



Issue Date: 04 November 2014

CASE NO.: 2013-ERA-17

In the Matter of:

MARK A. HOOVER,
Complainant

v.

SOUTHERN NUCLEAR,
Respondent

BEFORE: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 *et seq.* and its implementing regulations, 29 C.F.R. Part 24 (“the Act” or “ERA”). Complainant, Mark Hoover, filed a complaint with the Occupational Safety and Health Administration on or about May 31, 2013, alleging that he had been terminated from employment with Respondent because he had raised concerns about Respondent’s nuclear safety program. After investigating, OSHA dismissed the complaint. Hoover objected to the OSHA findings and requested a *de novo* hearing before an administrative law judge. On June 24-26 and July 2, 2014, I presided over the formal hearing. The record was held open for the parties to submit proposed findings of fact and closing briefs. They have done so, and the matter is ripe for decision.¹

For the reasons set forth below, I conclude that Respondent did not violate the Act by terminating Hoover’s employment. Consequently, the complaint will be dismissed.

FINDINGS OF FACT

1. On May 31, 2013, Complainant Mark Hoover (“Complainant” or “Hoover”) filed a complaint against Respondent Southern Nuclear Operating Company, Inc. (“SNC”) alleging that he was notified that his employment would be terminated in June 2014 in

¹ Complainant’s Exhibits (CX) 1-56, Respondent’s Exhibits (RX) 1-38, and ALJ Exhibit 1 were admitted into evidence. CX 1 and RX 1 were admitted for the limited purpose of impeachment and to refresh Hoover’s recollection of events. The record of the proceeding will be referred to as Tr (hearing in Birmingham) and Tr2 (telephone hearing).

retaliation for identifying potential ERA violations. Hoover testified that the adverse action took place in April 2013. (Tr. 563).

2. On August 26, 2013, OSHA dismissed the Complaint.
3. SNC is an employer within the meaning of 42 U.S.C. § 5851. Complainant was employed by Respondent as an engineer. Complainant and Respondent are covered by the Act.
4. SNC's corporate headquarters is in Birmingham, Alabama.
5. SNC operates six nuclear power generating units at three different plant sites. Two units are located at Plant Hatch near Baxley, Georgia. Two units are located at Plant Vogtle near Augusta, Georgia. Two units are located at Plant Farley near Dothan, Alabama.
6. Hoover began working for SNC in 1980. Hoover was part of the Component Programs Group within the Fleet Engineering Group. Hoover had been assigned to the Motor Operated Valves ("MOV") Periodic Verification Program since the nineties and had more knowledge than any other employee since he had created all the calculations over the years. Prior to 2012, Hoover was responsible for all of Plant Vogtle calculations and had done calculations for all three sites. (Tr. 36, 475, 485, 544).
7. It is clear from the record that SNC considers safety a top priority and trains its employees to maintain a safety conscious environment. SNC employees are encouraged to raise safety concerns, and, in fact, they raise them often. There are numerous ways to report a safety concern, including writing a Condition Report (CR), contacting supervision, discussing with nuclear oversight personnel, and submitting a concern to the Concerns Program.
8. Numerous CRs are written every day at SNC. On average, more than 160 CRs are written at the plants each day. Approximately 15,000 CRs are written at each plant per year, and approximately another 5,000-8,000 are generated per year in the Corporate Office. (Tr. 369-70). SNC expects employees to write CRs, and it is not unusual for more than one CR to be written for a particular issue. (Tr. 371, 574).
9. Many employees have written multiple CRs. For example, Joey Chandler has written 85 CRs since 2008. (Tr. 208). Hoover has written 7 or 8 CRs since 2008. (Tr. 207).
10. The Generic Letter 96-05 ("GL 96-05") program, a federal regulatory program, provides that certain valves at nuclear plants sites within the scope of the program need to be periodically tested. In September 2006, the NRC approved and issued the Joint Owners Group Program Safety Evaluation ("JOG"). The JOG specifies that participating licensees will implement the long term recommendations of the JOG MOV within six years. SNC committed to do this. Not all safety-related valves are in the GL 96-05 program. Valves that are not in the program do not need to be classified for JOG and do not require a calculation. (Tr. 43, 103; Tr2 19-20, 26).

