

Edward Vigluicci, Assistant General Counsel, Nuclear Licensing Email February 16, 2012, April 5, 2012, April 6, 2012 Regarding Falsification Of Documents By Complainant (RX 2-10, 11)

On February 16, 2012, Mr. Vigluicci sent an e mail to 5 individuals attaching Dr. Sowter's e mail regarding Complainant. He highlighted what was revealed during Dr. Sowter's interview with Complainant, that "he defended his DUI related transgressions was a defense (?) That such matters should not be all that concerning to TVA in light of the fact that he has, in the past, been asked to cover up work orders at WBN when he was a contractor... Mr. Elliott also admitted to having done what was asked of him in covering up such work orders." Mr. Vigluicci stated that Complainant had worked for 5 separate contractors at the Watts Bar Nuclear Plant. He also stated that in light of Complainant's admission, Dr. Sowter was "putting on hold any reinstatement of Mr. Elliott's UAA based on questions about his trustworthiness and reliability pending the results of TVA's inquiry into these potential falsification issues." He also highlighted that per Dr. Sowter, it is common for employees to make such statements when defending themselves on alcohol or drug related issues. He requested follow-up investigation.

On February 24, 2012 , Mr. Vigluicci emailed 5 individuals and requested acknowledgement that this was being handled. (RX 2-9)

On April 5, 2012, Ms. Ansel, manager Nuclear Access Services, emailed Mr. Vigluicci and the other parties on the email list stating that Complainant called asking to be allowed to return to work. He advised he completed the required treatment and evaluations. Complainant stated that “he could guess he was being ‘punished’ for raising issues that were happening at WBN. ”

On April 6, 2012, Mr. Vigluicci sent an email response advising that the matter had been referred to the Tennessee Valley Authority Office of Inspector General. He recommended she follow-up with OIG for status, which she did. (RX 2-9)

Unescorted Access Authorization (UAA) Denial Letter April 18, 2012 (RX 2-7)

On April 18, 2012, the Tennessee Valley Authority, Nuclear Access Services, sent Complainant a letter. The letter was from R. L. Casey, Manager, Nuclear Access Services And Fitness For Duty. Mr. Casey advised Complainant his unescorted access authorization (UAA) had been denied effective April 18, 2012. He stated it was because of Complainant's

continued alcohol abuse, repeated disregard of criminal law forbidding the operation of a motor vehicle while under the influence of alcohol, as well as your admitted improper handling of work records over a period of time while employed at Watts Bar Nuclear Plant. The latter matter has been referred for further investigation by TVA.

Mr. Casey explained that “these issues reflect adversely on your trustworthiness and reliability in accordance with NRC regulations and TVA’s access authorization procedures.” He advised that following the results of the investigation, and depending on those results, Complainant may be eligible for reconsideration in April 2017. Mr. Casey also advised that Complainant may request independent review and provided the address. (RX 2-7)

Notice Of Termination Due To Denied Unescorted Access Authorization (UAA), April 18, 2012 (RX 2-6)

On April 18, 2012, Complainant was sent a Notice Of Termination from Adam Scales, Work Control Manager for the Tennessee Valley Authority. He was advised he was terminated because his unescorted access authorization (UAA) had been denied. He was advised the maintenance specialist position requires that the employee maintain their UAA. Based on the reasons for denial of the UAA, Complainant’s trustworthiness and reliability per NRC regulations and TVA procedures, Complainant was in a nonwork and a non-pay status.

Mr. Scales advised that

you will be terminated from your position as a maintenance specialist (Nuc) at TVA’s Watts Bar Nuclear Plant not earlier than 30 days from the date of this

letter. On April 18, 2012, Watts Bar Nuclear Plant was notified by Nuclear Access Services that your unescorted access authorization (UAA) has been denied.

A requirement of your position as a maintenance specialist (Nuc) is to maintain your UAA. Therefore, I find that your termination is appropriate under TVA policy. Your termination will be effective May 18, 2012. Because of the reasons for the denial of your UAA, your trustworthiness and reliability in accordance with NRC regulations and TVA's access authorization procedures, you will be in nonwork and non-pay status during this notice period.

Independent Denial Review of Denied Unescorted Access, May 10, 2012 (RX 2- 4, 5)

An Independent Denial Review was conducted. The timeline of events was listed and reviewed. The review noted that on January 19, 2012, Complainant was suspended due to reporting legal action. The reporting legal action was a January 7, 2012 DUI and failure to consent to test, with previous criminal history of January 11, 2004 DUI and September 1987 DUI.

On April 18, 2012, Complainant was denied unescorted access due to "inability to establish trustworthiness and reliability due to criminal history and individual's background." Complainant was sent a certified denial letter. On April 24, 2012, the independent denial facilitator received Complainant's request for appeal.

The independent denial review noted that "the unfavorable recommendation due to MRO's inability to establish trustworthiness and reliability due to criminal history in individual's background." (RX 2-5)

On May 10, 2012, A Decision Of Independent Denial Review (IDR) was issued. It was signed. The decision stated that the final decision upheld the denial of unescorted access. The decision-maker stated per the Access Authorization procedure and regulations for determining "Fitness For Duty," an independent and impartial review has been completed regarding Complainant. (RX 2-4)

Final Decision Of Denial Letter To Complainant, May 23, 2012 (RX 2-3)

On May 23, 2012, Dr. Mark Findlay, Director, Nuclear Security, Tennessee Valley Authority, Nuclear Access Services, sent Complainant a letter regarding the final decision on his unescorted access authorization clearance. Dr. Findlay stated "the Independent Denial Review (IDR) decision is to uphold the denial of your clearance. This is the final decision of the IDR and there is no further appeal within TVA. You will be eligible for unescorted access reconsideration after April 3, 2017." (RX 2-3)

Summary Of The Job And Stipulations Of Fact Regarding Job At TVA

Complainant was hired as a maintenance specialist with the Tennessee Valley Authority to work in the work control group at Tennessee Valley Authority, Watts Bar Nuclear Plant. (Stipulation

3). Prior to that, Complainant was a contractor. On his job application for full-time TVA employee, he reported that he had 2 prior DUIs on his record. (Stipulation 6) On September 27, 2010, he was hired as a full-time employee with TVA. (Stipulation 5). The job description stated that he works on large projects, reviews maintenance and modification work orders, provides technical support, reviews drawings, manuals, coordinates work assignments, including safety concerns, for smooth flow of job activities. (CX 9). The job description for maintenance specialist required that the individual “be able to maintain a clearance for unescorted access authorization because they work in the protected area of Watts Bar Nuclear Plant.” (Stipulation 7). On September 27, 2010, when hired, Complainant signed a specialist appointment condition stating that “continued employment [is] subject to establishing and maintaining clearance for unescorted nuclear plant access.” (Stipulation 8). The Nuclear Regulatory Commission requires a physical protection system which includes unescorted access authorization. (Stipulation 9). The requirements of unescorted access authorization, state that “the employee must be ‘trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security.’” (Stipulation 10). All “employees with unescorted access authorization clearance are required to immediately self-report any legal actions on the next business day after the legal action occurred.” (Stipulation 11). On January 7, 2012, Complainant was arrested for driving under the influence and violation of implied consent. (Stipulation 12). On January 9, 2012, he reported the incident to the Tennessee Valley Authority. (Stipulation 13). The Manager Of Nuclear Access Services for the Tennessee Valley Authority “is responsible for certifying, maintaining, suspending, terminating, revoking, or denying an individual’s unescorted access authorization clearance.” (Stipulation 14). On January 9, 2012, Complainant was advised “that his unescorted access authorization clearance had been suspended by the Manager Of Nuclear Access Services.” (Stipulation 15). On January 10, 2012, Complainant was “placed in a nonwork and non-pay status” as a result. (Stipulation 16) In order for Complainant to have unescorted access authorization clearance reinstated, he “was required to successfully complete a fitness for duty evaluation.” (Stipulation 17). Pursuant to the fitness for duty program, a “determination of fitness is the process entered when there are indications that an individual may be in violation of TVA [Nuclear Power Group’s] [fitness for duty] policy or is otherwise unable to safely and competently perform his or her duties.” (Stipulation 18). This determination is “made by a licensed or certified professional who is appropriately qualified and has the necessary clinical expertise.” The evaluation is usually performed by the “TVA Nuclear Power Group’s Substance Abuse Expert and/or contract psychologists.” (Stipulation 19)

Complainant was evaluated by the Tennessee Valley Authority Substance Abuse Expert and the contract psychologists. (Stipulation 20). In February 2012, he was interviewed by the TVA Substance Abuse Examiner. (Stipulation 21). “He stated that he had been instructed to ‘cover up’ work orders ‘in order to improve the incentive plans and bonuses’ while he was a contractor.” (Stipulation 21). At the hearing, Respondent disputed that Complainant was given instructions to change work orders but stated it was not going to “dispute that [Complainant] was so instructed for purposes of this hearing only.” (Stipulation 22). Subsequently, the Office of Inspector General began an investigation into Complainant’s allegations. (Stipulation 23). Based on her evaluation, “the Substance Abuse Examiner recommended denial of [Complainant’s] unescorted access authorization.” (Stipulation 24). On April 18, 2012, Complainant was advised by the Manager of Nuclear Access Services that his unescorted access authorization had been denied. The stated reason was his “continued alcohol

abuse, repeated disregard of criminal law forbidding the operation of a motor vehicle while under the influence of alcohol, as well [as] his admitted improper handling of work records over a period of time while employed at Watts Bar Nuclear Plant.” (Stipulation 25). On April 18, 2012, Complainant was advised that he had been terminated effective May 18, 2012 since his unescorted access authorization had been denied. (Stipulation 26). On April 24, 2012, Complainant requested an independent review of the access denial. (Stipulation 27). On May 23, 2012, Complainant was advised by the Tennessee Valley Authority that the denial of his clearance had been upheld and “that he would be eligible for reconsideration after April 3, 2017.” (Stipulation 28).

NEW EMPLOYEE DOCUMENTS WITH TENNESSEE VALLEY AUTHORITY

Employment Affidavit And Conditions, September 27, 2010 (RX 5-53)

On September 27, 2010, Complainant signed an acceptance of appointment. He stated he read and understood the statutory provisions. He signed that his employment status is subject to the terms and conditions described, existing law, TVA agreements and policies, and the Tennessee Valley Authority Act.

Tennessee Valley Authority, NPG Standard Programs And Processes, Fitness For Duty (RX 8)

The Tennessee Valley Authority NPG Standard Programs And Processes Fitness For Duty Manual describes the standards and procedures for roles and responsibilities of TVA employees. It addresses illegal drugs and alcohol, off-site alcohol consumption, alcohol and drug testing, determination of fitness evaluation, independence denial review (IDR) process, employee assistance program (EAP), fitness for duty (FFD) violations, fitness for duty requirements for unescorted access, and all procedures. (RX 8, 92-93).

Specifically, section 3.10 Fitness For Duty Requirements For Unescorted Access states that for an employee to maintain authorization, he must “successfully meet alcohol and drug test requirements and successfully complete fitness for duty training.” (RX 8-126, 127). Section 3.2.2 Illegal Drugs And Alcohol states that employees and workers shall not use, possess, or consume alcohol during work or on any TVA property. All employees and workers are prohibited from reporting to work at a TVA work location under the influence of alcohol. (RX 8-156). Section 3.4 Determination Of Fitness/FFD Evaluation states that determination of fitness for duty is conducted when there is an indication the employee may be in violation of TVA fitness for duty policies or unable to safely perform his duties. The fitness for duty determination must be made by a licensed professional qualified with the necessary clinical expertise to evaluate fitness issues. Determination of fitness will be per the Tennessee Valley Authority access authorization manual which states the requirements for access authorization for TVA employees. It addresses unescorted access authorization program elements, legal action reporting, suspension, denial of access, termination, and independent denial review (IDR) process performed by the Tennessee Valley Authority Substance Abuse Expert (SAE) [Dr. Sowter] or the contract psychologist. [Dr. Lavin]. It states these individuals may determine fitness of individual. Impaired workers are

those whose fitness is questionable and shall be removed from activities such as unescorted access. (RX 8-120, 121).