11. On July 13, 2011, Hoover had a meeting with Jay Doyal, Joey Chandler, Daniel Ellison, and John Wheless. During this meeting, Hoover expressed his belief that certain MOVs at Plant Hatch were missing calculations because they had been improperly left out of the JOG. (Tr. 151 Tr2. 12-13). There was a difference of opinion as to whether the MOVs were included in the JOG calculations. (Tr. 28-29; Tr2 15-16).
12. Doyal told Chandler to independently review the issue raised by Hoover and to write a CR regarding the valves if he deemed it appropriate. Doyal also called Jeff Graves, the employee at Plant Hatch whom he considered to be most knowledgeable about the Hatch MOV program, and asked him if the valves referenced by Hoover belonged in the JOG program. Graves indicated that the valves did not belong in the program. Doyal did not feel like there was a safety concern after this call. (Tr. 42, 63, 153).
13. On July 22, 2011, Chandler wrote a CR regarding the scope of the MOVs at Plant Hatch. In the CR, he addressed the fact that there was a difference in the scope between the MOVs included in the IST (In-Service Testing) Program and the MOVs that have periodic testing performed as part of the GL 96-05 program. Chandler also was involved with putting together an Expert Panel for the Technical Evaluation and gathering the information needed in order to reconcile valves both in the IST Program and the GL 96-05 program. (Tr2 13-14; RXs. 33-37).
14. In August of 2012, Hoover, Chandler, and Doyal had a meeting. Hoover asked if there was a resolution to Chandler's CR related to the Hatch MOV valves and the need for calculations. Doyal told Hoover about the then-pending Expert Panel that was going to convene and review all of the valves. (Tr. 70, 78).
15. In October 2012, Hoover asked then Component Program Supervisor Andrew Neal about his concerns that certain MOV valves did not meet regulatory requirements. Neal told Hoover he would let upper management know his concerns. Although Neal believed the valves were not an issue, he told Mike Altizer, the Programs Manager, of Hoover's concerns. (Tr. 111, 131).
16. Hoover sent JOG Calculations on Plant Hatch to Chandler for review on December 6, 2012. Chandler believed the JOG calculations submitted by Hoover were incorrect because they included valves that did not need to be included. Chandler had many discussions with Hoover that certain valves were not in the program and did not need to be classified. Chandler intended to review the calculations but eventually told Doyal that he did not have time to work on these particular calculations because he had too many other competing priorities. (Tr2 21, 28- 32).
17. Neal brought the question regarding what valves should be included in the GL 96-05 program to the technical team Expert Panel. The Expert Panel consisted of Chandler and the MOV owners from the three sites. The Expert Panel determined that the valves that Hoover had concerns about did not belong in the program, and Neal so informed Hoover. (Tr. 100, 112-25).

18. The regulatory completion date for the JOG on the MOV was September 2012—six years from the date of the safety evaluation. The completion date concerned what was being implemented at the plant. The review of calculations was not part of the six-year requirement and could be completed later, if needed. SNC completed implementing the requirements of Generic Letter 96-05 by the due date. To the extent an extension was necessary, SNC could have requested an extension. (Tr. 29, 44, 92-93, 153).
19. On May 9, 2013, Hoover filed a Concern with SNC's Concerns Program regarding his position that certain Hatch MOV valves should have been included in the GL 96-05 program. (Tr. 499-501). The Concerns Program coordinator assembled a team that looked at the 94 valves that Hoover believed should be in the program. The team identified 12 or 14 valves that should have been included in the program. (Tr. 224).
20. I find Hoover engaged in protected activity when he expressed his belief that certain MOVs at Plant Hatch were missing calculations because they had been improperly left out of the JOG. This protected activity began with the July 13, 2011 meeting and included the other meetings Hoover had with supervisors and the filing of the May 9, 2013 Concern.
21. In 2009, the Institute of Nuclear Power Operations recommended that SNC adopt the GOSP (Governance, Oversight, Support, Perform) business model, a corporate organizational structure recognized as the industry standard. As part of the GOSP model, technical functions (Support, Perform) were moved from corporate headquarters to the plant sites. SNC began transitioning to the GOSP model in 2010.
22. In the middle of 2012, SNC began implementing the GOSP model in the Fleet Engineering Group. The reorganization of the Fleet Engineering Group was spearheaded by the Engineering Leadership Team ("ELT"). (Tr. 379-80).
23. The ELT was led by Paula Marino and was comprised of the directors of the functional areas and the engineering directors at the four sites. (Tr. 354, 357-58). These people included Bryan Griner (Materials Quality Engineering Manager) and Paul Hayes (Fleet Engineering Director). (Tr. 169-70, 304-05).
24. Jay Doyal was assigned to a short term role as Marino's assistant in 2012. He was not a member of the ELT but did support the ELT in preparing agendas, making copies, taking minutes, and issuing actions. (Tr. 34, 357).
25. SNC implemented the GOSP model in the Fleet Engineering Group in phases. The first phase determined what the organization would look like. SNC looked at what the best performing companies in the industry were doing and determined what tasks were being done in corporate offices and which were being done at the plant sites. Based on this, SNC determined that most of the engineering functions would go to the sites. SNC learned that other nuclear companies were performing all of the MOV and AOC calculations at the sites. (Tr. 380-82). As such, SNC's goal was for all calculations to be performed at the plants and none to be performed in the Corporate Office after the

reorganization. (Tr. 216-17). This meant that employees in the MOV calculation positions were going to the sites. (Tr. 514).

26. Beginning in the fall of 2012, SNC began communicating with employees in the Fleet Engineering Group to let them know that the reorganization process would begin for their group. (Tr. 386). Hoover's Programs Group was notified on December 20, 2012 that the "perform" aspects of the engineering programs, particularly AOV, MOV, fire protection, FAC, and ISI programs would be transitioned to the sites. During these meetings, Marino was asked several times whether severance packages would be offered, and each time she informed employees that severance packages would not be an option. (Tr. 387-88, 545; RX 28).
27. The next step of the reorganization was the selection phase – determining which employees would actually do the "Governance" and "Oversight" work in the Corporate Office. The ELT had to decide which employees would be selected for the positions. Rather than requiring employees to apply and interview to fill the positions, the ELT made decisions "based on the qualifications, the requirements of the job, and matching the best fit to those jobs." Business need was the overriding factor in job selection. (Tr. 263, 266, 174, 383).
28. HR representative Cheryl Byars was not a member of the ELT but assisted the ELT. Byars was not aware of any protected activity by Hoover until August 2013. Byars prepared a voluntary online survey to collect from employees any input that they wanted to provide to management to use as they made their decisions, including information about employees' interests and the locations at which they would like to work. The survey was not considered a job application during the reorganization period nor was it considered an application for any post-reorganization jobs. (Tr. 37, 60-61, 97, 174, 257, 265, 389-91; RX 13).
29. Hoover indicated on his survey that he was not interested in working in a leadership position, that the only location he was willing to work was corporate, and that he planned to retire within two years. (RX 13)
30. No member of the ELT was aware that Hoover had filed a safety concern. Griner, Hayes, and Marino credibly testified that they were not aware that Hoover had ever raised any safety concerns. There is no evidence that Hoover, Doyle, Ellison, Wheless, Morrow, or any other individual that had knowledge of Hoover's safety concern shared that knowledge with any member of the ELT. (Tr. 304, 321, 331, 353, 373). I specifically find that the decision makers (Marino and Hayes) had no knowledge of any protected activity on the part of Hoover prior to May 15, 2013.
31. Prior to the reorganization, Hoover's primary function was doing the Vogtle calculations. This performance function was being transferred to the site. The ELT decided Hoover was the best candidate for the Vogtle function in light of his experience level on MOV calculations. (Tr. 308-11; 347-51).