Tennessee Valley Authority NPG Standard Programs And Processes Access Authorization November 2012 (RX 9)

The Tennessee Valley Authority access authorization manual includes processes for unescorted access authorization (UAA), legal action reporting, suspension of unescorted access authorization clearance, denial, termination of UAA, and independent denial review (IDR) process. (RX 9-162, 163)

Specifically, section 3.3.3 Legal Action Reporting, requires employees with unescorted access authorization to report all legal actions the next business day and in writing. (RX 9-181). Section 3.5 Denial/Unfavorable Termination/Suspension And Review Of Unescorted Access Authorization (UAA) Clearance states that the individual must immediately notify the manager “when an individual’s trustworthiness, reliability, and/or fitness for duty may be in question.” (RX 9-186) Procedures for suspension and final termination are stated. Section 3.5.3 Unfavorable Employment Terminations requires that the manager be notified of all Tennessee Valley Authority and contractor unfavorable terminations. “The facts involved must be provided in order to make a determination regarding the individual’s trustworthiness and reliability.” Subsection B requires that “TVA’s review process shall apply these safeguards supplement when determining whether or not the behavior cited as the reason for unfavorable termination or resignation in lieu of termination by an Respondent may also make the individual untrustworthy or unreliable and therefore ineligible to continue to hold UAA/UAA.” (RX 9-188)

Tennessee Valley Authority Standard Department Procedure Plant Access March 2014 (RX 10) regarding unescorted access, Tennessee Valley Authority Standard Department Procedure Access Authorization Program March 2014 (RX 11), Tennessee Valley Authority Access Authorization March 2014 (RX 12), Tennessee Valley Authority Standard Programs And Processes Employee Discipline July 2014 (RX 14), were all reviewed and considered for this decision but will not be discussed or quoted here.

Performance Review, September 2010 – September 2011 (Complainant’s Exhibit 17)

In September 2011, Complainant received his annual performance review for September 27, 2010 through September 25, 2011. He received “exceeds expectations” for planning work timely and quality packages, and “satisfactory” reviews for adhering to procedures and personal safety and training.

Complainant’s Graphic Emails Sent from Complainant’s TVA Email Address to TVA Employees and Other Individuals, 2008 - 2012 (Respondent’s Exhibit 25)

Respondent submitted exhibits from Complainant’s TVA office email address sent to fellow workers of the TVA or others outside of TVA. The exhibits contain pages of emails with photographs, cartoons, graphic images, and written jokes in a 6 inch, 3 ring binder originating from 2008 through 2012. The email exhibits noted photographs of sexually explicit images,

female nudity, photographs of racist images, sexist images, political images; cartoons of pornography, racist, sexist, Presidential and political content; jokes of racist, sexist, Presidential, political, homophobic content, and possible Hatch Act violations as a federal employee. The e mails and accompanying graphics have all been reviewed for the purposes of this Decision and Order. As they are self-explanatory, they will not be summarized here.

Complainant's Alcohol Emails Sent From Complainant's TVA Email Address To Other Individuals Regarding Alcohol And Its Affect At Work, 2010 – 2011 (Respondent's Exhibit 25)

Respondent submitted copies of emails from Complainant's TVA office email address referencing alcohol consumption outside of work and its effects at work. They are from 2010 to 2011.

On October 30, 2010, at 7:44 a.m., Complainant sent an email from his TVA email address to Gayle Klasa. "Sorry for email earlier might have been drinking last night shared a few too many feelings,... Feel just a little rough. [Sic]" (RX 25, page 1118)

On November 19, 2010, Complainant sent an email from his TVA email address to Reed Jones. The subject line said "life." Complainant wrote, "just missing you I am just an old drunk as usual, but am TVA employee now they may fire me but I guess what I will take some with me. [Sic]" (RX 25 page 1112)

On November 19, 2010, 11:21 p.m., Complainant sent an email from his TVA email address to Ms. Klasa at her personal Yahoo email account. "For first time in my career I have come to my desk, drunk." (RX 25 page 1080.)

On November 19, 2010, 11:38 p.m., Complainant sent an email from his TVA email address to Harold Fiveash. "In for 8, might have been drinking..." (RX 25 page 1138)

Complainant's Emails Concerning Changing Work Orders For Performance Bonuses, 2010 - 2011 (Respondent's Exhibit 25)

Respondent submitted copies of emails from Complainant's TVA office email address referring to performance bonuses and work orders and his dissatisfaction with changing work orders. They were all sent to friends, who were non-TVA employees. Most were sent to Gayle Klasa, at her Yahoo personal email account. Per her emails to Complainant, she worked for Johnson Service Group and for TSA in airport security. (RX 25, page 1100). They are from 2010 to 2011.

On November 22, 2010, Complainant sent an email from his TVA email address to Ms. Klasa stating "Not been too much fun today, was going to dig a hole for somebody to fall in just didn't happen. I just kept my mouth shut, maybe I can get over this monkey business at work and just have a regular life." (RX 25 page 1074).

On November 23, 2010, Complainant sent an email from his TVA email address to Reed Jones about the outage work orders. "Am not real happy they made me do something just before and the first week out here as employee and I have not got over it yet I have almost went to employee

concerns 3 times cause it's bothering me my boss was told to issue orders to us for a cover-up of outage work orders and he did not say no so all of us regular guys have to really perjure our career just so high managers could get a milestone bonus makes me sick but had to put up with it so far. [Sic]" (RX 25, page 1125). Per Mr. Jones's email address signature, he is the Quality Assurance Engineer for SRS.gov.

On March 29, 2011, Complainant sent an email from his TVA email address to Ms. Klasa at her personal Yahoo email address, stating, "It's not me in trouble just these managers that lied to get bonuses." (RX 25, page 1092)⁶

DISCUSSION AND CONCLUSIONS OF LAW

In a claim of retaliation or discrimination arising under the ERA, the complainant must demonstrate that he participated in protected activity, namely reporting a safety violation, which furthers the purpose of the ERA.

In his post hearing brief, Complainant argued that "TVA management had given orders to falsify work order status." Complainant argued that he previously had good performance reviews such that his unescorted nuclear clearance to the nuclear facility should not have been revoked. He argued that "based on clearance revocation for alcohol abuse off the job after work hours, TVA human resources had released complainant to return to work pending resolution of his whistleblower case which is still to be resolved." Complainant stated that he was disciplined "for falsifying documents solely to gain bonuses to [be] paid to upper management." Complainant argued this was a violation of the ERA and moved for back pay and benefits "due to wrongfully dismissing his nuclear clearance."

TVA is a constitutionally authorized executive branch corporate agency and instrumentality of the United States created by and existing pursuant to the TVA Act of 1933, 16 U.S.C. §§ 831 to 833ee. (Joint Stipulation of Agreed Facts, JX 1 2.) TVA employed Complainant as a Maintenance Specialist in the Work Control Group at TVA's Watts Bar Nuclear Plant. (*Id.* 3.) As a Maintenance Specialist, Complainant was responsible for writing and reviewing work orders to guide plant laborers as they performed maintenance work. (*Id.* 4.) Complainant initially worked at various TVA sites as a contractor. On September 27, 2010, TVA hired Complainant as a full time permanent employee. (*Id.* 5.)

Respondent argued that the Nuclear Regulatory Commission (NRC) grants Watts Bar its requisite operating license. *See Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 101 (6th Cir. 1996) (noting that TVA is an NRC licensee). As a condition of that license, NRC regulations mandate that Watts Bar employees maintain unescorted access authorization in order to enter the protected areas of a nuclear plant. (JX 19; 10 C.F.R. § 73.56; 10 C.F.R. § 73.1(a).) TVA is required to implement an access authorization program to

⁶ All of the Complainant's and Respondent's exhibits have been reviewed and considered for the evaluation and weighing of evidence, though some of the e-mails from the Complainant are not summarized here. They speak for themselves.

ensure that individuals with access to nuclear power plants "are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security." (JX 1-10; 10 C.F.R. § 73.56(c); RX 9 at 117, § LO.A.I; Tr. 89.) As is pertinent here, TVA "must [have] reasonable assurance that employees are trustworthy and reliable as demonstrated by the avoidance of substance abuse." 10 C.F.R. § 26.23(a).

Based on the evidence in the record, one of Complainant's job requirements was maintaining unescorted access authorization (JX 1 - 7), a fact that Complainant acknowledged when he signed an Employment Affidavit and Conditions form, stating that his "[c]ontinued employment [was] subject to establishing and maintaining clearance for unescorted nuclear plant access." (JX 1- 8; RX 5 at 32, 36.) Complainant also testified that he understood this to be a requirement of his continued employment with TVA. (Tr. 39)

Complainant alleged that in September 2010 while still a contractor, he was instructed by TVA management to change certain unfinished work orders to a "completed" status, which he claims resulted in the completion of a planning milestone and allowed management to receive bonuses. (RX 22; Tr. 33, 34, 36) This "falsification" happened when Complainant was still a contractor. (Tr. 34, 40) Complainant testified he was aware that he could report this incident to TVA's Employee Concerns Program (TR 39). He testified, however, that he did not make any such report. Complainant testified he also knew he could make reports to the NRC, but he chose not to do so. (TR 40)⁷

In late November 2011, more than one year after his alleged falsification occurred, Complainant sent an email to Preston Swafford and Donald Jernigan, TVA nuclear managers, regarding concerns with the outage planning then occurring at Watts Bar . He mentioned that during the prior outage planning period, he was asked "to cover up a bunch of Work Orders than [sic] were not finished so some managers could get bonus [sic]." (RX 25yyyy at 883-84.) Both Mr. Swafford and Mr. Jernigan responded to Complainant email and encouraged him to bring up any concerns that he had. (*Id.* at 883.) The Tennessee Valley Authority did not take any action against Complainant for making this report. (Tr. 43-44)

Complainant reported on his application for full-time TVA employment that he had two prior DUIs on his record. (JX 1 6.) On January 7, 2012, Complainant was arrested a third time for driving under the influence, as well as for violating the State of Tennessee's implied consent law, following a series of events that began on the evening of Friday, January 6, 2012. (JX 1 -12; RX 2 at 23) Per the evidence in the record, Complainant began that evening at a bar, where he drank three "bourbon and Diet Mountain Dew" cocktails. (RX 2 at 12.) He then drove to a second bar called "Jokers," where he drank several wine coolers. (*Id.*) Around 1:30 a.m., he decided to drive home, but made a detour to check on his boat because it had been leaking the previous summer. (*Id.*) Per the police report in evidence, a

⁷ TVA disputed that Complainant was instructed to change any work orders. Respondent argued that because this did not cause Complainant's termination, (he was terminated because his access was denied for alcohol abuse issues,) TVA did not submit evidence at the hearing to refute this allegation.

police officer observed Complainant driving on the wrong side of the road and pulled him over. (RX 2 at 23.) The officer observed that there was "a strong odor of alcohol coming through the window" and that Complainant was "very unsteady on his feet." (.) Complainant admitted to the police officer that he had been drinking at Jokers, but refused to consent either to a breath or blood alcohol test. (*Id.*)

The Tennessee Valley Authority NRC required that an employee self-report any legal action within a specific time frame. Per the TVA NRC-mandated access authorization policies and procedures, Complainant self-reported his arrest to TVA the following business day. (JX 1 - 11, 13; RX 9 at 134, § 3.3.3.A.1.; RX 2 at 22; Tr. 90-91) As a result, TVA informed Complainant that his unescorted access authorization was suspended, and he was placed in non-work and non-pay status. (JX 1 - 15-16; RX 2 at 20.) In order for his nuclear access to be reinstated, Complainant was required to successfully complete a fitness-for-duty examination. (JX 1 - 17; RX 2 at 20.) "A determination of fitness is the process entered when there are indications that an individual may be in violation of TVA [Nuclear Power Group's] [fitness-for-duty] policy or is otherwise unable to safely and competently perform his or her duties." (RX 8 at 71, § 3.4; JX 1 - 18.) The determination must be "made by a licensed or certified professional who is appropriately qualified and has the necessary clinical expertise." (JX 1 - 19; RX 8 at 71, § 3.4.) Based on the evidence in the record, and the testimony of Dr. Sowter, this evaluation is performed by TVA Nuclear Power Group's Substance Abuse Expert (SAE) and/or contract psychologists. (JX 1 - 19; RX 8 at 71, § 3.4.) In this case, Complainant was evaluated by both a contract psychologist, Dr. Lavin, and TVA's SAE, Dr. Sowter. (JX 1-20, TR 93)

Dr. Brenda Sowter is TVA's Substance Abuse Expert (SAE), and is responsible for making fitness for duty determinations where alcohol and/or drug issues are involved. (RX 1). Dr. Sowter testified regarding her qualifications, role, duties, interview with the Complainant and recommendations. Dr. Sowter's testimony and opinions regarding Complainant's fitness for duty and subsequent revocation of unescorted nuclear access are given significant weight. She has extensive substance abuse experience and qualifications. Her opinions and recommendations are impartial, well-reasoned, and consistent with the requirements of the NRC regulations and the TVA. Complainant has presented no evidence to rebut the medical opinion and recommendations of Dr. Sowter.