32. On April 18, 2013, Byars and Hayes met with Hoover to notify him that he had been selected for a position in the new organization at Vogtle. (Tr. 230-31, 279). As with all employees who were selected, Hoover was provided a salary quote and a copy of the relocation plan. (Tr. 332-33; RX 25).
33. The Compensation Summary indicated that Hoover was offered his same position, senior engineer, at Vogtle. Hoover was offered a bonus of \$9,411 if he accepted the position. After he was provided that information, Byars and Hayes asked him to think about the offer and to let them know whether he accepted it. (Tr. 283, 308, 333). Hoover indicated that he would accept the Vogtle position if SNC would pay him expenses on a per diem basis. (Tr. 237-38, 345). SNC generally only allows movement on a per diem basis for temporary moves. Because the reorganization was intended to move people permanently, per diem expenses were not offered to any employees affected by the reorganization. (Tr. 237-38, 281-82, 345-46). There was no evidence presented that any person who moved because of the reorganization was paid a per diem.
34. At some point, Hoover inquired about getting a severance package instead of being selected for a position in the new organization. However, no SNC employee was offered a severance as part of the reorganization. (Tr. 279-80).
35. Hoover declined the Vogtle position. On April 23, 2013, he was provided a letter outlining the availability of transitional work at the Corporate Office until December 2013. (Tr. 308-09; CX 32).
36. On May 15, 2013, Hoover had a meeting with Marino and Hayes. The meeting was prompted by an email that Hoover wrote to Marino, copying Hayes. In the email, Hoover asked whether work until December 31 was guaranteed, whether he should retire in 2013, or whether he be able to carry over vacation and retire in 2014. (Tr. 573; CX 34, 35). During the meeting, Hoover asked whether transition work could be extended beyond December 31, 2013 to support his goal of retiring in June 2014. Marino informed him that they would look into his request. At no time during this meeting or since has Hoover asked to be placed in a permanent position. (Tr. 323, 334, 398-99). Hoover has never informed any SNC management representative that his plans to retire in 2014 changed. (R-1. 334-335, 534). After the meeting, Hoover told Marino and Hayes that he had filed a Concern but did not indicate the subject matter. (CX 35).
37. By letter dated July 24, 2013, Hoover was informed that his request for transitional work through June 30, 2014 had been approved. (CX 33).
38. The reorganization closed on June 1, 2013. Thereafter, all positions were filled using SNC's normal selection process. Any employee interested in a position must apply for the position. Hoover has not researched or applied for any opening at SNC. (Tr. 545-46).
39. Hayes encouraged Hoover to apply for two specific jobs for which he believed Hoover was qualified. For the Nuclear Piping Engineer (Corporate) job, Hayes emailed Hoover, *"I think you are a viable candidate for the new posting and I encourage you to apply on-*

line by Thursday afternoon.” When Hoover did not reply, Hayes went to Hoover’s office and encouraged Hoover to apply as SNC could use Hoover’s expertise. Hoover did not apply for either job. (Tr. 316-17; 335-37; 550; CX 37).

40. Hoover complains that several other employees were offered corporate jobs after declining to relocate during the reorganization. I find each of these decisions was based on different circumstances than were presented by Hoover – including Hoover’s stated goal of retiring in June 2014.
41. Larry Myers was offered a position at Plant Hatch. Before Myers accepted or declined the position, he was offered a position in the Corporate Office in the Civil Seismic Group. One of the first steps in the reorganization was to determine which employees would actually do the “Governance” and “Oversight” work in the Corporate Office. The Corporate position is a “Governance” and “Oversight” position and requires Myers to use his leadership skills. Prior to the reorganization, Myers performed “Governance” and “Oversight” duties. Hoover’s prior duties were “Perform” duties, and, on his survey, Hoover stated he did not want a leadership position. (Tr. 433-45).
42. Jesse Budraitis is recently married and indicated on his survey that he would move to Plant Farley if SNC would wait to transfer him after his wife finishes Optometry School in Birmingham. Budraitis will be transferring to Plant Farley. Similar to Hoover’s request that he be allowed to stay at Corporate until his planned retirement in June 2014, Budraitis was allowed to stay at Corporate until his wife graduated. (Tr. 423-31, 570-71).
43. Stan Bailey was not selected for a site position as he had received a poor performance review. (Tr. 447-50).
44. Chris Murphree was offered a fire protection position at Plant Hatch which he declined. Murphree had talent in the area of computer programming and database management and had previously assisted in the automation of some processes. He was considered a software programming expert. Because of need, Murphree was offered a job as project cost analyst. Murphree was pursuing other jobs within and outside SNC. Hoover never pursued any position at SNC and indicated that he planned to retire. (Tr. 313-37).
45. Brad Harkins was offered a position at Plant Farley. Harkins had several meetings with Hayes and explained that he has a child that requires special medical care that, in Alabama, can only be provided in Birmingham. Harkins initially declined the Farley position and received the same letter as Hoover. (Tr2 57). But a week later, Harkins told Hayes he would take the Farley position. Following Hoover’s May 15 meeting in which Hayes and Marino said they would look into moving Hoover’s retirement date back to June 2014, a check valve position became available. Harkins had indicated he was willing to take on additional responsibilities and a leadership role. By putting Harkins in this position, it would free up additional work that would allow Hoover to work through his requested retirement date of June 2014. On May 29, 2013, Hayes met with Hoover and told him that SNC could accommodate his request to continue working until his requested retirement date of June 2014. (Tr. 306-319; CX33).