Dr. Sowter made the initial determination to suspend Complainant's unescorted access authorization was suspended pending a full fitness-for-duty determination (Tr. 97, Jan. 9, 2012 email from Brenda Kay Sowter to Carol Manning Wilson, RX 2 at 21) and she eventually conducted Complainant's fitness-for-duty exam. (Tr. 96-97) As a separate part of the fitness-for-duty process, Dr. Patrick Lavin, a psychologist, examined Complainant to determine whether there was a reasonable assurance that Complainant exhibited the necessary trustworthiness and reliability to have his unescorted access reinstated. (Tr. 103-104.) Although Dr. Sowter and Dr. Lavin performed different functions, Dr. Sowter testified that they frequently compared notes with one another because issues may arise in their respective evaluations that might be pertinent to the other's determination. (Tr. 104-105) Both the SAE and the psychologist must approve the employee in order for the employee's access to be reinstated. (Tr. 105.) Dr. Lavin's evaluations of Complainant occurred on January 11 and 27, 2012. (RX 2 at 17.) Dr. Lavin's later opinion to reclassify Complainant's

status pending substance abuse expert fitness for duty evaluation is given significant weight. It is well reasoned, impartial, based on his review of all documents, Dr. Sowter's opinions regarding the role of the SAE and the contract psychologist, are given significant weight. Based on the persuasive evidence in the record, Dr. Sowter knows the job duties of each, and her opinions are impartial, well-reasoned, and based on her long time expertise working as the SAE with TVA.

Complainant was also assessed by Horizon Health Employee Assistance Program (EAP), Ms. Foster. (RX 2 at 19; *see also id.* at 15.) Complainant testified that he felt the EAP representative had the authority to send him back to work and relied upon that. He testified that the EAP representative, Haley Foster, told him that he was "cleared to go back to work." (Tr. 40-41). However, Dr. Sowter testified that Ms. Foster had no role regarding reinstatement of unescorted access for an employee and therefore had no authority to state whether Complainant's unescorted access should be reinstated. (Tr. 102-103). Dr. Sowter testified that Ms. Foster's role involved facilitating treatment or counseling options that might be needed as part of the fitness-for-duty process. Ms. Foster also wrote that TVA determines fitness for duty based on TVA policies and procedures. (Tr. 103) Dr. Sowter's testimony regarding the role and authority of the Substance Abuse Expert compared to the Horizon Health Employee Assistance Program staff person, is given significant weight. Based on the persuasive evidence in the record, Dr. Sowter knows the job duties of each, whereas an employee being reviewed for fitness for duty would not. Complainant's statement regarding his perceived clearance for work by Ms. Foster, the Employee Assistance Program representative, is not supported by the evidence in the record, and is entitled to less weight.

Dr. Sowter evaluated Complainant on February 2, 2012 to determine, as required, whether she had "a reasonable assurance that there [was] not an ongoing drug or alcohol issue" such that she could recommend reinstatement of Complainant's unescorted access authorization. (Tr. 95, JX 1-21; RX 2 at 12-13). Dr. Sowter testified that during the course of her evaluation, Complainant "did not want to talk about the specifics of alcohol" (Tr. 101-102) and he expressed a belief that "what he d[id] after work should not be an issue at work." (RX 2 at 13.) She noted that Complainant announced that he had been instructed to "cover-up" work orders "in order to improve the incentive plans and bonuses" while he was a contractor. (RX 2 at 13; JX 1-20; Tr. 101). Dr. Sowter testified that she initially interpreted this statement as an attempt to deflect from the matter at hand. She testified deflection was a common avoidance tactic used by individuals with alcohol or drug problems. (Tr. 106-107.) Dr. Sowter's opinion regarding evaluating employees and how they handle discussing their drug or alcohol use is given significant weight. It is well-reasoned, and since she has extensive training and expertise in drug and alcohol treatment.

Dr. Sowter testified that after evaluating Complainant, she realized that Complainant's statement regarding the falsification of records at Watts Bar created the potential to be an issue. (Tr. 107-108). As a result, she reported this information to TVA's Office of the General Counsel. She also contacted Dr. Lavin to discuss what transpired during her evaluation. (Tr. 108, RX 2-11.) Dr. Lavin held his ultimate recommendation open pending Dr. Sowter's determination. (RX 2 at 16, Tr. 106.)

Dr. Sowter testified that her unescorted access authorization determination was put on hold for a few months while the matter was referred to TVA's Office of the Inspector General (OIG) and the OIG's investigation. (Tr. 111-112.) Based on her evaluation, Dr. Sowter later recommended that Complainant's unescorted access authorization not be reinstated. (RX 2 at 11.) Dr. Sowter testified that following her February 2012 evaluation, she "could not state that [she] had a reasonable assurance" that he did not have an ongoing alcohol issue. She testified she had the necessary information needed to make this determination at that time. (Tr. 112; RX 2 at 11.) Dr. Sowter's opinion regarding the lack of reasonable assurance regarding Complainant's alcohol issues and his fitness for duty is given significant weight. Her opinion is well-reasoned, well-documented, and based on her lengthy drug and alcohol training and expertise.

The allegation of document falsification 1 1/2 years prior, which was noted by Dr. Sowter following her fitness for duty evaluation and not reported to TVA by Complainant himself, was referred to the Office of Inspector General (OIG) by TVA's Nuclear Access Services. (TR. 82). The OIG investigated per Congressional mandate to operate independently from TVA. (Tr. 73, JX 1) Per the credible evidence in the record, OIG investigations and conclusions cannot be influenced by TVA management or any other party. (TR. 81-82) Senior OIG special agent Jeffrey Dale Shelton testified at the hearing that he investigated Complainant's allegations. (TR 73, 82.) Agent Shelton and Agent Haga interviewed Complainant, on two separate occasions. (TR 82 - 84; RX 7.) At the hearing, Complainant clarified that the concern he expressed to the OIG was that TVA management had obtained illegal bonuses as a result of the work order falsification. (TR 39)

Upon receiving confirmation from Complainant that he falsified work orders for manager bonuses, Agent Shelton relayed this information to Nuclear Access Services. (TR 84-85.) Agent Shelton testified that he provided Nuclear Access Services with this information because such an admission speaks to an individual's trustworthiness and reliability. (TR 85.) Agent Shelton also learned during his investigation that two other individuals admitted to similar falsifications and reported their names to Nuclear Access Services. (TR 79, 80, 87, RX 20 at 416.) Agent Shelton's statements regarding his independent investigation, findings, conclusions, are given significant weight and are persuasive. His statements were well-reasoned, consistent with the Congressional mandate for independence, and based on his independent evaluation and investigation.

Based on the credible evidence in the record, the responsibility for certifying, maintaining, suspending, terminating, revoking, or denying an employee's unescorted access authorization clearance is with TVA's Manager of Nuclear Access Services. (JX 1 -14; RX 9 - 119, § 3.1.B.1.) The evidence shows that staff working in Nuclear Access Services, operate independently of TVA management. (Tr. 91) Based on the evidence in the record, the Manager of Nuclear Access Services relies on the Substance Abuse Expert's recommendation to make the final determination of whether a TVA employee's unescorted access authorization should be reinstated or denied. (TR. 91.)

On April 18, 2012, the Manager of Nuclear Access Services, in accordance with Dr. Sowter's recommendation, wrote Complainant that his unescorted access authorization had been

denied due to his "continued alcohol abuse, repeated disregard of criminal law forbidding the operation of a motor vehicle while under the influence of alcohol, as well his admitted improper handling of work records over a period of time while employed at Watts Bar Nuclear Plant." (RX 2 at 7; JX 1 - 25.) The letter noted that "[t]he latter matter has been referred /or further investigation by TVA." (RX 2 at 7.) Complainant acknowledged that TVA told him "in writing that [the denial of his unescorted access] was because [he] was somewhat of an alcoholic and [he] didn't belong in their realm of business out there." (Tr. 35.) The findings by the Manager of Nuclear Access Services, are given significant weight since they are based on independent TVA rules, independent investigation, and evaluation.

Based on the credible evidence in the record, an employee must have unescorted nuclear access as a condition of employment to work in Complainant's position at the Tennessee Valley Authority. As a direct result of Complainant's access being revoked, he received notification that his employment was being terminated because he no longer had unescorted access to Watts Bar Nuclear Plant, which was a condition of his employment. (JX 1 - 7-8, 26; RX 2 at 6.) An independent review of the access denial decision was upheld. (JX 1, RX 2 -3).

Complainant subsequently filed a Complaint with the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) against TVA under the Employee Protection provisions of the ERA. The OSHA Assistant Regional Administrator dismissed the complaint, finding that there was no reasonable cause to believe that TVA violated the ERA. (ALJX 4.)

Complainant Did Not Establish Liability Under the Energy Reorganization Act (ERA).

In order to establish a prima facie case under the ERA, Complainant must show by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the Tennessee Valley Authority had knowledge of his protected activity; (3) he was subjected to an unfavorable personnel action; and (4) his protected activity contributed to the unfavorable action. *Benson v. N. Ala. Radiopharmacy, Inc.*, ARB Case No. 08-037, 2010 WL 1776977, at *3 (ARB Apr. 9, 2010). *Palmer v. Canadian National Railway*, ARB No. 16-035 (ARB Sept. 30, 2016, ARB Jan. 4, 2017 reissued with full dissent). If Complainant makes this showing, the burdens shift to TVA to present clear and convincing evidence that it would have taken the same personnel action absent protected conduct. *See Trimmer v. U. S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999) (citing 42 U.S.C. § 5851(b)(3)(B)), *Palmer, supra*.

Complainant Did Not Engage In Protected Activity.

The ERA "protects workers who report safety concerns from retaliatory termination." *Mary Ma. v. American Electric Power, Inc.*, No.15-2105, 2016 WL 2641232, at *2 (6th Cir. May 10, 2016); *Am. Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (noting that the ERA protects many types of activities that implicate safety, such as "internal reports concerning regulatory violations"). However, the "ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *Am. Nuclear Res.*, 134 F.3d at 1295. To constitute protected activity, "an employee's acts must implicate safety definitively and specifically." *Id*; *accord Bechtel Construe. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995) (finding

protected conduct under ERA where carpenter "raised particular, repeated concerns about safety procedures" regarding the protection of radioactive tools).

Complainant's testimony regarding his alleged protected activity, and his claim that the denial of unescorted nuclear access authorization, and termination were due to his alleged protected activity, is not persuasive. This is due to the time lapse between the alleged protected activity falsifying records for bonuses in September 2010, the reporting to TVA in November 2011 where they responded to his email and took no action against him, and his later mandatory substance abuse evaluation in January 2012 and February 2012 due to his 3rd DUI arrest, where Complainant did not report the alleged protected activity but used it, according to Dr. Sowter, to deflect his alcohol use and 3rd DUI arrest.

Based on the credible evidence in the record, the case law, and the Act, Complainant has failed to establish a prima facie case because he did not present any evidence that he engaged in protected activity as contemplated by the ERA. Complainant testified at the hearing that the concern he expressed to the OIG was TVA managers' alleged receipt of bonuses resulting from the falsification. (Tr. 39.) Although the falsification of work orders at a nuclear plant *could* implicate a safety concern, that was not his claim. He falsified completion of work orders for monetary bonuses. He made no claim, and has never made a claim, either to Dr. Sowter, the Office Of Inspector General (OIG), or at the hearing, that his document falsification in any way implicated nuclear-safety concerns. The issue was payment of management bonuses and money. The complaint, made over a year after the alleged falsification occurred and in the context of a fitness-for-duty evaluation, and then during an interview with an OIG investigating agent that Complainant himself did not contact or initiate, is not the type of conduct that the ERA was meant to protect. Complainant did not contemporaneously make any complaint. Time went by. Complainant was hired as a full time employee of the TVA. When he did email regarding his alleged falsification of documents for bonuses, he was encouraged by upper management to always report complaints. The Tennessee Valley Authority also took no action as a result of his contacting them. Only after his third DUI, when he was being evaluated for fitness -for -duty required by the terms of his employment in nuclear energy, and possible revocation of unescorted nuclear access to nuclear energy, did he mention his claim of alleged falsification. It was not in the form of a complaint, but in response to his alcohol issues that were being assessed. Nonetheless, Dr. Sowter forwarded the alleged falsification concern for investigation .

Based on the credible evidence in the record, the case law, the Act, and the arguments of the parties, Complainant did not participate in protected activity under the ERA. However, even if Complainant made an ERA-covered report, the ERA is clear that an employee does not engage in protected conduct when he reports his own misconduct. 42 U.S.C. § 5851(g). *Hibler v. Exelon Generation Co.*, No. 2003-ERA-9, 2006 WL 861358 (Sec'y Mar. 30, 2006), is on point. The Complainant in that case initialed a work package indicating that he had completed inspections that he had not performed. The Administrative Review Board (ARB) upheld a determination that, by engaging in this misconduct, the employee forfeited the ERA's whistleblower protections. In the case of Complainant Elliott, on similar facts, he cannot be afforded whistleblower protection when reporting his own improprieties, particularly when the persuasive evidence shows that the reporting was made two years

later in an effort to deflect from the employee's subsequent DUI. Additionally, Complainant's position that his interview with Senior Special Agent Shelton constituted protected conduct is similarly not protected under the ERA. Complainant was re-reporting his own misconduct, now to Agent Shelton. Based on the persuasive evidence in the record, the only reason the independent Office of Inspector General investigated the matter was because Dr. Sowter, not Complainant, reported the issue to her supervisors based on her concern that the alleged falsification might implicate public safety concerns regarding his fitness for duty.

Based on the persuasive evidence in the record, the case law, and the Act, Complainant's conduct is also not protected because he re-raised past conduct that he already reported to TVA management. The evidence shows that months before the third DUI arrest that ultimately led to his termination, Complainant wrote an email to TVA management. He indicated that he had covered up "a bunch of work orders" during an outage when he was working at TVA as a contractor in 2010. (RX 25yyyy at 883-84.) TVA acknowledged Complainant's concern, told him not to "push[] things under the rug," and did not take any employment action against him. (RX 25yyyy at 883, TR 43-44) The law is clear that where, as here, an employee raises a concern and his employer addresses it, the concern loses any protected status it may have had. *See Stockdill v. Catalytic Indust. Maint. Co.*, No. 90-ERA-43, 1996 WL 171409, at *2 (Sec'y Jan. 24, 1996) (employee's initial safety complaint lost its protected status after employer properly addressed the issue); *Rocha v. AHR Util. Corp.*, ARB No. 07-112, 2009 WL 1898237, at *5-7 (ARB June 25, 2009) (affirming ALJ's finding that employees were properly terminated for insubordination because, although the employees initially engaged in protected conduct by questioning the quality of certain pipe welds, their conduct lost its protected status after the employer agreed with and addressed their concerns); *Sartain v. Bechtel Construct. Corp.*, No. 87-ERA-37, 1991 WL 733605, at *8 (Sec'y Feb. 22, 1991) (holding that an employee's refusal to work lost any protection after employer addressed his concerns).

Accordingly, Complainant's mention of a previous concern regarding an earlier isolated incident, which now arose during the required evaluation for his alcohol issues, fitness for duty, and review of unescorted access in a nuclear facility, does not constitute protected activity. *Cf Am.Nuclear Res.*, 134 F.3d at 1296 (employee's complaint about an isolated incident, as opposed to ongoing safety concern, was not protected). Therefore, Complainant did not meet the first element by a preponderance of the evidence in his prima facie case and his complaint is dismissed.

Alleged Protected Activity Did Not Cause or Contribute To His Termination.

Even if it were found that Complainant engaged in protected activity, which has been discussed and dismissed above since it does not involve a safety issue, involves reporting of own misconduct, and the employer addressed his concern taking no personnel action, there must be evidence that alleged protected activity contributed to the termination. In this case, there is no evidence that Complainant's reporting the alleged falsification of records for manager bonuses caused or contributed to his termination. Instead, it was Complainant's failure to maintain

unescorted nuclear access authorization due to his non-fitness for duty because of his 3rd DUI arrest.

In *Palmer v. Canadian National Railway*, ARB No. 16-035 (ARB Sept. 30, 2016, ARB Jan. 4, 2017 reissued with full dissent), the Administrative Review Board (ARB) held there is a two-step framework with different burdens of proof for the court to consider in railroad, Air 21, and Energy Reorganization Act whistleblower complaints. *Id.*, slip op. pages 39-40. The ARB held that per the legislative background, “the provision establishes a 2-step framework for factfinders: first, the factfinder must determine whether the employee has *proven*, by a preponderance of the evidence, that the protected activity was a contributing factor in the adverse action (the ‘contributing factor’ step); and, if the employee prevails at step one, the factfinder must determine whether the employer has proven, by clear and convincing evidence, that, even if the employee had *not* engaged in protected activity, the employer nonetheless *would have taken* the same adverse action (the ‘same-action’ defense).” *Id.*, slip op. at 34-35 (emphasis in original).

The Administrative Review Board in *Palmer* held that, as part of the contributing-factor analysis, “the ALJ must consider the employer’s nonretaliatory reasons, but only to determine whether the protected activity played any role at all” in the decision to take the adverse action. Based on the facts, evidence in the record, and analysis of Complainant’s termination, the court finds that alleged protected activity did not cause or contribute to Complainant’s termination. Complainant has not proven by a preponderance of the evidence that his alleged protected activity “played any role at all” in his termination.

Complainant’s January 2012 DUI when he was driving the wrong way on the highway early in the morning, triggered his fitness-for-duty evaluation. Dr. Sowter reached a conclusion based on her examination, evaluation, training and expertise as a substance abuse expert. Dr. Sowter subsequently determined in her capacity as TVA’s substance abuse expert that she did not have reasonable assurance that Complainant did not have an ongoing alcohol problem. This determination meant that he was not fit to work in the protected area of the Watts Bar Nuclear Plant. As a result, Nuclear Access Services determined that Complainant’s unescorted access authorization should not be reinstated. Once Nuclear Access Services made that determination, Tennessee Valley Authority management followed standard, impartial, and well-known policy. It terminated Complainant because he was unable to maintain a requirement for continued employment. Neither Dr. Sowter’s recommendation, nor the Manager of Nuclear Access Services’ decision based upon that recommendation, is influenced by TVA management. (Tr. 112, see also 91.) The evidence in the record is clear and persuasive regarding the independence of the Substance Abuse Expert and the Nuclear Access Services assessment from management. Based on the evidence in the record, and weighing the evidence, the court gives significant weight to the findings of the Substance Abuse Expert, the Nuclear Access Services Manager, and the Office of Inspector General. Based on the evidence in the record, the court finds there is no evidence to support Complainant’s allegation that Mr. Scales had retaliatory motives against him. The declaration in evidence by Mr. Scales is that he did not instruct document falsification or bonuses. He also declared that bonuses are not tied to meeting milestones. Even if it is assumed that Mr. Scales (the individual Complainant claims ordered the September 2010 document falsification for alleged management bonuses) had retaliatory motives against him

and wished to retaliate against him based on his discussions with the OIG, these motives could not have influenced the termination. The evidence is clear and persuasive that Mr. Scales had no input on the unescorted nuclear access determination. Complainant submitted no evidence demonstrating that Dr. Sowter had a motive to retaliate against him, and no evidence of collusion between Dr. Sowter and Mr. Scales. Dr. Sowter testified that although she knew who Mr. Scales was, she never met him in person. She also testified she did not speak to him regarding her decision to recommend denial of Complainant's unescorted access authorization. (Tr. 99.) Based on the credible evidence in the record, Complainant has not demonstrated or proven as a fact that the alleged protected activity was a contributing factor in his denied unescorted nuclear access authorization or his termination. *Palmer*, slip op. at 17.

Based on the persuasive evidence in the record, the testimony, the reports, the OIG investigation, TVA letters and notifications, Complainant's loss of his unescorted access authorization required for his continued employment with TVA was due to his 3rd DUI arrest, was the reason for his termination. It was not due to any alleged protected activity.

Complainant has not proven by a preponderance of the evidence that his alleged protected activity caused or contributed to his termination from the Tennessee Valley Authority.

TVA Would Have Taken The Same Action Against Complainant Absent His Alleged Protected Activity.

The court finds, as discussed above, that Complainant did not engage in protected activity. The court finds, as discussed above, that his termination was not caused or contributed to by any alleged protected activity. However, even if it did make the finding that Complainant engaged in protected conduct in reporting his work order falsification for management bonuses, this did not give him "carte blanche to ignore the usual obligations involved in an employer-employee relationship." *Lopez v. W. Texas Utils.*, No. 86-ERA-25, 1988 WL 524363, at *4-5 (ARB July 26, 1988); *see also Makam v. Pub. Serv. Elec. & Gas Co.*, ARB No. 99-045, ALJ No. 1998-ERA-22 (ARB Jan. 30, 2001) (holding that whistleblower protections are not "intended to be used by employees to shield themselves from termination actions for non-discriminatory reasons."). Whether he engaged in protected conduct or not, Complainant acknowledged and cannot dispute that he was required to maintain his unescorted access authorization to work for the Tennessee Valley Authority. When Complainant was hired as a full-time employee of the TVA on September 27, 2010, he signed a specialist appointment condition stating that "continued employment [is] subject to establishing and maintaining clearance for unescorted nuclear plant access." (Stipulations 5, 7, 8). Based on the agreed facts and the employment documentary evidence in the record, Complainant was aware of the requirement to maintain his unescorted nuclear access authorization in order to work for the Tennessee Valley Authority. The Parties stipulated that the Nuclear Regulatory Commission requires a physical protection system which includes unescorted access authorization. (Stipulation 9). The Parties agreed that the requirements of unescorted nuclear access authorization state that "the employee must be 'trustworthy and reliable,' such that they do not constitute an unreasonable risk to public health and safety or the common defense and security." (Stipulation 10).

To maintain fitness for duty and unescorted access authorization to a nuclear plant, Complainant was required to demonstrate avoidance of substance abuse, as well as criminal activity adversely affecting his trustworthiness and reliability. (Stipulation 11). 10 C.F.R. §§ 26.4; 73.56.

When Complainant re-raised the document falsification issue over a year later when being evaluated by Dr. Sowter for substance abuse, that did not shield him from Dr. Sowter's independent finding that his attitude concerning his repeated alcohol abuse and violation of drinking and driving laws rendered him ineligible for reinstatement. Dr. Sowter's persuasive testimony was that she had enough information following her evaluation of Complainant in February 2012 to warrant a recommendation that his unescorted nuclear access authorization should not be reinstated. Although Dr. Sowter had concerns about Complainant's claims of document falsification based on the possibility that this could have potential implications, her access-related decision was because she did not have a reasonable assurance that Complainant did not have an ongoing problem with alcohol. (TR 112)

Complainant has presented no evidence that would reduce the credibility of Dr. Sowter's opinions or explanation. Complainant has presented no evidence that the Respondent would not have taken the same action.

Based on the persuasive testimony of Dr. Sowter, the findings of the Office of Inspector General, the credible evidence in the record, the TVA has presented clear and convincing evidence that Nuclear Access Services Management would have taken the same action against Complainant to revoke his unescorted nuclear access authorization due to his non-fitness for duty after his 3rd DUI absent his alleged protected activity. Respondent has presented clear and convincing evidence that the TVA would have taken the same action to terminate employment for failure to maintain unescorted nuclear access authorization required for employment with the TVA, absent any alleged protected activity.⁸

No Back Pay And Benefits

Inasmuch as Complainant did not present sufficient evidence to establish a whistleblower claim under the ERA, he is not entitled to his requested back pay and benefits.

⁸ Ms. McCormick, Human Resources Manager at Watts Bar Nuclear Plant, Tennessee Valley Authority, testified regarding the volume and content of Complainant's sexually explicit, sexist, racist, political, and sexual orientation emails sent from his TVA email account. She testified they violated Numbers 10, 14, 24, and 37 of the TVA employee policy regarding computer use. She testified that Complainant would have been terminated based on a violation of the Cyber Security Policies due to "the quantity, the length of time and the content" of his office emails which were submitted into evidence. Ms. McCormick's opinion regarding employee discipline is persuasive and given significant weight based on her knowledge of TVA employee policies and discipline policies as a Human Resources Manager at Watts Bar. Ms. McCormick testimony and opinion that Complainant would have been terminated absent any alleged protected activity is persuasive and given significant weight based on her knowledge and expertise as Human Resources Manager at Watts Bar. Respondent has presented clear and convincing evidence that TVA would have taken the same action and terminated Complainant's employment based on the violation of Cyber Security and misuse of TVA email account absent any alleged protected activity.

CONCLUSION

For the reasons stated and upon the authorities cited, this court finds that Tennessee Valley Authority did not violate the employee protection provisions of § 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. Complainant has not established that he was engaged in protected activity since he did not report safety concerns but reported monetary bonuses. Alternatively, Complainant has not established by a preponderance of the evidence that alleged protected activity was a cause of or contributing factor in his termination since he was required to maintain fitness for duty, and unescorted nuclear access authority to the Tennessee Valley Authority nuclear plant as a requirement of working for TVA. Alternatively, TVA established by clear and convincing evidence that it would have taken the same action and discharged him even absent any alleged protected activity.

ORDER

It is hereby ORDERED that the complaint filed with OSHA, is **DISMISSED**.

SO ORDERED.

Dana Rosen
Administrative Law Judge

DAR/ksw

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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be

had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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.

If filing paper copies, 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, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.