CONCLUSIONS OF LAW

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

Hoover Engaged in Protected Activity

Under the ERA, protected activities include notifying an employer of an alleged violation of the ERA, refusing to engage in any practice that is unlawful under the Act, commencing or causing to commence a proceeding under the ERA, and testifying, participating, or assisting in any manner in such a proceeding or in any other action to carry out the purposes of the ERA. 42 U.S.C. §§ 5851(a)(1)(A)-(F); 29 C.F.R. §§ 24.102(a) and (c). In addition to a formal complaint, an ERA protected activity includes an informal complaint about nuclear safety or a violation of the Act which implicates safety “definitively and specifically.” Consequently, the ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1571 (11th Cir. 1997); *Amer. Nuc. Res., Inc. v. U.S. Dep’t. of Labor*, 134 F.3d 1291, 1295 (6th Cir. 1998). Additionally, the complainant must actually believe a violation has occurred, and his belief must be objectively reasonable. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. 25 (ARB Jul. 14, 2000). While it does not matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations of [the Act].” *See Minard v. Nerco Delamar Co.*, 1992-SWD-1, slip op. at 8 (Sec’y Jan. 25, 1995). The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997). The reasonableness of the complainant’s belief regarding statutory violations by an employer is to be determined on the basis of the knowledge available to a reasonable person, with the complainant’s training and experience, under the same circumstances. *Melendez*, ARB No. 96-051, slip op. at 27.

I find Hoover engaged in protected activity when he expressed concerns to several supervisors over various safety performance issues with MOVs.

Hoover Did Not Suffer an Adverse Employment Action

I find that Hoover's selection for a position at Plant Vogtle was not an adverse employment action. Hoover was selected because he was deemed the best qualified employee for the position. Though Hoover was denied per diem and severance pay and though the company would not buy his 60 acres of land, SNC treated him no differently than anybody else. Per diem and severance pay were not offered as part of the reorganization package. SNC offered to purchase up to seven acres of land.

Hoover certainly was not terminated. The company let him retire as he had requested. I find that Marino and Hayes accommodated Hoover exactly as he had requested. Although Hoover used the phrase "termination letter" repeatedly, the letters were Hayes's way of reassuring Hoover that he had employment through the end of 2013 and, then, through June 2014 as Hoover had requested.

Engaging in Protected Activity Was Not a Contributing Factor in any Decision Concerning Hoover

I find and conclude that Hoover's identification of safety performance issues with MOVs did not contribute to any employment decisions regarding Hoover. The decision to adopt and follow the GOSP model was made in 2009. Because Hoover was valued, he was selected as the best employee for the position at Plant Vogtle. Hayes and Marino were not aware of any safety concerns raised by Hoover when they made all the relevant decisions. I found them both credible. Bottom line – the company wanted to keep Hoover. When Hoover declined the Plant Vogtle position, Marino and Hayes tried to accommodate Hoover as he requested by allowing him to stay at Corporate until his planned retirement date in June 2014. The first time Hayes was aware that Hoover wanted a permanent position at Corporate was after Hoover filed his OSHA complaint. Thereafter, Hayes identified two jobs for which he encouraged Hoover to apply. Hoover did not apply for either of these positions or for any other position with SNC.

CONCLUSION

Although Hoover has shown he engaged in protected activities, he has failed to show that he suffered any adverse employment action and that the complained of employment actions were taken against him because of that protected activity.

Based upon the foregoing and upon the entire record, the complaint of Mark Hoover is hereby dismissed.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge