United States
Nuclear Regulatory Commission

Report of Review

MILLSTONE UNITS 1, 2, AND 3:

Allegations of Discrimination in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned

Millstone Independent Review Team

March 12, 1999

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Attachments:

REPORT OF REVIEW OF ALLEGATIONS IN NRC OFFICE OF INVESTIGATIONS CASE NOS. 1-96-002, 1-96-007, 1-97-007, AND ASSOCIATED LESSONS LEARNED

In accordance with Chairman Jackson's January 28, 1999 tasking memorandum and the Chairman's February 9, 1999 memorandum establishing a charter for the Millstone Independent Review Team (MIRT), we have conducted a review of Office of Investigations (OI) Case Nos. 1-96-002, 1-96-007, and 1-97-007, all of which were described or referenced in the Office of the Inspector General (OIG) Event Inquiry, Case No. 99-01S (Dec. 31, 1998) [hereinafter OIG Report]. Based on that review, we have concluded the following:

1. With respect to Case No. 1-96-002, as described in Attachment 2, the available evidence is sufficient to support the conclusion that the two allegers were the subjects of discrimination in violation of 10 C.F.R. § 50.7.

2. With respect to Case No. 1-96-007, as described in Attachment 3, the available evidence is insufficient to support the conclusion that the three allegers were the subjects of discrimination in violation of section 50.7.

3. With respect to Case No. 1-97-007, as is described in Attachment 4, the available evidence is sufficient to support the conclusion that the alleger was the subject of discrimination in violation of section 50.7.

Further, although we find there is an adequate basis for a finding of discrimination in two of these three cases, we recommend that no enforcement action be taken. Our conclusion in this regard is based on the utility's apparently successful response to the remedial requirements already imposed by the agency to correct discrimination at the Northeast Utilities System (NU) Millstone facility.

In section II of this report, we summarize the results of our review of each of the three cases and, having concluded there is a sufficient evidentiary basis for proceeding in two of these cases, in section III explain our recommendation regarding appropriate enforcement action.

In addition, based on our review of the OI investigative materials for these cases and the information provided in connection with background interviews conducted by the MIRT with individuals from the Office of the General Counsel (OGC), the Office of Enforcement (OE), OI, and OIG, we have concluded there are certain "lessons learned" that can be drawn relative to the investigative and enforcement processes that were utilized in these cases. These are set forth in section IV of this report. Moreover, as requested in the Chairman's January 28, 1999 memorandum, and as an introduction to our discussion regarding the merits of the individual OI cases, in section I of this report we provide a

discussion of the "standard of review" for initiating enforcement cases concerning violations of the provisions of 10 C.F.R. § 50.7 that afford individuals protection from discrimination based on their involvement in "protected activities."

Gary K. Hamer, Supervisory Investigator with the United States Office of Special Counsel (OSC), acting as an expert advisor to the MIRT, participated in our background interviews and discussions regarding the attached case studies, and reviewed the final case studies and this report. He agrees with the conclusions and recommendations made in this memorandum and the accompanying case studies.

Also acting as an expert advisor to the MIRT was Alan S. Rosenthal, former Chairman of the NRC Atomic Safety and Licensing Appeal Panel and the General Accounting Office Personnel Appeals Board. He likewise participated in our background interviews and discussions regarding the attached case studies, and reviewed the final case studies and this report. His views concurring in the contents of this report and the attached case studies are included as Attachment 5.[1]

[1] The Review Team would like to express its appreciation to the administrative staff of the Atomic Safety and Licensing Board Panel, in particular Jack Whetstine, Sharon Perini, Allene Comlez, and James M. Cutchin, V, for their invaluable assistance in the preparation of this report.

I. EVIDENTIARY STANDARD OF REVIEW

Before providing our analysis of the particular OI cases, we outline the general standard of review we consider appropriate for reaching a decision about whether there is an adequate evidentiary basis to proceed in connection with each of these cases. It should be noted, however, that this is not the equivalent of a determination about whether to actually proceed with an enforcement action. Although a determination about whether there is an adequate evidentiary basis to sustain a discrimination allegation may be a substantial factor in making a decision to proceed with an enforcement action, that enforcement decision also involves consideration of the exercise of enforcement discretion, with all of its policy and resource implications.

A. Four Elements for Review in Discrimination Cases

We discussed with both OE and OGC the standard they currently use to determine when an enforcement case should be instituted relative to claimed violations of section 50.7. We were provided with a copy of guidance recently prepared by OGC for use by the staff in determining whether discrimination occurred in violation of section 50.7. In that memorandum, a copy of which is included as Attachment 1, OGC describes an analytical framework for determining whether discrimination occurred, pertinent parts of which we summarize below.

As this guidance is relevant to the three cases we were asked to review,[2] four elements are of critical importance:

1. Did the employee engage in protected activity?

To answer this question requires a determination about whether the employee took some action to raise or advance a nuclear safety concern. As the OGC memo notes, activities might include instituting an NRC or Department of Labor (DOL) proceeding, documenting safety concerns, or an internal or external expression of safety concerns.

2. Was the employer aware of the protected activity?

This element necessitates a finding that the employer knew about the employee's nuclear safety concern or activities to advance the concern. An employer would not be liable for violating section 50.7 if an employee failed to articulate a safety concern in a way that brought it to the employer's attention.

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[2] As the OGC memo notes, other elements, such as whether the individual who is the subject of the claimed discrimination is an "employee," may be involved; however, they are not at issue in the OI cases we reviewed.

3. Was an adverse action taken against the employee?

To satisfy this component, it is necessary to conclude that the employer visited some detrimental effect on the employee's terms, conditions, or privileges of employment. As OGC points out, this could include a variety of actions ranging from actual termination to the threat to take some detrimental action.

4. Was the adverse action taken because of the protected activity?

This requires a finding that there is a causal link between the adverse action and the protected activity. Thus, in considering an employer-articulated reason for taking an adverse action that invariably is interposed to demonstrate the action was not taken because of an employee's protected activity, it is necessary to determine whether (1) the articulated reason is a pretext intended to conceal an action taken solely because of protected activity; or (2) the articulated reason is part of a dual motive for the action in that there was both a legitimate and an improper, discrimination-based reason for the action, with the latter being a "contributing factor" to the action.[3]

B. Standard for Determining Whether There Is A Sufficient Evidentiary Basis to Institute an Enforcement Action

1. Nature of the Evidence in Discrimination Cases

Although all four of the items described above are necessary to make out a case of discrimination under section 50.7, the fourth item is the most problematic, both generally and in the cases we were asked to review. This is because it is rare that this crucial element can be established by so-called "smoking gun" evidence, i.e., evidence that irrefutably shows the adverse action was pretextual. (The clearest example of such evidence would be an admission by the official of the employer who was directly responsible for the adverse action that he or she took that action against the employee because the employee engaged in protected activity.)

Instead, what usually is available from an investigation into a section 50.7 discrimination allegation is testimony and documentary information, often conflicting, that provides circumstantial evidence of whether an adverse action was taken because an employee engaged in protected activity. Circumstantial evidence is "evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue." Webster's New Collegiate Dictionary 203 (1975) [hereinafter Webster's Dictionary]. In the context of a discrimination case, relying on circumstantial evidence means that the requisite factual

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[3] The question of the degree to which the protected activity must be a consideration in the employer's determination to take an adverse action so as to be a "contributing factor" is discussed further in section I.C.2 below.

finding that adverse action was taken because of the protected activity would be the product of a reasonable inference drawn from other proven events or circumstances in the case.

In so describing what is often the central supporting material in discrimination cases, it should not be supposed that because the information is circumstantial, the cases are somehow rooted in weak or deficient evidence. All cases, including a criminal case that must be proven with the highest degree of certainty, i.e., beyond a reasonable doubt, legitimately can be based wholly on circumstantial evidence. Indeed, such evidence, often the result of a painstaking exercise in drawing inferences (or more specifically reasonable inferences) based on the factual circumstances that are presented, can be as convincing as the "smoking gun."

One other comment is appropriate regarding the nature of circumstantial evidence. Based as it is upon the ability to draw "reasonable inferences," it is a somewhat subjective notion. As is often said, "reasonable people can differ." Thus, there is room for judgments to diverge about the extent to which any given circumstance or set of circumstances is sufficient to create an inference about the fact in issue, i.e., in section 50.7 discrimination cases, whether there is a sufficient causal nexus between the protected activity and the adverse action.

2. Evidentiary Basis for Enforcement Action

With this background, the question remains about the basis on which a decision should be made whether there is sufficient evidence to institute an enforcement action in a section 50.7 discrimination case, particularly with regard to the problematic fourth element. This being said, there appear to be four possible "burden of proof" constructs within which to frame a decision about whether there is sufficient evidence to conclude that a violation of section 50.7 occurred. In ascending order of difficulty these are: (1) the prima facie case; (2) preponderance of the evidence; (3) clear and convincing evidence; (4) beyond a reasonable doubt. And in the context of a discrimination case relative to the question of whether an adverse action was taken because of a protected activity, they might be summarized as follows:

a. Prima facie case – is there evidence that shows temporal proximity between the protected activity and the adverse action (as this standard is utilized in DOL discrimination cases, described further below, this is usually one year).

b. Preponderance of the evidence – it is more likely than not (more than a 50-50 case) that the adverse action was pretextual or that protected activity was a "contributing factor" in the adverse action.

c. Clear and convincing evidence – is there evidence that shows with reasonable certainty or a high probability that the adverse action was

pretextual or that the protected activity was a "contributing factor" in the adverse action.

d. Beyond a reasonable doubt – is there evidence that is clear, precise, and indubitable or that establishes to a moral certainty that the adverse action was pretextual or that the protected activity was a "contributing factor" in the adverse action.

From this group, the most obvious candidate is the preponderance of the evidence standard. As the OGC memorandum correctly indicates, this is the standard to be applied if an administrative hearing is held on an agency enforcement case charging discrimination. In contrast, invoking the clear and convincing evidence or beyond a reasonable doubt standards seems unnecessary. Either would put the agency to a higher standard of proof to lodge a charge than it would need to actually prove that charge if it is challenged. It is not apparent why imposing this burden on the enforcement process might be warranted.

So too, the lower standard used to establish a prima facie case seems inappropriate. That standard is used in cases brought before DOL under section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, both in making a decision to institute an agency investigation of an employee's discrimination complaint and in the initial stages of the administrative hearing regarding the validity of the individual's challenge. In DOL hearings, the shifting allocation of burdens that begins with the complainant's need to establish a prima facie case recognizes the inherent difficulty an individual faces in bringing a case that is likely to be based on circumstantial evidence about unspoken motivations. As similarly is true in the equal employment opportunity (EEO) arena, providing that only a prima facie case must be established to shift the burden back to the employer to show it did not act improperly "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). In DOL cases, the prima facie case generally is established by utilizing a inference (or presumption) based on temporal proximity. Once established, the employer is then required to show that the adverse action was motivated by legitimate, nondiscriminatory reasons. Ultimately, however, the burden rests on the complainant to show by a preponderance of the evidence that the employer's adverse action was taken because of the employee's protected activity.

In the context of NRC discrimination cases, one of the significant justifications for the burden shifting that is at the heart of the prima facie case seems to be lacking. With its resources and access to licensee employees and documentation by way of its investigative processes, this agency should be able to look into allegations of discrimination in a way that allows development of a significantly more concrete evidentiary record than the average employee in a DOL hearing. Accordingly, it makes sense for the decision about whether there is a sufficient evidentiary basis to proceed to be based on an assessment of how strong the case is in relationship to the ultimate

standard of proof -- preponderance of the evidence. Compare U.S. Department of Justice, Principles of Federal Prosecution 5-6 (July 1980) (government attorney should commence or recommend federal prosecution if he or she believes that a person's conduct constitutes a federal offense and that admissible evidence will probably be sufficient to obtain a conviction).

Accordingly, in assessing these and other discrimination cases, we believe the appropriate "evidentiary" standard should be:

> Whether, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

In the context of this standard, as the OGC memorandum suggests, Attachment 1, at 2 n.1, we would consider the "available evidence" to include all the information accessible to those making the enforcement decision, regardless of whether it would be considered admissible in an adjudicatory hearing.[4] Further, we note that, because this standard is based on a "reasonable expectation" of what can be shown, there is room for differing informed judgments about when the requisite expectation has been fulfilled.

C. Additional Considerations

Having outlined this general standard, we think two additional, related points require some mention.

1. Evidentiary Basis to Charge Company v. Individual Company Officials

From the information gathered as part of the OIG investigation, there seems to be some uncertainty about whether there is a difference in the evidentiary standard when enforcement action is being considered against a company, as opposed to the company employees who are alleged to have been the actors in the adverse action. There is a suggestion that, for the latter, there should be a somewhat higher standard, going more toward the clear and convincing side of the evidentiary spectrum. As far as we can ascertain, however, the applicable statutory or regulatory provisions regarding discrimination do not distinguish between the company and its employees in terms of

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[4] As the OGC memorandum appears to recognize, see Attachment 1, at 3, making a decision based on "available" rather than "admissible" evidence does not relieve those entrusted with making the decision on whether to go forward from candidly considering the strength of that evidence, which should include possible admissibility problems. In the administrative context, however, "admissibility" is a more flexible concept that allows the use of evidence, such as hearsay, that would not be permitted in a judicial proceeding. See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

culpability or liability. Accordingly, in both instances, the evidentiary standard must be the same.

What may lead to different treatment is the exercise of enforcement discretion. Even with a determination that there is an adequate evidentiary basis for finding a violation, as the Enforcement Policy indicates, the agency has wide discretion in determining when to act against companies or individuals that violate its requirements. Relative to discrimination cases, any number of factors may be relevant to bringing charges against individuals, including the seriousness of the violation, whether the individual has committed previous violations, and the company's efforts to correct any violation both as to the company employee involved in the adverse action and the employee who was the subject of the action.

Ultimately, it is important not to confuse the standard being utilized to determine whether a case has a sufficient evidentiary basis to go forward and the associated exercise of enforcement discretion to ensure that all applicable agency policy and resource considerations are given appropriate consideration.

2. Protected Activity as a "Contributing Factor" in Dual Motive Cases.

As we have already noted, in "dual motive" cases the question that must be confronted is whether the protected activity was a "contributing factor" in the adverse action. It might be asked, however, what is the meaning of "contribute" in terms of the quantitative or qualitative addition that the protected activity made to the decision to bring an adverse action?

One suggestion we encountered was to apply a "but for" analysis, whereby one would find the protected activity to be a contributing factor if one could reasonably conclude that "but for" the protected activity, the adverse action would not have been taken. This, however, seems to set the bar too high, because it essentially requires that the protected activity be a predominate reason for the adverse action. On the other hand, if the protected activity played a role in the adverse action that was the equivalent of adding "a drop of water into the ocean," would that provide a sufficient evidentiary basis for going forward? Common sense suggests that it must be something more.

"Contribute" is defined as "to play a significant part in bringing about an end or result." Webster's Dictionary at 247. And, in turn, "significant" is defined as "having or likely to have influence or effect." Id. at 1079. These definitions, in concert, arguably strike the proper balance. And consistent with their terms, knowledge that an employee has engaged in protected activity by the company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." Instead, there would need to be an adequate evidentiary basis, i.e., a preponderance of the evidence, for a reasonable inference that the company official had some motivation or impetus relating to the protected activity that, in some meaningful way, was an ingredient in the decision to take the adverse action.

II. ANALYSIS OF CASES

A. Case Review Process

In accordance with the directive in Chairman Jackson's January 28, 1999 memorandum, the review team evaluated three OI cases involving discrimination allegations. Although all the team members and team advisors familiarized themselves with each of the cases, an individualized, in-depth review of each of the cases was conducted by a single team member or advisor who provided a report on his or her conclusions.

For these in-depth studies, the case reviewer had available the OI case report; all supporting exhibits; the OI investigative file for the case, which included correspondence and investigator notes; and the OE file for the case. In addition, relative to Case Nos. 1-96-002 and 1-97-007, team personnel conducted interviews with the OI investigators with principal responsibility for those cases to clarify questions about the scope of the investigation that was conducted. Further, relative to Case No. 1-96-007, the in-depth review included consideration of the October 2, 1996 NRC Task Force Report and associated attachments; a December 10, 1997 OI investigator memorandum; the investigative report in another OI case, No. 1-90-001, along with two interview reports conducted in connection with that case; and a February 4, 1999 letter to Chairman Jackson from one of the allegers. Also in connection with that case, the team reviewed additional comparative information regarding the employees who were in the final pool considered for termination that OIG obtained from NU as part of the inquiry that resulted in the OIG December 1998 report. Finally, also considered in Case No. 1-96-002 were SECY-98-292, Proposed Staff Action Regarding Alleged Discrimination Against Two Employees at Northeast Utilities (EA 98-325) (Dec. 21, 1998); Commissioner vote sheets concerning that SECY paper; and letters dated January 19, January 27, February 9, and February 23, 1999, from one of the allegers to OIG that were referred to the review team for its consideration.[5]

Besides this case specific information, team personnel also reviewed various "generic" documents in an attempt to acquire an understanding of the overall situation at Millstone during the relevant time period. These included: Confirmatory Order Establishing Independent Corrective Action Verification Program (Effective Immediately) (Aug. 14, 1996); NRC Office of Nuclear Reactor Regulation, Millstone Lessons Learned Task Group Report, Part 1: Review and Findings (Sept. 1996); Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of Millstone Station Employees' Safety Concerns (Oct. 24, 1996) [hereinafter October 1996 Order]; SECY-97-036, Millstone Lessons Learned Report, Part 2: Policy Issues (Feb. 12, 1997); SECY-98-090, Selected Issues Related to Recovery of Millstone

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[5] OIG advised the team that the alleger was informed of the referral of the January 1999 letters.

Nuclear Power Station Unit 3 (Apr. 24, 1998); SECY-98-119, Remaining Issues Related to Recovery of Millstone Nuclear Power Station, Unit 3 (May 28, 1998); SECY-99-10, Closure of Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of the Millstone Station Employees' Safety Concerns (Jan. 12, 1999); Transcript of Meeting on Status of Third Party Oversight of Millstone Station's Employee Concerns Program and Safety Conscious Work Environment (Jan. 19, 1999).

Each of the individual case studies was subjected to critical analysis by all team personnel. The case studies have been adopted by all of the team members and, as is noted above, each has been endorsed by the team's advisors.

B. Discrimination at Northeast Utilities

As is noted above, each of the three cases assigned for independent review was evaluated in terms of its individual merits as reflected by the documentary and testimonial evidence obtained in the course of the OI investigation. Nonetheless, given the circumstantial nature of the body of that evidence, in reaching a conclusion respecting whether discriminatory action on the part of NU management occurred it was necessary in each case to draw inferences from the established facts.

This function was undertaken against the background of an order issued in late 1996 on behalf of the Commission by the Acting Director of the Office of Nuclear Reactor Regulation with regard to the operating licenses held by NU for the three Millstone units. As noted in its caption and further developed in its text, the order imposed a requirement that there be independent, third-party oversight of NU implementation of a mandated "comprehensive plan for reviewing and dispositioning safety issues raised by [its] employees and ensuring that employees who raise safety concerns are not subject to discrimination." October 1996 Order at 7.

As justification for imposing the requirement, the order observed that it was addressing "past failures in management processes and procedures for handling safety issues raised by employees, and in ensuring that the employees who raise safety concerns are not discriminated against." Id. at 2. The order went on to note the Commission's concern regarding the manner in which NU "has treated employees who brought safety and other concerns to the attention of [its] management." Id.

Still further, the order pointed to NU completion in January 1996 of its review of "the effectiveness of its Nuclear Safety Concerns Program (NSCP) in taking corrective actions related to employee concerns and ensuring that the employees who raise concerns are treated appropriately." Id. at 3. According to the order, that review led to findings "similar to those of previous [NU] assessments, studies and audits performed since 1991." Id. at 4. Among those "common findings" was one to the effect that management "tended to punish rather than reward employees who raised safety concerns." Id. Moreover, the review disclosed that many of the past problems it

identified still existed because prior recommendations had not been implemented "in a coordinated and effective manner." Id.

The cases before us involve allegations of discriminatory action in 1993, 1995, and 1996, respectively. Thus, they called for an examination of events occurring in the period during which, according to the Commission order, there were significant deficiencies in the manner in which NU was treating employees who raised safety concerns.

Standing alone, that consideration could not be deemed dispositive in assessing the merit of the allegations at hand. Stated otherwise, it does not necessarily follow from the fact there may have been numerous instances of discriminatory action in the relevant time period that the individual allegers with whom we are concerned were among the victims.

At the same time, however, the revelations contained in the Commission order manifestly could be taken into account in circumstances where the OI investigation was found to have produced sufficient independent evidence to support an inference that a nexus existed between the alleger's dismissal or demotion and the protected activity in which he had previously engaged. More specifically, NU's unenviable track record in dealing with employees who had raised safety concerns could properly serve in such circumstances to buttress the independently drawn inference of improper management conduct. Additionally, although seemingly not the situation in any of the cases at hand, had the OI record allowed a choice between equally plausible opposing inferences respecting the likelihood that protected activity was an influencing factor in the adverse personnel action, that track record might well have tipped the balance in favor of a finding of discrimination.

Against this backdrop, we provide the following synopsis of our review and conclusions regarding each of the three cases.[6]

C. Case No. 1-96-002

OI Case No. 1-96-002 involved two supervisors who were demoted in the course of a "reintegration," i.e., reorganization, of NU's nuclear engineering functions in November 1993. Both employees maintained that their demotions, to the positions of senior and principal engineer, respectively, were prompted by the fact that they had raised and championed a variety of safety issues in the two years preceding the reorganization. Indeed, just days before the announcement of the reorganization, both had raised

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[6] In connection with the foregoing discussion, we note that the totality of the record before us does not support the conclusion that discriminatory circumstances at NU were so "pervasive and regular" with respect to the individual allegers as to constitute a "hostile work environment" as that concept is outlined in the OGC guidance memorandum. See Attachment 1, at 2.

controversial safety issues with the vice president who presided over the process that led to their demotions.

The reorganization involved not merely first-level supervisory positions such as those held by the employees here involved but, as well, higher-level positions including those held by vice presidents. The process of determining with whom the various positions would be filled was, however, not the same in all instances.

In the case of managers, directors, and vice presidents, each candidate for such a position received a formal assessment based upon the consideration of a number of competency factors and a numerical rating that ultimately influenced the placement decisions. In the case of the first-level supervisory positions, however, there was no equivalent evaluation of employees who were supervisors at the time. The selection for those positions was made from a pool consisting of incumbent supervisors and employees who either had some experience as acting supervisors or no supervisory experience at all. The managerial potential of only the forty to fifty employees not in supervisory positions was assessed. Those employees were then ranked in four quartiles.

The actual supervisory position selections were made at a meeting presided over by a vice president and attended by, among others, persons who had already been tapped for director positions in the reorganized engineering structures. Apart from the quartile ratings for the potential supervisors, there was no written material – such as performance appraisals – available to the selecting officials. Moreover, it appears that, in order to receive any consideration, a candidate had to be proposed by one of those officials. According to the presiding vice president, the objective of the selection process was to determine which candidates would be the "best fit" in the positions that survived the reorganization.

Whether or not the names of the two allegers were ever mentioned, the OI record indicates that apparently neither received any consideration at all. In the totality of the circumstances disclosed by the OI record, we concluded that it could and should be inferred that this failure was influenced by the employees' prior protected activity. Among other things, both individuals had strong performance appraisals that reflected attributes that would appear to have been what was being sought in the quest for the "best fits." Beyond that, one of the allegers was replaced as a supervisor by an individual (a prior mere acting supervisor) who was not shown to have possessed qualifications lacking in the alleger.

All in all, the officials involved in the selection process did not supply a credible explanation respecting why neither alleger was worthy even of consideration for retention in supervisory positions in which they had performed well in the past. Given the totally subjective nature of the selection process for supervisory positions, this shortcoming could be deemed pivotal on the question of whether their protected activity influenced their non-selection.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

D. Case No. 1-96-007

OI Case No. 1-96-007 involved three individuals whose employment was terminated in January 1996, along with ninety-nine other employees, as part of a workforce reduction program. Each employee alleged that his inclusion in the reduction was brought about by reason of his involvement in protected activity.

Employees under consideration for termination under the workforce reduction program were evaluated and ranked, on a matrix, with their peers in a number of specific areas of competence. With input from their supervisors, managers were responsible for completing the matrices and were to base their scores on the employee's last two performance reviews and a prediction of how the employee was likely to perform in the future organization. The review procedure in connection with the completed matrices included an examination of those of certain employees who had raised safety concerns. The purpose was to ensure that they had not been targeted specifically for reduction. The three allegers were on this so-called "added assurance" review list.

In the case of the division in which each of the allegers was employed, it was ultimately determined that a total of four employees were to be terminated. On the basis of their low relative rankings on the matrices, the allegers were included in that group.

Because the matrices of the employees not terminated were destroyed in the interim, an inquiry into whether there was invidious disparate treatment of the allegers has been foreclosed. The OI record, however, not only confirmed that the allegers had faired poorly in the evaluation process, but also negated any suggestion that their low rankings might have had discriminatory underpinnings. The content of their matrices was furnished by first and second-level supervisors without any discernible reason to provide the allegers with unjustifiable low evaluations in retaliation for their protected activity. More important, peers of all three allegers confirmed the existence of performance shortcomings that readily justified the rankings that were given to them. There was some suggestion that the vice president in charge of the division in which they worked may have acted against them because of his knowledge either of the past involvement of two of the allegers with a well known Millstone whistleblower or as a result of his service on a board that reviewed the other alleger's appeal of his 1994 performance evaluation. In the totality of circumstances, however, we could not discern a sufficient basis for a finding that the protected activities of one or more of the allegers was a factor involved in their inclusion in the workforce reduction.

In this regard, we have considered the concerns expressed by the NRC Task Force and the OI investigator with principal responsibility for this case. On analysis of these concerns, our assessment of the record before us remains unaltered.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there is not information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

E. Case No. 1-97-007

OI Case No. 1-97-007 involved an electrical engineering supervisor whose employment was terminated in August 1995. The assigned justification for that action was that his performance in that role was unsatisfactory and, under a newly-formulated accountability philosophy, in such circumstances dismissal rather than demotion was required. The employee insisted, however, that his dismissal was in retaliation for his having immediately reported to higher-level management a threat he had allegedly received from his immediate superior approximately nine months earlier. As he had interpreted the threat, he was being told that, if modifications on a Millstone Unit 2 safety-related system extended a refueling outage then in effect, he and a subordinate engineer assigned to the project would be fired. Thus, he was being at least implicitly directed to cut corners if necessary to ensure that the project did not hold up resumption of Unit 2 operation.

Our analysis of the record persuaded us that the reason assigned for the employee's termination was pretextual and that, in actuality, he was a victim of discriminatory action based upon his protected activity in reporting the threat. Two considerations principally undergird this conclusion.

First, the management officials responsible for the termination decision maintained that, in the 1994-95 time period, his supervisory performance was so poor that resort to a performance improvement plan would have served no good purpose. (Subsequently, a grievance committee ordered his reinstatement on the ground that company and departmental policy had required that he be given an opportunity to improve his performance.) Yet, the employee had become a supervisor in the early 1980s and the OI investigation revealed that, up to 1994, his performance appraisals were unblemished.

Second, the primary assigned example of assertedly poor supervisory performance involved an untoward incident that occurred when the employee was on vacation. The explanation given by management for nonetheless holding him accountable for the incident was specious. Moreover, the individual found principally responsible for the incident was later given supervisory responsibilities.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

III. ENFORCEMENT RECOMMENDATION

The question remains as to whether enforcement action should be taken in either or both of the two cases in which we have concluded that NU management personnel discriminated against subordinates because they engaged in protected activities. If taken, that action could be directed against either or both the licensee and the discriminating managers.

Manifestly, the question is essentially one of the appropriate exercise of enforcement discretion and, as such, brings policy considerations into play. Moreover, some of those considerations – for example, the best utilization of what are doubtless limited agency resources – clearly are beyond our ability to evaluate. We thus must confine ourselves to what can be said based upon our understanding of the philosophy undergirding the Commission's enforcement policy, as well as of significant developments occurring since the determined discriminatory actions took place in 1993 and 1995, respectively.

A. Enforcement Policy Regarding Discrimination Cases

A reading of the totality of the General Statement of Policy and Procedures for NRC Enforcement Actions, NUREG-1600, Rev. 1 (May 1998), 63 Fed. Reg. 26,630 (1998) [hereinafter NUREG-1600], confirms the remedial nature of such actions. In the context of discriminatory misconduct such as that found to have occurred in the two cases here, the foundation of the enforcement policy appears to be the recognition that retaliation against employees who have raised safety concerns poses a significant actual or potential threat to the public health and safety. Accordingly, it is important where wrongdoing of that stripe has been uncovered that measures be taken designed to ensure that there is not a repetition on the part of the licensee and its managers. Further, it is equally important that the message be clearly conveyed to other NRC licensees and their managers that retaliatory adverse personnel actions are a very serious matter and cannot and will not be tolerated by this agency.

B. Relevant Factors in Implementing Policy

If this understanding is correct, the pivotal inquiry is into whether, in the circumstances at hand, enforcement action against NU and/or its offending managers is warranted in the furtherance of the dual purposes at the root of the enforcement policy as it applies to discrimination cases. In approaching this question, we have taken note of three documents of seeming relevance: (1) the previously discussed October 24, 1996 Commission order in which NU was directed to take certain specific steps designed to rectify prior misconduct in the treatment of employees who had voiced safety concerns; (2) the transcript of an open Commission meeting held on January 19, 1999, regarding possible closure of that order; and (3) the March 9, 1999 staff requirements memorandum (SRM) approving the staff's recommendation to close out the October 1996 order.

1. October 1996 Order

As earlier noted, the backdrop of the October 1996 order was a several year history of retaliation by NU managers against employees who engaged in protected activity; as stated in the order, one recurrent finding was to the effect that the management "tended to punish rather than reward employees who raised safety concerns." This state of affairs prompted the Commission to order NU to put in place an independent, third-party oversight of its implementation of a mandated "comprehensive plan for reviewing and dispositioning safety issues raised by [its] employees and ensuring that employees who raise safety concerns are not subject to discrimination." See supra p. 10.

2. January 1999 Commission Meeting

The January 19 Commission meeting -- conducted more than two years after the October 1996 order was issued -- addressed specifically the matter of the status of the third-party oversight of Millstone Station's Employee Concerns Program (ECP) and safety conscious work environment (SCWE). The participants in the meeting included, in addition to a number of NU officers assigned to the Millstone facility, officials of Little Harbor Consultants, Inc. (which conducted the independent third-party oversight), members of the Millstone Ad-Hoc Employee Group, and senior members of the NRC staff.

At the outset of the meeting, Chairman Jackson referred to the October 1996 Commission order and to events in the wake of that order. Among other things, she noted that, with Commission approval, NU had selected Little Harbor Consultants to conduct the third party oversight. Since May 1997, approximately a dozen meetings had been held between NU, Little Harbor, and the NRC staff to discuss the status of the mandated NU comprehensive plan embracing the ECP and the SCWE. The purpose of the January 1999 briefing, she indicated, was to collect information to assist the Commission in deciding "whether to close the October, 1996 order." Tr. at S-5 to S-8.

After entertaining the views of NU senior management who expressed the belief that the comprehensive plan was achieving the desired results, Tr. at S-8 to S-75, the Commission invited Little Harbor's appraisal. In response, John Beck, its president, first outlined the specific functions that Little Harbor had undertaken in carrying out the assigned mission. Tr. at S-76 to S-78. He then stated categorically that he supported the lifting of the October 1996 order. Tr. at S-78 to S-79. In his words: "We genuinely feel that we are no longer needed on a full time basis to assure that Millstone management does the right thing when challenged by those events which occur in everyone's work place. We further believe that Millstone management is committed to keeping it that way in the future." Tr. at S-79.[7] This assessment was essentially

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[7]The Commission was told that NU nonetheless planned to continue to avail itself (continued...)

endorsed by Billie Garde, a Little Harbor consultant involved in the oversight activity. Tr. at S-83.

For its part, the NRC staff concurred in the Little Harbor judgment that the strictures of the October 1996 order were no longer required. Tr. at S-89 to S-120. And the three representatives of the Millstone Employees Ad-Hoc Group were generally positive respecting the effectiveness of the corrective measures taken in fulfillment of that order. Tr. at S-128 to S-147.[6]

3. Closure of October 1996 Order

Subsequently, in apparent agreement with the appraisals of NU, the staff, Little Harbor, and the Millstone Employees Ad-Hoc Group, in a March 9, 1999 SRM concerning SECY-99-10, the Commission approved the staff's recommendation to close the October 1996 order. In doing so, the Commission directed the staff to be vigilant in monitoring NU's performance in the ECP and SCWE areas to ensure any performance decline is detected early on.

C. Timing of Enforcement Action

As is apparent from the foregoing, over two years before the determination of wrongdoing that we now make in Cases Nos. 1-96-002 and 1-97-007, the Commission took action against NU that, in its effect, applied directly to such wrongdoing. This was, of course, a very unusual sequence of events insofar as concerns the customary Commission response to allegations of discrimination flowing from protected activity.

Normally, the consideration of possible Commission enforcement action addressed to a particular alleged violation of the employee protection provisions of 10 C.F.R. § 50.7 does, as it must, abide a finding that the allegation is meritorious. Only upon such a finding can it be appropriately determined what, if any, sanction against the licensee and/or the offending managers should be imposed in the fulfillment of the purposes underlying the enforcement policy as applied to section 50.7 violations.

As seen, two factors turned the normal process on its head in this instance. First, by 1996 it had become clear to the Commission that there had been for many years an unhealthy NU environment respecting the treatment of employees engaged in protected

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[7](...continued)
of Little Harbor's services on a part-time basis. Tr. at S-21, S-80.

[8] Other witnesses, including representatives of the State of Connecticut Nuclear Energy Advisory Council and Friends of a Safe Millstone, expressed the view that it was desirable to continue Little Harbor oversight on an "on call" part-time basis. Tr. at S-123, S-146.

activities. As a consequence, corrective action in the form of the NU implementation of a broad-scale remedial plan under independent third-party oversight was ordered in that year. Second, while the umbrella of the decreed corrective action extended to the allegations of 1993 and 1995 wrongdoing in Cases Nos. 1-96-002 and 1-97-007, respectively, it is not until 1999 that those allegations are being upheld. As of this time, the corrective action has been in progress for over two years and, according to all those involved in its implementation (NU), its oversight (Little Harbor), and its regulatory appraisal (NRC staff), has successfully accomplished its intended objective, an assessment with which the Commission seemingly agrees.

D. Recommendation

1. Completed NU Remedial Actions Make Enforcement Action Unnecessary

In the final analysis, it appears that, with the Commission's apparent acceptance of the representations made at the January 19 meeting, as a result of agency action taken on the basis of a generic determination of wrongdoing the misconduct found in the two cases under consideration was adequately remedied before those findings surfaced.[9] In that extraordinary circumstance, there is reason to question what worthwhile purpose might be served by taking further, formal enforcement action against either NU or its managers responsible for the 1993 and 1995 discrimination. The October 1996 order conveyed a strong message to NU respecting the unacceptability of the conduct addressed in it and, among other things, put NU to the considerable expense of arranging for independent third party oversight. That message seemingly has had its desired result insofar as regards NU and doubtless was not lost on other reactor licensees.[10] That being so, any additional sanction imposed at this time – such as the imposition of a civil penalty – might be thought to be more punitive in character than remedial.

2. Enforcement Action if Completed NU Remedial Actions Are Found to be Insufficient as Basis for Foregoing Enforcement Action

Should the Commission nonetheless not be satisfied that the misconduct found in the two cases under consideration has already been totally remedied, as we explain below

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[9] In addition, it should be noted that, in Case No. 1-97-007, an NU grievance committee overturned the termination that we have found had a discriminatory foundation (albeit on other, purely procedural, grounds).

[10] With what is an apparently radical change in the NU environment since 1996 with regard to the treatment of employees raising safety concerns, it is a reasonable assumption that the offending managers in the cases we have reviewed who are still employed by NU have been "given the word" that such conduct is not acceptable and will not be tolerated.

the violations we have identified do appear to warrant escalated enforcement action against the licensee. Additionally, enforcement action against the utility officials involved in the discriminatory activities may be warranted as well.

For Case No. 1-96-002, given our conclusions about the involvement of two mid-level management officials (a director and a vice president, who were third and fourth-level supervisors, respectively), a Severity Level II civil penalty is potentially involved. See NUREG-1600, at 23, 63 Fed. Reg. at 26,652. Moreover, applying the enforcement policy flow chart, id. at 9, 63 Fed. Reg. at 26,638, because NU has been the subject of escalated enforcement action within the past two years, see SECY-98-119, at 13-14, and, in these circumstances, would receive no credit for identification or corrective action,[11] subject to the exercise of discretion,[12] the civil penalty amount potentially would be the Severity Level II base amount ($88,000) plus 100 percent.

For Case No. 1-97-007, because one of the NU officials involved was at the time a mid-level management official (a director, who was third-level supervisor), a Severity Level II civil penalty also potentially is involved. Again, because NU has been the subject of escalated action within the past two years and, in these circumstances, would be entitled to no credit for identification or corrective action,[13] subject to the exercise of discretion, the civil penalty amount potentially would be the Severity Level II base amount plus 100 percent.

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[11] The identification credit appears inappropriate in Case No. 1-96-002 because the agency, not NU, is identifying the violation. In connection with the corrective action credit, the enforcement policy statement indicates that in discrimination cases it should normally be considered only if the licensee "takes prompt, comprehensive corrective action that (1) addresses the broader environment for raising safety concerns in the workplace, and (2) provides a remedy for the particular discrimination at issue." NUREG-1600, at 11, 63 Fed. Reg. at 26,640. For Case No. 1-96-002, up to this point the licensee has not taken any action under the second element, and thus does not appear to qualify for this credit either.

[12] In both cases, there may be significant questions about the appropriate use of limited enforcement resources. As we have previously noted, this is a matter about which we cannot make an informed judgment.

[13] The identification credit appears inappropriate in Case No. 1-97-007 as well because the agency, not NU, is identifying the violation. The corrective action credit also appears inapplicable because under element two -- provide a remedy for the particular discrimination -- although the utility did take action to reinstate the terminated employee through an internal grievance process, that was as a result of a finding unrelated to discrimination. See supra note 9.

With respect to the individuals involved, the agency previously has taken enforcement action against utility officials found to have been involved in discriminatory activities, by issuing either a notice of violation or an order banning the individual from licensed activities for a specified period.[14] A review of significant enforcement actions between January 1990 and June 1998 reveals three instances in which utility supervisors, as individuals, have been subjected to agency enforcement action for being involved in taking discriminatory actions in violation of section 50.7.[15]

As the enforcement policy notes, however, when escalated enforcement action appears to be warranted, the agency may provide the opportunity for a predecisional enforcement conference to obtain further information to assist it in making the appropriate enforcement decision. In this instance, particularly with respect to the individuals involved,[16] such a conference should be convened to ensure that the agency can make a fully informed enforcement decision.

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[14] Although the enforcement policy also indicates that a letter of reprimand may be issued to an individual to identify significant deficiencies in his or her performance of licensed activities, it is our understanding that use of this administrative action is in the process of being discontinued.

[15] In 1995 and 1996 cases – IA 95-042 and IA 96-015, respectively – notices of violation for Severity Level II and Severity Level III violations were issued to individuals after OIG or OI and DOL findings of discrimination by their employer based on their actions, and, in one case, a federal criminal guilty plea to violating NRC requirements. In both cases, the staff did not issue an order removing the individuals from licensed activities. In the one instance, the staff indicated this was based on the employer's action removing the individual from such activities, while in the other the staff recognized the significant penalties already imposed, including loss of employment and a felony conviction, as well as the individual's recognition he had acted improperly and understood the importance of the requirements of section 50.7. In the third case, which was brought in 1997 (IA 96-101), an enforcement order was issued against a utility vice president for violating section 50.7 following OI and DOL findings of discrimination by his employer based on his actions. In the enforcement order, which placed a five-year prohibition on his involvement in NRC-licensed activities, it was noted that during a predecisional enforcement conference the utility official continued to insist that he had not taken any discriminatory action.

[16] With respect to the individuals involved, based on the cases previously brought by the agency, a significant factor in making an enforcement decision appears to be the extent to which those individuals are willing to acknowledge wrongdoing.

IV. LESSONS LEARNED

A. Lessons Learned Review Process

In seeking to draw lessons learned from the investigative and enforcement processes used with respect to these cases, and principally Case No. 1-96-007 that was the focus of the December 1998 OIG report, in addition to review of the individual case information outlined in section II.A. above, team personnel reviewed the January 27, 1999 memorandum from the Executive Director for Operations (EDO) outlining staff responses to Chairman Jackson's January 7, 1999 questions concerning the December 1998 OIG report, and conducted interviews with senior officials from OI, OE, and OGC about the general conduct of the agency's investigative and enforcement processes. Team personnel also had discussions with an OIG investigator who was involved in the preparation of the December 1998 report. In this regard, the team was given access to the transcribed interviews of various agency employees taken during the OIG inquiry that led to the December 1998 report.

Based on the information gathered through this process, we provide the following suggestions and recommendations.

B. Lessons Learned

1. Utilization of Millstone Task Force

From what we have been able to gather, the decision to assemble the special task force to begin a review of the 1996 Millstone reorganization apparently was a sound one. What is less clear, however, is whether there was a clear concept of the way in which that group's work was to be utilized and incorporated into the existing investigative and enforcement processes. The seemingly abrupt decision to halt their work, in combination with the belated direction, some five months later, to prepare a report on their conclusions, seems to reflect there was not, at its conception, a plan for integrating the task force into the existing regulatory scheme. This is also reflected by the apparent lack of any concerted effort to include appropriate task force members in all steps of the enforcement process, including the June 1998 final conference on Case No. 1-96-007.

A special task force like that established to review the 1996 NU downsizing effort can serve a valuable purpose by bringing special expertise and insight into the investigative and enforcement processes. As the circumstances surrounding that task force illustrate, however, failure explicitly to define the group's role in the existing agency processes from the outset can effectively nullify its usefulness by creating unnecessary misunderstandings and misperceptions about the validity of any results derived from those processes.

2. OI Investigation

Although as to each of the three cases reviewed, we generally found the OI investigation to be thorough and comprehensive, we were struck by the lack of comment by the investigators regarding their observations of witness behavior or demeanor that would be relevant in assessing the witness' credibility and veracity. Particularly in the context of these discrimination cases that depend on inferences about motives, witness credibility can be a significant factor in assessing the strength or weakness of evidence upon which inferences about discrimination will be based. In discussions with OI, it was suggested that they are reluctant to put such information in reports, but are always willing to discuss such matters with OE or OGC personnel involved in case review. To the degree there is a need for closer coordination between OGC and OI (and perhaps OE as well) regarding case development and analysis, see section IV.B.5 below, we would hope this type of information will be conveyed and affirmatively utilized in making decisions about whether there is an adequate evidentiary basis to proceed with particular discrimination cases.

3. Department of Justice (DOJ) Interaction

Another apparently unique aspect regarding the various discrimination cases relating to Millstone is the request from the local United States Attorney's Office that OI investigative reports relating to referred Millstone discrimination allegations not include a summary of conclusions. The apparent basis for this request was previous leaks of this information coming from within the NRC that the federal prosecutors perceived was interfering with their ability to conduct their prosecutorial assessments.

While the decision not to forward OI summaries for these reports was appropriate, the apparent decision not to even prepare those summaries is questionable. The process of analyzing the mass of information generated in the course of investigations such as those at issue here in order to prepare a thorough, reasoned summary and supporting conclusions is a vital part of the process. Notwithstanding the problem of leaks, it does not seem that preparing such a summary, retaining it within OI until DOJ has finished its review of the report, and then attaching the summary (with any additional supplementation that might be necessary based on the DOJ review) as the report goes forward for consideration as part of the agency enforcement process is likely to cause the problem identified by DOJ relative to Millstone.[17]

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[17] The January 27, 1999 EDO response to Chairman Jackson's January 7, 1999 memorandum regarding the December 1998 OIG report indicates that "OI will provide written conclusions and synopses after DOJ returns the case to NRC." Jan. 27, 1999 Memorandum from William D. Travers, EDO, to Chairman Jackson, attach. 1, at 1 (emphasis supplied). So that the analytical process is complete, we think it is important the conclusions be drafted at the same time the report is prepared, even if they are not "attached" until later.

Although acknowledged in the OIG report, it is worth mentioning again that the lack of any investigatory summary here apparently had another, albeit again unintended, detrimental impact on the process. OI has a policy in its manual that governs the resolution of disputes between investigators and OI managers. See OI Procedures Manual at 32-33 (Aug. 1996). As the OIG report indicates, however, that policy was not utilized to address the apparent conflict between the OI investigator and the Field Office Director over the sufficiency of Case No. 1-96-007 because the report did not contain a written conclusion. See OIG Report at 10. This is unfortunate, since a more direct confrontation of the problems of this case at an earlier stage through this policy might have surfaced at a much earlier point the uncertainties that ultimately led to the position reversal that raised concerns about the overall integrity of the enforcement process.

4. Enforcement Conference Process

As we have noted, because they involve drawing inferences about the generally unexpressed motives of individuals, discrimination cases are among the most difficult agency enforcement matters. Especially concerning the critical question of whether there is a sufficient "causal nexus" between the protected action and the adverse action, these cases require a careful analysis of the factual record -- determining what the relevant facts are and how they are to be weighted, compared, and contrasted -- to reach a conclusion.

Enforcement Guidance Memorandum (EGM) 99-001, which is included as Attachment 2 to the January 27, 1999 EDO response, provides guidance intended to ensure that Enforcement Action (EA) Request and Enforcement Strategy Forms now used as status and briefing aids at staff enforcement conferences more accurately reflect what occurs during, and the outcome of, these conferences. This certainly addresses the recordkeeping concern identified by the OIG report. There is, however, another, perhaps more substantive concern, that appears to remain regarding the enforcement conference decisional process as it relates to discrimination cases.

From the most recent draft of Staff Requirements Memorandum (SRM) M990115, it appears the Commission is considering requested that in future enforcement papers to the Commission, the staff clearly state (1) the criteria it used to determine whether a violation occurred and the facts and analysis relied on to reach that conclusion; and (2) in the event of differences between OE and OI, the basis for OE's ultimate recommendation, including a supporting analysis. We think, however, that particularly for the concededly difficult discrimination cases, consideration should be given to starting this "articulated analytical process" at the inception of the enforcement process, not just when these matters reach the Commission.

What we contemplate for discrimination cases is a process, beginning at the enforcement panel stage, in which there is some attempt by the major participants -- e.g., OI, OGC, and OE -- to set out briefly in writing the analytical framework for their tentative conclusions regarding a particular discrimination allegation. The construct we have

described in section II.A. above (supplemented to address other relevant factors) could provide a template for such an analysis, with the length being something along the lines of the case summaries that are set forth in section II.C.-E of this report.

The OI investigation report (with conclusions) seemingly could constitute the articulated analysis for that office.[18] OGC and OE likewise would be expected to provide some concise written explanation of their analysis of the facts provided in the OI report. These office products arguably would provide a more focused basis for the subsequent enforcement conference discussions.

To be sure, there are personnel resource and timeliness implications to this approach, to say nothing of the general antipathy to further "papering" what in may instances are already voluminous records. On the other hand, given the significance of discrimination cases in the overall investigative caseload, see section IV.B.5 below, this additional "up front" work might well provide the benefit of requiring less "clean up" labor later in the enforcement process.

5. OGC Involvement

On the basis of disclosures in the OIG investigation, there may be room for reassessing the OGC role in determining whether to take enforcement action in a particular case of alleged discrimination.[19] It appears that, at least in the time period relevant to our inquiry, in many instances OGC confined itself to a notation that it had "no legal objection" to the institution of a particular enforcement action. That notation, as we have been led to understand it, did not mean that the OGC enforcement attorneys who had reviewed the case file had concluded that the case for enforcement was strong, i.e., that, should it be litigated, the proposed penalty would likely be upheld.[20] All that "no legal objection" appears to have meant was what was literally stated: whether or not justified on the established facts, no illegality would be involved in bringing an enforcement action.

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[18] It is our understanding that, at least in some of the regional offices, a separate written case analysis is prepared by regional officials prior to an enforcement conference, which also could continue to be provided for the conference.

[19] In making this recommendation, it should be understood that we are not critiquing the way in which OGC enforcement attorneys or supervisors have performed their duties in any individual case, given the institutional construct in which they were operating. Rather, what we suggest is a concern about the nature of the framework within which they labor.

[20] To the contrary, the attorneys might have concluded that the case was so weak that, in the words of one OGC lawyer interviewed during the Office of Inspector General's investigation, bringing an enforcement action would be "a dumb thing to do."

When so confined, as it may well have been in connection with the December 1997 enforcement panel meeting in which it was decided to proceed with enforcement in Case No. 1-96-007, such OGC participation is not as helpful as it might otherwise be. Given the fact that at least one OGC enforcement attorney has reviewed the entire case file, the role of that office might extend far beyond simply venturing an opinion on whether an enforcement action would or would not be legally precluded. Rather, we know of no good reason why OGC should not provide OE with its considered judgment as to whether an enforcement action is not only legally permissible, but also warranted under whatever evidentiary standard the Commission has adopted as a basis for taking such action.[21]

On the basis of oral briefings we received with regard to the role OGC attorneys play in giving advice to OE and OI in cases involving alleged violations of section 50.7, it appears that the situation indicated by the OIG investigation may now have changed. Specifically, we have been given reason to believe that, at present, OGC enforcement attorneys may be assuming a more proactive role in providing their views on the strengths and weaknesses of particular cases as illuminated by the record amassed in the course of the OI investigation. If so, the process of reaching an informed judgment on whether a section 50.7 violation worthy of enforcement has occurred will have been benefitted.

We also note that, according to the information we were given by OI, approximately forty percent of the office's total caseload is discrimination cases, with those case types making up sixty-five percent of the high-priority cases. Because discrimination cases are so "fact intensive," i.e., they require a careful development and sifting of the facts to determine what reasonable inferences can be drawn, earlier involvement on the part of OGC attorneys (and perhaps OE personnel) may well be useful, arguably from the investigation's inception. In one of our oral briefings, OGC indicated that in the context of a planned office reorganization, it is considering assigning discrimination cases with the anticipation that the attorney who advises on the case during the investigative/enforcement process will be the attorney responsible for trying the matter should it go to an administrative hearing.[22] This undoubtedly would help to ensure that

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[21] OGC would not, of course, be called upon to pass upon such policy questions as whether it would be an appropriate exercise of prosecutorial discretion to forego an enforcement action in the circumstances of the particular case.

[22] In this regard, we hope that the seeming need for enhanced interaction between OI and OGC enforcement attorneys, particularly at the outset of the investigative process, would not fall victim to historical concerns about OI independence. The need to maintain OI independence is clear; however, more collaboration between OGC enforcement attorneys and OI investigators to develop the factual construct for enforcement cases, particularly discrimination cases, seems highly desirable.

evidentiary problems are explored thoroughly before any decision to bring enforcement action is made.[23]

6. Handling of Discrimination Cases Generally

As we have already noted, several of those interviewed suggested that the Millstone situation was somewhat unique. It nonetheless seems to us that, with the present state of the electric generation industry in which competition and deregulation are hallmarks, massive downsizings like that which occurred in 1996 can be expected at other utilities in the future. It further seems likely that in such instances, as was the case with Millstone, a number of discrimination complaints can be anticipated. It thus may be a benefit to the agency to have in mind a more systematic approach to handling such events.

As we have indicated in our report on Case No. 1-96-007 relative to the 1996 NU reorganization, the utility's destruction of the matrix information on everyone other than those selected for termination has rendered impossible any attempt to analyze the circumstances based on disparate treatment. Nonetheless, because evidence of disparate treatment may be significant in identifying as pretextual discrimination actions that otherwise might be discounted as "legitimate business reasons," a principal agency concern should be that for a reasonable period of time the utility retains, and the agency has access to, all relevant information regarding those whose positions were implicated in a reorganization/downsizing process. This would include information on all personnel whose positions were considered as part of the reorganization process, whether or not they were (1) involved in protected activity; or (2) actually subjected to an adverse action, such as termination or demotion.

Along these same lines, the agency may wish to consider a more standardized approach relative to identifying and interviewing "comparable" individuals in connection with the disparate treatment aspects of an investigation into a large reorganization. Admittedly, attempting to get a complete picture of what occurred for the purpose of making a disparate treatment analysis often will be very resource intensive. For instance, in Case No. 1-96-002, to get a complete view of disparate treatment would require interviews with perhaps thirty people, including those who were demoted in 1993, those who retained their supervisory positions, and those who were given supervisory positions for the first time. Nonetheless, without obtaining relevant information on a significant number of these individuals, it may be difficult to reach a concrete conclusion about the

[23] In scrutinizing a claim that a federal executive branch "whistleblower" has been subjected to a prohibited personnel practice, an Office of Special Counsel investigator and the OSC attorney responsible for seeking corrective and disciplinary action through litigation before the Merit Systems Protection Board work closely on the case almost from its inception. Based on his 20 years of experience with the OSC, Supervisory Investigator Hamer has found this interaction is integral to developing and prosecuting such cases successfully.

role of disparate treatment evidence in a particular investigation. Further, although some interviews designed to elicit comparative information were done in Case No. 1-96-002, it does not seem there was a clear idea of exactly what "comparative" information was needed to provide the best analytical basis to reach a conclusion about disparate treatment. Given the similarity of this analysis to that which is regularly used in the EEO context, continuing interaction between those in the agency who handle EEO cases and OI, OE, and OGC enforcement attorneys might provide those on the enforcement side with a better understanding of what is required.

7. Other Matters

The MIRT also received unsolicited suggestions for revisions/improvements to the investigative and enforcement processes from an agency employee and a public interest group with a stated interest in Millstone. One commenter outlined a perceived problem with the job classification used for OI investigators, while the other suggested that OI should again be made a Commission-level office. These appear to be matters that fall outside of the scope of the review we were asked to undertake. Accordingly, absent some further Commission directive, we plan to offer no recommendations regarding either suggestion.

V. CONCLUSION

In reviewing the allegations in OI Case Nos. 1-96-002, 1-96-007, and 1-97-007 that NU management officials violated the prohibition in 10 C.F.R. § 50.7 on taking adverse action against an employee for participating in any protected activity, we have sought to determine whether, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence. A case meeting this evidentiary standard of review is a legitimate candidate for enforcement action, subject to the exercise of discretion in accordance with the agency's enforcement policy.

Further, based upon a review of the available evidence for these three cases, we have concluded with respect to OI Case No. 1-96-007, that there is not information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence. On the other hand, with regard to OI Case Nos. 1-96-002 and 1-97-007, we have determined there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence. We do not recommend that enforcement action be instituted in connection with those cases, however, because of the remedial actions already undertaken by NU to address previously identified failures in management processes and procedures for handling safety issues raised by employees, thereby ensuring that employees who raise safety concerns are not discriminated against.

Finally, based on our review of the investigative and enforcement processes utilized by the NRC staff with respect to these OI cases, and in particular OI Case No. 1-96-007, we make the following recommendations regarding those processes:

1. At its inception, any "special" task force formed to investigate or otherwise review circumstances in which agency enforcement action is a possible outcome should have its role within the agency's existing investigative/enforcement processes clearly delineated.

2. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, to the degree practical, OI investigator impressions regarding witness credibility and veracity garnered though observation of the witnesses should be communicated to those making the decision on whether there is sufficient evidence to pursue enforcement action.

3. Notwithstanding a DOJ request not to transmit an OI summary and conclusion for a case sent for prosecutorial review, the OI summary and conclusion should be prepared at the time the OI case report is assembled and, once the case is returned from DOJ, made a part of the OI report so as to be available as an aid in determining whether agency enforcement action is appropriate.

4. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, an "articulated analytical process" should be incorporated into the enforcement conference process to the extent practicable.

5. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, OGC enforcement attorneys should take a more proactive role in the investigative process from its inception, with the expectation that, to the extent practicable, the attorney assigned to an OI case would be responsible for handling the case if it is adjudicated.

6. Anticipating that electric industry deregulation and enhanced competition will produce other large scale reorganization/downsizing efforts, the agency should endeavor to ensure that the utility retains all relevant documentary information regarding all those whose positions are implicated in the reorganization/downsizing.

Respectfully Submitted by
the Millstone Independent Review Team

Original Signed by:

G. Paul Bollwerk, III
Acting Chief Administrative Judge
Atomic Safety and Licensing Board Panel

Original Signed by:

Carolyn F. Evans
Regional Counsel
NRC Region II

Original Signed by:

Sara McAndrew
Attorney
Office of the General Counsel

March 12, 1999

Attachment #5

SEPARATE STATEMENT
OF
ALAN S. ROSENTHAL

Advisor to the Millstone Independent Review Team [MIRT]

My independent examination of the voluminous product of the OI investigations, as well as of the other documentary materials made available to the review team, leaves me in total agreement with the conclusions reached in the three cases addressed in the team's report. As will be discussed in greater detail below, this is not to say that I would have deemed a contrary conclusion in one or more of the cases to have been beyond the bounds of reason. In each instance, however, the team has provided an analysis of the relevant facts disclosed by the OI investigation that, in my judgment, amply supports the inferences drawn respecting the ultimate question presented: was the adverse personnel action taken against the particular alleger motivated, in whole or in part, by protected activity in which he had engaged?

My agreement with the content of the report extends to the discussion of the evidentiary standard of review, as well as to the enforcement recommendation applicable to the two cases in which the review team has concluded that a violation of 10 C.F.R. § 50.7 had occurred. And it further seems to me that the review team has identified the principal lessons to be learned from what has transpired with regard to these cases.

Notwithstanding my endorsement of the review team's report in its entirety, I offer a few additional observations of my own. In the main, they serve simply to stress portions of the report that I feel warrant additional emphasis.

1. In none of the three cases examined by the review team was it difficult to discern from the OI investigation materials the presence of three of the four elements that, as the review team notes, must undergird a finding of a violation of the employee protection provisions

of 10 C.F.R.

§ 50.7. Each alleger manifestly had engaged in protected activity;[1] there was the requisite management awareness of that fact; and the alleger's termination or demotion was a classic example of adverse personnel action.

Unsurprisingly, the difficult assessment concerned the fourth element: whether the required nexus existed between the protected activity and the adverse action. In approaching that question in each case, there was a recognition of the obvious: the fruits of the OI investigation would not include any acknowledgment of licensee wrongdoing or, in all likelihood, anything that might constitute direct evidence either in support or in refutation of the alleger's claims. Thus, the determination respecting whether the licensee's proffered explanation for the adverse action was genuine, or instead in whole or in part pretextual, would necessarily hinge upon the drawing of inferences from evidentiary disclosures that might well be in substantial conflict.

Such was the situation that confronted the review team as it embarked upon its assigned task. In carrying out that task, it had two marked advantages.

The first, presumably enjoyed whenever the results of an OI investigation are in hand, stemmed from the completeness of the evidentiary record on which the inferences had to be based. There doubtless is no investigation that could not be taken a step further if time and resources permitted. In the three cases before the review team, however, the investigation was

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[1] I would think that employees called upon to perform safety-related functions (as were all the allegers in the cases at hand) inevitably will find it necessary to raise safety issues from time to time in the fulfillment of their responsibilities. Of course, the extent to which they might choose to pursue those issues either internally or with the NRC will vary and might well affect the solicitude of superiors regarding a particular protected activity.

conducted by one or more OI Special Agents with considerable thought and consummate thoroughness. Without being overbearing in their probing, the investigators identified and pursued tenaciously the appropriate lines of inquiry; had no hesitancy in confronting a witness with contradictory statements of another witness; and, in general, sought to develop a record that would enable an informed judgment by the ultimate decision maker on each issue that had to be addressed. In almost 40 years of federal service in three separate agencies, I had occasion to consider and to act upon innumerable investigation reports and their underlying documentation. None surpassed in quality what I encountered here.[2]

Second, and this was an advantage not usually possessed in the assessment of the product of OI investigations, the review team -- consisting of three NRC lawyers -- had available to it six full weeks to analyze these cases and to reach its conclusions.[3] As a consequence, its members and advisors were able to spend innumerable hours in examining the wealth of interview transcripts and documentary exhibits in the OI file; in collegial discussion of the decisional implications of that material; and in the drafting and peer review of the extensive case studies now put before the Commission. This luxury of time and resources is likely not accorded to OE and OGC personnel who customarily must pass judgment on the merits of alleged Section 50.7 violations.

Despite these advantages, I think that the review team members would agree with me that in none of the cases did the answer to the nexus question become obvious from a casual examination of the OI report of investigation and its documentary foundation. (Indeed, in the

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[2] I would hope that, either in their reports or in separate documentation, the OI investigators would supplement the transcripts or summaries of witness interviews with any impressions as to a witness' credibility garnered through observation of his or her demeanor during the interview. Such additional information can be most helpful, particularly in circumstances where there is a clear conflict in the evidence.

[3] This advisor also devoted his entire attention to the project during that period.

case in which I was asked to take an early particularly close look, my first impression as to the likely appropriate response made an 180-degree turn as I gave the matter additional thought.) And, even after all involved in this enterprise had made full use of the time available for study and reflection, there still was room in the instance of at least some of the allegers to be less than fully confident in the choice that had to be made between conflicting possible inferences.

I do not mean to suggest that the conclusions reached by the review team in its case studies are suspect. Once again, I think them totally supported by a cogent analysis based on a full consideration of the pertinent facts as disclosed by the OI investigation. Accordingly, had a like conclusion founded on a like analysis come before me in my time as an adjudicator in this agency and later in the General Accounting Office, I would have had no hesitancy in upholding it. All that I do mean to convey is my belief that cases such as these do not lend themselves to certainty. Whenever the drawing of inferences from inconclusive facts is the order of the day, reasonable minds can and often will differ.[4] Thus, for example, while it may be contrary to the outcome of the review team's analysis (with which I am in full agreement), it does not follow that the conclusion reached by the NRC Task Force in Case No. 1-96-007 is perforce flawed.[5]

2. In two of the three cases examined (Nos. 1-96-002 and 1-96-007), the adverse action taken against the allegers was part of a broad-based restructuring or reduction-in-force involving a significant number of NU employees. Thus, for example, the three allegers in Case No.

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[4] This is especially so where the required inference relates to the state of mind of the management official(s) who took the adverse action alleged to have been discriminatory.

[5] Of course, the Task Force may not have had at its disposal the time and resources available to the review team.

1-96-007 were among a total of over 100 individuals (out of a pool of approximately 3,200) who were terminated as part of a 1996 downsizing effort.

In such circumstances, the issue of disparate treatment would appear on the surface to have been of potentially appreciable significance in determining whether their protected activity was a factor in the decision to include the allegers in the group of employees ultimately selected for termination. Yet, as noted in the review team report (in Section IV. B. 6.), in the instance of Case No. 1-96-007 that issue could not be effectively explored. This was because NU had destroyed the matrix information on all employees other than those terminated -- i.e., there was not available the information as to performance and capabilities that supposedly was central to the decision on which employees should be laid off.

I agree with the review team's recommendation that utilities be required to retain, and make available to the agency as required, all relevant information regarding those persons whose positions were implicated in a reorganization/downsizing process. At the same time, however, it should be recognized that, even had all of that information been in hand, it might well not have proven particularly useful in reaching a disparate treatment conclusion in Case No. 1-96-007.

The data supplied by NU to the Office of the Inspector General at the latter's request revealed, among other things, that 19 of the 43 candidates for layoff who were on an "added assurance" review list were subsequently (albeit not by the reviewers of that list) removed from consideration for termination as part of the reduction-in-force.[6] It was also disclosed that, of the approximately 90 employees who were identified by name as having raised safety concerns with

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[6] That list was comprised of employees who, for one reason or other (such as prior protected activity) were deemed "sensitive" and, as such, merited special examination before being included in the layoff.

either the NU Employee Concerns Program (ECP) or its equivalent predecessor group at Millstone from January 1990 to January 1996, five were included in the "added assurance" review list. Of those five, three were selected for termination. In addition, two employees who had raised safety concerns with the ECP were terminated even though they had not been on the " added assurance" review list.

Presumably, all 19 of the employees on the "added assurance" review list who survived the workforce reduction were among the total of approximately 3,200 individuals subject to evaluation by the matrix process. Additionally, it may reasonably be assumed that, even if they did not turn up on that list, most of the retained persons who had brought safety concerns to the ECP similarly had been assessed as candidates for possible layoff.

The short of the matter thus is that, if the matrices of the several thousand employees who were evaluated but not terminated had been available to the OI investigator and then examined, the results likely would not have justified the formidable time and effort that would have been involved in the examination. The investigator still would have been confronted with the fact that a vast majority of the employees who placed safety concerns before the ECP between 1990 and 1996 were not laid off and, in the more select group of employees receiving special "added assurance" review because of their perceived "sensitivity," almost 50% kept their jobs. This being so, it is difficult to see how a comparison of the matrices of the three allegers in Case No. 1-96-007 (all of whom were on the "added assurance" review list) with those of some or all of the retained employees might have assisted an informed determination on the likelihood that the allegers had been the victims of disparate treatment because of their protected activity.

As it turned out, in Case No. 1-96-007, as well as in the other case involving adverse action taken in the course of a large-scale program involving many employees (No. 1-96-002), it was possible to reach an ultimate conclusion on the Section 50.7 violation issue on bases that did not require an inquiry into the possibility of disparate treatment. In 1-96-007, the low matrix

ranking given to all three allegers, which in turn was supplied as the reason for their inclusion in the reduction-in-force, was sufficiently supported by the appraisal of their peers. Beyond that, nothing uncovered by the OI investigation gave rise to a suspicion that, nonetheless, more probable than not past protected activity was an influencing factor in their termination. Thus, the review team reasonably concluded that any determination that the allegers' layoff was impermissibly motivated would have had a purely conjectural -- and therefore unacceptable -- foundation.

As the review team found, the situation disclosed by the OI investigation in 1-96-002 was markedly different and called for an opposite result. There, the process used in determining who should receive positions as first-level supervisors as part of the 1993 reorganization was both unusual and wide open to the making of choices on bases other than merit. In stark contrast to the matrix process utilized in carrying out the 1996 workforce reduction program, which brought about the evaluation of all candidates for termination, in the 1993 reorganization existing supervisors were not formally appraised at all. Nor, apparently, were they given any consideration for retention as a supervisor unless, at the meeting convened for the purpose of making the selections, one of the management officials in attendance put their names forward.

In the case of the two supervisor allegers in 1-96-002, no official did so. As a consequence, without any discussion of their qualifications, both ended up demoted to line positions and, indeed, one of them found himself subordinated to a newly-created supervisor. Given the fact that the allegers had solid prior performance appraisals in their supervisor roles -- appraisals that, however, were not made available at the selection meeting -- this state of affairs manifestly placed a decided burden upon the management to demonstrate that the demotions had a totally non-discriminatory basis. This burden was not met.

The third case examined by the review team (No. 1-97-007) did not involve a broad-scale reorganization or workforce reduction but, instead, a termination of a single

individual – the alleger – for asserted lack of satisfactory supervisory performance. Although two instances of different treatment accorded other employees surfaced in the course of the OI investigation, the review team found them of no probative value. Rather, the conclusion that the alleger's termination was at least partially motivated by his prior protected activity was founded on the responsible management officials' failure to provide an acceptable basis for their claim that his supervisory capabilities and performance were poor beyond the possibility of remedy. Given the totality of the circumstances undermining the explanation offered, the review team found that explanation pretextual.

As I see it, the analytic framework utilized in these three cases has generic value. In a nutshell, while there well may be cases in which disparate treatment can be discerned and a Section 50.7 violation based thereon, I believe that, in most instances, the more useful

exploration will be in another area.[7] Specifically, it will be into whether, taking into account all attendant circumstances, the reasons assigned by the licensee's management as constituting the non-discriminatory basis for the adverse action appear totally credible on their face. If not, and the management is not able to counter successfully the difficulties that inhere in the assigned reasons, an inference that the adverse action was impermissibly motivated (at least in part) both can and should be drawn.

3. Finally, a solid foundation appears to undergird the review team's recommendations regarding enforcement action in the two cases in which it found 10 C.F.R. § 50.7 violations. At first blush, given the unusual step taken by the Commission in chartering an extensive, independent inquiry into these three cases, a failure to pursue found violations might seem anomalous. The fact remains, however, that the Commission addressed in its October 1996 order the hostility that this licensee had demonstrated over the course of years with regard to employees raising safety concerns. If that order has served its intended purpose, as the Commission apparently now believes based on the briefing that took place less than two months

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[7] As noted above (fn. 1), employees engaged in safety-related activities can be expected to raise safety issues in the course of the performance of their assigned functions. Any disparate treatment analysis would have to take this fact into account, as well as the equally obvious fact that not all protected activity will be looked upon by licensee management in identical fashion. For example, it might turn out that the employee suffering the adverse action had presented a claim to his superiors that the reactor was operating unsafely and, when it was rejected by the management, had renewed the claim before this Commission. In deciding whether that conduct had motivated the adverse action, it would be quite beside the point that similar action had not been taken against other employees who either had raised safety concerns of less impact upon the licensee's pocketbook or had readily accepted the management's response to the expressed concerns.

Thus, disparate treatment analyses may require a sophisticated determination respecting precisely which employees should be selected for comparison purposes. This is another reason why I believe that, in many instances, such an analysis might not prove fruitful.

[8] See March 9, 1999 SRM regarding SECY-99-010.

ago[6], it is difficult to quarrel with the review team's conclusion that further enforcement action would have a punitive, rather than a remedial, flavor.

With the Commission's indulgence, I close this brief statement with a purely personal observation. I welcomed the opportunity to return, if but for a very short time, to the agency in which I had served for the better part of two decades. And it was a particular pleasure to have renewed my association with Judge Bollwerk, a member of the Atomic Safety and Licensing Appeal Panel during my last years on that Panel, and to have become acquainted with the other members of the review team.

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[6] See March 9, 1999 SRM regarding SECY-99-010.

CASE NO. 1-96-002

[ALLEGATIONS OF [redacted]] EY7C

I. INTRODUCTION

In November 1993, an engineering reintegration, i.e., reorganization, of the nuclear engineering functions occurred at NU. The top management official involved in the reintegration was John Opeka, Executive Vice President, to whom Eric A. DeBarba, Vice President Nuclear Engineering, reported. Over 100 employees located at corporate offices in Berlin, Connecticut, the three Millstone plants, and the Connecticut Yankee (CY) plant were affected by the action. Among them were [redacted] who were not EY7C reselected as supervisors. Although neither suffered an immediate loss of pay as a result, [redacted] demoted to a senior engineer [redacted] downgraded to a principal engineer. EY7C

In Part II of this report, we discuss in detail the duties and responsibilities of the subject employees, their job performance and the protected activity they engaged in, NU's reintegration process in general, and its application to these employees specifically. Part III contains our analysis of the facts, while in Part IV we set forth our conclusions.

On the basis of the OI investigative report and other available materials, it appears both [redacted] had raised and championed safety issues in the two years preceding the EY7C reintegration. Review of the case file further supports the conclusion that Northeast Utilities System (NU) discriminated against [redacted] in violation of 10 C.F.R EY7C

§ 50.7 in that their involvement in protected activities preceding the reorganization was a contributing factor in their demotions.

II. BACKGROUND

A. Allegers' Employment History and Activities

1. [redacted] EXC

a. Position and Performance. [redacted] started as an engineer with NU i. [redacted] was made EXC a [redacted] and maintained his position through reorganizations in 1989 and 1991. EXC In 1993, he was a [redacted] a group providing support to EXC the Millstone and Connecticut Yankee plants. [redacted] received very good evaluations during the EXC period 1990-1994, ranging from "Quality" (next to highest rating) to "Exceptional" (highest rating) in 19 elements (Exh. 40). The accompanying narratives by Peter Austin, a manager [redacted] EXC compliment his technical expertise and ability to monitor work. For the appraisal EXC dated [redacted] was commended for his efforts in convincing management to EXC

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[1] An understanding of the relative position of [redacted] vis a vis other NU EXC management officials before the 1993 reintegration occurred is important to understanding this case. Thus, for.

a. [redacted]

b. [redacted]

c. [redacted] EXC

d. [redacted]

e. John Opeka, a fifth-level supervisor, was DeBarba's superior and had the title of Executive Vice President of Nuclear Operations.

b. Relevant Safety-Related Activities. For the two years just prior to the reintegration, high-profile safety issues: and (2) an operability determination regarding the CU-29 valve.[2] involvement in each of these matters is outlined below.

i. In brought the to believed that was being done in a manner inconsistent with NU's license for Millstone Unit 1. supported position and sent to meetings in attempts to resolve the matter (Exh. 2, at 52-55). At suggestion, contacted the NU Nuclear Licensing Department for an explanation of what perceived to be an inconsistency between NU's practice of and its license (id.). Mike Wilson, a supervisor promised to provide a memorandum from the NRC supposedly approving NU's method of Wilson never did so (id.).

of open and closed issues (id. at 30, 33). DeBarba, [ ] others met four to six times before [ ] stopped attending because "he got fed up" with "the company's continuing desire to circumvent the issue" (id. at 31).

On [ ] informed DeBarba in writing that [ ] was not satisfied with NU's responses to his concerns and that [ ] might "take definitive action, possibly with the NRC" (Exh. 53; Exh. 42, at 38-39). [ ] that the formation of an Independent Review Team (IRT) to address the spent fuel issue might satisfy [ ] DeBarba did not respond to [ ] On [ ] wrote to DeBarba, informing him that his concerns "were not being addressed" by the task force and that he no longer [ ] He stated that he would pursue his issues "through other [ ] thereafter communicated his concerns to NU's Nuclear Safety Concerns Program (NSCP) and the NRC (Exhs. 88, 92, 95).

ii. CU-29 Check Valve. The most contentious of the safety-related issues in which [ ] involved, the CU-29 check valve issue at Millstone Unit 1,[3] was assigned to [ ] (see generally Exh. 2, at 38-46; Exh. 42, at 8-26; Exh. 47, at 116-17, 119-27). Because he was allocated no money to test the check valve, [ ] reviewed the available information and concluded that the valve would not be leak tight after operating for twenty-two years without maintenance. His concern raised the question of continual operability of Unit 1 primary containment. Yet, in [ ] prepared an operability determination (OD) providing two options: "Case 1" and "Case 2." Case 1, the more conservative approach, concluded that the plant should be shut down until

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[3] The CU-29 valve issue was associated with Reportability Evaluation Form (REF) [ ]

the valve was assessed based on technical specifications (Exh. 42, at 9-13; Exh. 47, at 18-23). Case 2 relied upon the precise wording of the license and concluded that the plant could run until the next refueling outage (Exh. 42, at 9-13.) [redacted] admitted that he was "passing the buck" in providing two scenarios to provide management with a way to avoid shutting down the plant (id. at 13). When he presented his options to a scientist from the Nuclear Licensing Department and a supervisor and a senior engineer from Millstone Unit 1, he was asked and agreed to change the order of the Case 1/Case 2 scenarios to reflect that his first recommendation was to keep the plant operating (id. at 14-15). Further, a member of the Nuclear Licensing Department requested that [redacted] remove from the OD a statement about existing deficiencies in the license (id.) [redacted] complied in order to move the OD along (id. at 15).

Harry Haynes, Director of Millstone Unit 1 Nuclear Engineering, nonetheless disagreed with [redacted] entirely, stating that "primary containment remains operable" (Exh. 47, at 53). To support this conclusion, Haynes relied upon license information obtained from the Winston & Strawn law firm in March 1993 (id. at 15-18).[4] [redacted] reviewed the legal information at Haynes' request but concluded in May 1993 that it had no effect on [redacted] technical determination as to operability (id. at 16-17; Exh. 47, at 55).

In July 1993, the Nuclear Licensing Department drafted its own operability report, "Addendum 2," concluding that primary containment was operable (Exh. 42, at 20-26; Exh. 47, at 59-60).[5] That report "caught [redacted] by surprise" because he viewed it as the second attempt

[4] The license information from Winston & Strawn is contained in Exh. 47, at 32-42.

[5] Thomas Silko, scientist, Department of Nuclear Licensing, drafted Addendum 2 to the January 18, 1993 operability determination. His department was directed by Richard Kacich.

to reverse his group's conclusion in the [ ] operability determination (Exh. 42, EXC at 21). Moreover, [ ] saw no basis for the conclusions contained in the report. The EXC seventeen references listed in the report had been previously considered by EXC [ ] and, thus, did not sway him (id. at 22-23; 25-26). [ ] manager, not EXC to sign this report (Exh. 2, at 34). The issue was, thus, unresolved when, as a result of the reintegration, [ ] the project (id. at 34-35). EXC

The issue was ultimately settled in [ ] EXC By this time, Kalsi Engineering (Kalsi) had tested the valve and reported that the level of its reliability was unacceptable. With his original determination validated by Kalsi, [EXC] that primary containment was not operable. H.P. "Bud" Risley, Director of Nuclear EXC Engineering, Millstone Unit 1, refused to accept this determination, but decided to allow Millstone Unit 1 supervisors and technical staff to settle the operability issue, resulting in a vote of 17-1, in favor of inoperability (Exh. 47, at 116-17). Thus, after three years, the issue finally had been decided the way that [ ][6] EXC

One other post-reintegration event bearing on the ultimate issue of this case concerns and the CU-29 valve. In the summer of 1995, Larry Chatfield, Director of NU's NSCP, recommended to DeBarba that [ ] because he EXC

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[6] In 1995, Matt Kupinski, who had become [ ] EXC drafted a memorandum on "lessons learned" from the CU-29 issue (Exh. 47, at 107-09). In that memorandum, which also addressed the 1992-93 period when [ ] was involved in the OD on the valve, Kupinski was critical of NU in a number of ways, including its reliance on legalistic arguments to support operability instead of focusing on safety concerns. Kupinski stated that:

> The issue resolution was not conducted in an open and honest fashion. There was a reluctant acceptance of this issue by both management and subordinates at MP-1(Millstone Unit 1). A chilling environment existed; personnel [are] reluctant and afraid (Exh. 47, at 108 (emphasis added)).

had [redacted] CU-29 issue forward (Exh. 87, at 285-86). EXC

Chatfield proposed that [redacted]

EXC

However, DeBarba never [redacted] When questioned in 1996 about [redacted]

the [redacted] DeBarba stated that he decided against it because he thought

that [redacted] would receive it "negatively" (Exh. 28, at 15).

2. [redacted]

a. Position and Performance.

EXC

[redacted] performance evaluations from 1990 through 1993 contain all "Quality" and "Exceptional" ratings, with one exception (Exhs. 39, 61).[8] He was given the highest rating in

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[redacted] the supervisory chain was as follows:

a. [redacted] was Supervisor in the Engineering Mechanics group.

b. [redacted]

c. [redacted]

EXC

d. DeBarba, a fourth-level supervisor, was [redacted] superior, and had the title of Vice President of Nuclear Engineering Services.

e. Opeka, a fifth-level supervisor, was DeBarba's superior and had the title of Executive Vice President of Nuclear Operations.

[8] The record also contains [redacted] 1989 performance evaluation. A different format was used then, rating the employee from one to five, the highest. [redacted] was rated a four, "exceeds normal expectations" (Exh. 39, at 2-8).

EXC

EXC

problem-solving and analytical skills, and initiative and innovation consistently from 1990 through 1993 (Exh. 39, at 11, 15, 21; Exh. 61, at 2). He earned "Exceptional" ratings in interpersonal relations; "Quality" in customer orientation; and "Quality" in teamwork in 1991 through 1993 (Exhs. 39; 61). One criticism in 1992 was that he needed to "improve in work monitoring and control and commitment follow" (Exh. 39, at 21). According to [ ] that comment reflected the fact that he fell behind in administrative paperwork because he was assigned about half of the work although there were three other supervisors in his section (Exh. 72, at 4-6). EXC

b. Relevant Safety-Related Activities. [ ] involved in several high profile safety issues during the 1991-1993 time frame, including: (1) motor-operated valve's (MOV's); (2) turbine-building secondary closed cooling water (TBSCCW) heat exchangers; and (3) reactor cooling pumps (RCPs) (Exh. 6). His involvement in each is outlined below. EXC

i. MOV Program. [ ] worked on the MOV-related program required by NRC Generic Letter-89-10. When [ ] he realized that the program was behind the corrective schedule NU had submitted to the NRC (Exh. 6, at 9). He determined that there was a shortage of money and resources to implement the program properly at the three Millstone plants and Connecticut Yankee. He raised these issues with Matt Kupinski, [ ] also spoke directly with DeBarba about his concerns while working on this matter in 1991 and 1992 (id. at 11). EXC

[ ] Kupinski's signature [ ] outlining his concerns about the MOV program. DeBarba was sent a copy. In his memorandum [ ] called for EXC

additional resources and outlined a plan of action for the MOV project (id. at 10; Exh. 78). Within several days of the April 21, 1992 memoranda, [ ] the MOV program EXC from [ ] No explanation was given to [ ] for this EXC change (id. at 10).

In October 1993, [ ] received a report on an audit of the MOV program. The audit EXC found about some twenty-five technical issues, or shortcomings, with the program. Austin's section responded that they had addressed them or were about to address them. EXC doubted that this group had completed any substantive work in the preceding year and on September 1, 1993, stated so in a memorandum to DeBarba (Exh. 46). In a November 3, 1993 reply, DeBarba disclaimed any problems with the MOV Program (Exh. 71).

ii. TBSCCW Heat Exchangers. The heat exchanger issue at Millstone Unit 1 arose in 1990. [ ] was presented with the problem that the

EXC

However, those units were operating at approximately [ ] raising EXC concerns [ ] was asked to EXC determine whether the system could continue in the short term (id. at 14). To help answer that question, he brought in a consulting firm at EXC some point in 1991 (id.).[10] Based on the results, [ ] determined that the EXC heat exchangers should not operate more than a short period of time.

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[9] Austin was the manager unde: [ ] who, as shortly will be seen, also received the EXC heat exchanger project after it was taken away from [ ] EXC

[10] The record does not specify the date of the [ ] report.

The plant staff refused to acknowledge that the failures in the heat exchangers [redacted] (Exh. 30, at 9). Nothing was done until November 1991 when [redacted] took the heat exchanger issue away from [redacted]

Austin claimed [redacted] analysis was flawed, but never identified [redacted] alleged error. In [redacted] performed a second analysis. [redacted] noticed a mistake in [redacted] report, which he corrected in an [redacted] memorandum. In that same time frame, [redacted] informed management that he could not agree with its [redacted] approach on the heat exchanger issue (Exh. 6, at 19; Exhs. 63, 64).

On September 15, 1993, [redacted] was surprised to learn that Paul Blasioli, manager of Millstone Unit 1 Technical Support, had written to Kupinski complaining about the lack of accuracy in [redacted] work (Exh. 6, at 19-20). In part, Blasioli based his complaint on the mistake in Holtec's report, never acknowledging that [redacted] had addressed it in his [redacted] memorandum. [redacted] also learned that Blasioli had filed a plant incident report (PIR) regarding his alleged mistakes. [redacted] strongly felt that filing a PIR was a serious undertaking and uncalled for in this situation, a concern echoed by Kupinski, [redacted] in his memorandum to Bud Risley, Director of Millstone Unit 1 Design Engineering (id. at 23).[11] According to [redacted] this was the first time [redacted] at NU that his

[11] [redacted] recalled that Kupinski wrote to Risley between September 8, 1993, and October 8, 1993, but [redacted] did not have a copy of that memorandum.

professional integrity had been questioned, which he attributed to management's desire to do everything possible to avoid making costly repairs to the heat exchangers (Exh. 6, at 23).

Upset with Blasioli's memorandum and the PIR questioning his accuracy, [redacted] EXC wrote to Kupinski on [redacted] In his [redacted] memorandum, [redacted] defended his EXC work product, expressed his views on the PIR and criticized how the heat exchangers issue had been handled, copying DeBarba, Risley,[12] and others (Exh. 6, at 20-22; Exh. 60, at 1-3). In his memorandum, [redacted] stated that the PIR was "probably driven by mischief on someone's EXC part" and that it "appears to be an attempt to discredit the analysis to divert the attention from one important question which still has not been answered. The question is 'how could this or any other equipment be operated at [redacted] without any technical EXC justification?'" (id. at 2).

Later that same day, when [redacted] confirmed to Risley that his memorandum had, EXC indeed, been sent out, [redacted] recalled Risley saying, "Why are we doing this? Why are we EXC lobbing grenades at each other?" (Exh. 72, at 8-9). [redacted] stated that Risley left in a "huff EXC and a puff" (id. at 9).

Also on October 8, 1993, Kupinski met with Risley, who now supervised Kupinski's section.[13] In speaking with OI, Kupinski asserted that Risley was upset because of [redacted] EXC memorandum and that Risley said to Kupinski, "I can make or break you" (Exh. 30, at 11-12). Kupinski stated that he believed that the purpose of Risley's comment was to inform him that

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[12] At the time of this event and through December 1993, Risley was the Director, Project Services Department. With the reintegration in 1993, he became the Director, Nuclear Engineering, Millstone 1.

[13] After [redacted] he no longer supervised Kupinski. EXC Risley, Director of Project Services Department, became Kupinski's first-line supervisor. [redacted] of course, reported to Kupinski (Exh. 30, at 12). EXC

"he could influence my employment and my position as well as others in my group, being in the position that he was" (Exh. 30, at 11). Kupinski relayed this comment to [redacted] shortly thereafter (Exh. 6, at 23-24).

Mario Bonaca, Director of Nuclear Engineering Services, stated that he observed Risley's anger with regard [redacted] memorandum. When Bonaca happened by Risley's office "shortly before the reorganization" while Risley was discussing the memorandum with [redacted] Bonaca noted that Risley's feelings were "very intense" and that Risley was "hot" about the memorandum going to Millstone Unit 1 (Exh. 8, at 2). When interviewed by OI in 1996, Risley denied making the "make or break you" statement to Kupinski (Exh. 26, at 118-19).

iii. Reactor Coolant Pumps. The RCP issue arose at Millstone Unit [redacted] in the [redacted] (Exh. 6, at 25-35). [redacted] was assigned the problem of determining which of the [redacted] (Exh. 6, at 25).

Plant personnel discouraged [redacted] from examining [redacted] (id. at 26). [redacted] also resisted any suggestion to continue the investigation (id. at 27). Finally, [redacted] (id.). Ideally, [redacted] would have studied the problem to determine the root cause and a corresponding permanent fix. Due to time constraints, however, they decided that they could fix the [redacted] and justify

continued operation for a "one cycle fix," but not a permanent fix (id. at 28).[14] [ ] notified DeBarba, Risley, and other NU officials of this recommendation on October 1, 1993 (id. at 28-32; Exh. 75). According to [ ] "management was not happy," implying that they would have preferred that he had determined that the fix was permanent (Exh. 6, at 28, 29, 33). Until the effective date of the reintegration [ ] the manufacturer of the pumps, to make recommendations for a permanent fix. When the reintegration was announced, however, DeBarba informed [ ] (id. at 30).

Some months later in April 1994, [ ] read a memorandum from the NRC advising licensees with pumps similar to those at Millstone Unit [ ] of the problems encountered by NU (id. at 31-35). [ ] believed that the NRC letter was accurate except that it did not mention that the recommended action was only a one-cycle fix (id. at 33). [ ] later learned that Opeka had written to the NRC on [ ] problems, but had failed to note that Millstone considered it a one-cycle fix. [ ] believed that the NRC, in reliance upon Opeka's representations, sent out incomplete information to other licensees (id. at 32).

B. The Deselections of [ ]

1. Engineering Reintegration of 1993

The 1993 reorganization of NU's nuclear engineering and related activities involved not merely first-level supervisory positions but higher-level positions up to and including those held by vice presidents. The process employed in determining who would occupy a particular position was not, however, the same in all instances. To the contrary, there was a marked

[14] A one-cycle fix allows operation for one fuel cycle or until the next refueling outage.

difference between the process utilized for first-level supervisory positions and the method that governed the selection of vice presidents, directors, and managers (Exh. 14).

NU retained an organization called the Hay Group as part of an overall performance improvement program. The Hay Group was called upon to develop competency models for use for the manager, director, and vice president levels and to play a role in the 1993 engineering reorganization. In this connection, it performed an "Executive 360 degree Managerial Assessment and Development Guide" on each official. The assessment was designed to provide Opeka, then NU Executive Vice President for Nuclear Operations, and the individual official with feedback on the latter's impact on the organization. The ingredients of the assessment included not only the individual's self-appraisal but information gathered from a number of other sources. Among those sources were the individual's superior and "direct reports" bearing on performance (id.).

As part of the process, each person was given a "FIT" score.[15] This numerical rating was designed to establish how well the individual's competency scores matched with the expected or superior ratings for the held position. Ultimately, the FIT scores played a part in determining who would best fit into certain positions within the reorganized engineering structure (id.).

Where selections for first-level supervisory positions were involved, however, the Hay Group played a much more limited role, or, in the case of incumbent supervisors [ ] no role at all. Those selections were made from a pool consisting of incumbent supervisors and employees who either had some experience as acting supervisors or no supervisory experience at all. The Hay Group was asked to evaluate only the managerial

EXC

EXC

[15] The derivation of "FIT" is not part of the record, but we assume that it is an acronym for the assessment of the non-supervisors interviewed by the Hay Group.

potential of 40 to 50 employees not in supervisory positions. Based upon its assessment of that potential in several different categories, the Hay Group placed the individuals into four quartile ratings (id.).

2. Engineering Division Supervisor Selection Meeting

The actual selection of first-level supervisors took place at a meeting held in November 1993 at a motel in Cromwell, Connecticut. The meeting was presided over by DeBarba and also attended by, among others, officials already tapped to hold director positions in the reorganized engineering structure (Exh. 26, at 27-28). One of those officials was Risley, who would become Director of Engineering for Millstone Unit 1 and reported to DeBarba (Exh. 26, at 8, 10).[16]

Apart from the Hay Group quartile ratings for the potential supervisors, the officials in attendance at the meeting had no written material to assist them in making their selections. More specifically, none of the prior performance appraisals of the candidates was made available to the selectors (Exh. 28, at 70). Further, apparently not every person in the pool of candidates was even discussed, let alone given serious consideration. Rather, it seems that, in order to be considered at all, a candidate had to be proposed by one of the attendees (id. at 59). According to DeBarba, the objective of the selection process was to determine which candidates would be the "best fit" in the positions that survived the reorganization (id. at 57).[17]

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[16] The others in attendance at this meeting were: Steve Scace, Vice President, Nuclear Operations Services; Ray Necci, Director of Nuclear Engineering, Millstone Unit 2; George Pitman, Director of Millstone Unit 3; Jerry Laplatney, Director of Nuclear Engineering, Connecticut Yankee; Lorraine Eckenroth, Market Learning Department; and Sam Modoono, Vice President of the Hay Group (Exh. 28, at 24-25; Exh. 7, at 32).

[17] In this regard, Risley stressed his belief that the selection process was not a matter of "going through and saying, well this guy's a dog or that guy doesn't do a good job. It was truly

(continued...)

DeBarba did not recall [redacted] name being mentioned at all (id. at 58). With regard to [redacted] DeBarba stated that he did not recall [redacted] name being proposed for a supervisor position (Exh. 28, at 70-71). In any event, none of the interviewed participants pointed to any discussion of either individual. Opeka, DeBarba, and Risley also testified that the issue of raising safety concerns was not discussed (Exh. 41, at 45; Exh. 28, at 38-39). Although Opeka was the nominal head of the supervisor selection group, he relied heavily on DeBarba and the directors for their personal knowledge of the candidates (Exh. 18, at 31). DeBarba described his approach as, "who do we feel is a good candidate for that position? . . . So it wasn't a matter of consideration of is there an incumbent because there really are no incumbents for these jobs" (Exh. 28, at 53-54). DeBarba stated that everyone "was on an equal footing" and that the "group selected the best candidates for the positions regardless of who or where they were previously" (id.).

Opeka stated that some documents reflecting the supervisor selection process were destroyed to preserve confidentiality (Exh. 18, at 83-84). The only records provided to OI by NU regarding this process were limited to the quartile rankings of the non-supervisors (Exh. 79, at 1-2). Documents reflecting the FIT scores and relative rankings of managers and directors, however, were preserved (Exh. 79, at 3-31; Exh. 80, at 3-6.).

In sum, in contrast to the process invoked for the selection of higher-level managers, the choice of first-level supervisors had no objective elements. Whether a particular individual remained a supervisor or was promoted to a supervisory position hinged upon (1) the willingness of a meeting participant to put his name forward; and (2) the entirely subjective

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[17](...continued)
a selection process rather than a de-selection process" (Exh. 26, at 51).

judgment of the collected officials as to whether he was the best fit -- a judgment made without resort to any documented appraisal of past performance in a supervisory role.

3. Deselection of [redacted] -- NU Reasons and Aftermath

Nineteen supervisors were deselected as a result of the reintegration;[18] sixteen supervisory positions were also eliminated (Exh. 80, at 15). [redacted] learned of his deselection from Mario Bonaca, [redacted] In delivering the news o[redacted] [redacted] Bonaca stated to [redacted] he could not tell why he was not reselected as a supervisor because Bonaca had not been privy to the process. When pressed further, he stated to OI that he was told that it was not a performance-based decision. Rather, the company had changed and [redacted] was "no longer a good fit for a supervisory position" (Exh. 2, at 11-12). [redacted] spoke to DeBarba soon after he learned of the decision. DeBarba informed him that his performance was not at issue (Exh. 2, at 14). He explained that there were others better equipped to fill the supervisor positions, which were fewer in number in the new organization. DeBarba also observed [redacted] experience was narrow compared to others whose experience was more broad. When Bonaca asked DeBarba the reason that [redacted] was not reselected for a supervisor position, however, DeBarba replied that [redacted] "was not good at closing issues" (Exh. 8, at 1).

[redacted] apparently filed no formal challenge to his deselection.

[18] There is a discrepancy in the record as to the number of supervisors who were demoted.. A note by Opeka states that they numbered 21 (Exh. 80, at 14). The difference is not material to the analysis of this case.

4. Deselection of [redacted] -- NU Reasons and Aftermath

[redacted] learned of his deselection from Risley who he asserts informed him of the decision with a smile (Exh. 6, at 7). He recalled that he was surprised because he felt that [redacted] had done "fantastic work" during the preceding year. Although he spoke with a number of officials -- DeBarba, Risley, Harris, and Kupinski -- he maintained he was never provided an explanation for his [redacted] (id. at 8).

Some months after the reintegration [redacted] filed a discrimination claim with NU's NSCP alleging that he had been demoted due to, among other things, his protected activity (Exh. 41, at 1, 13-15). In his [redacted] report, Chatfield concluded that there had been no discrimination against [redacted] in violation of 10 C.F.R. § 50.7. Chatfield based his conclusion on interviews with some management officials who had taken part in the selection process and Kupinski, [redacted]. No interviews of new supervisors or of other deselected supervisors were conducted. Chatfield asked all interviewees the same ten questions based on [redacted] concerns as expressed in his [redacted] meeting with Chatfield, i.e., the criteria used in the selection, the manner in which candidates were assessed, and whether his safety-related activity was a factor in his deselection. (Exh. 41, at 14-15, 38-39). DeBarba and Kupinski stated that a negative factor for [redacted] was being associated with [redacted] who was not viewed as effective by many NU directors and managers (Exh. 41, at 43, 53). The report also indicated that [redacted] name was not mentioned with respect to a supervisor position but only with regard to his placement as a principal engineer (Exh. 41, at 7). When asked about his personal knowledge of [redacted] DeBarba expressed doubt that [redacted] would be accepted in the operating environment of a plant since the new organization was focused on "working in and around a nuclear plant" (Exh. 41, at 51, 136; Exh. 45, at 34).

In his seven-page report, Chatfield provided his analysis of the discrimination issues in one-half page (Exh. 41, at 8.). He acknowledged that matters were not handled well by management but he found that "no translation of these shortfalls [was] apparent in the supervisory selection process" (id.).

5. New Supervisors

The record also reflects that eight new supervisors of the thirteen identified in the record were interviewed by OI (Exhs. 11, 13, 16, 17, 20, 22, 23, 24).[19] All but one of the new supervisors were interviewed by the Hay Group. The eight new supervisors stated that they had been interviewed for about one hour by representatives from the Hay Group one week prior to the announcement of the reintegration. None was informed of the pending reintegration at the time of the interview.

[redacted] who as a result of the 1993 reintegration became [redacted] was not interviewed. He, in fact, was surprised when informed of his promotion (Exh. 20, at 7, 10). Also [redacted] was the only new supervisor who had some prior supervisory experience at NU (id. at 9-10).

Regarding involvement in protected activity, [redacted] stated that they had none (Exhs. 17, 11). [redacted] stated that they had raised safety issues between 1987 and 1991 (Exh. 20, at 77-78; Exh. 16, at 14-20; Exh. 23, at 17). According to [redacted] they had been involved in protected activity in 1993 (Exh. 13, at 36-39; Exh. 22, at 11-12). While [redacted] claimed

[19] Opeka stated that 13 new supervisors were selected but only 12 were mentioned by name in the interviews. The eight new supervisors interviewed by OI were: [redacted]

that he had raised one safety concern, he did not provide a date for that event (Exh. 24, at 18-20.).

III. ANALYSIS

A. The Selection Process

The selection process for upper level management (from managers through officers) was markedly different from that of the supervisor selection process in that the latter allowed significant room for subjectivity. The assessments of NU officials done by the Hay Group provided objective information resulting in a score assigned to each upper level official. In contrast, objective criteria were not utilized in assessing and selecting supervisors. DeBarba acknowledged that the selection process for high ranking officials "was clearly used to avoid favoritism" (Exh. 28, at 36). In contrast, the supervisory selection process that lacked objective criteria clearly left considerable room for "favoritism" to come into play. That NU would employ an objective process for selections at all levels but one, i.e., supervisors, is puzzling and raises the inference that questionable criteria might well have played a part in the supervisor selections.

In addition, the process for considering an individual candidate was sufficiently unusual to raise suspicion as to its legitimacy. It essentially called for an NU official affirmatively to propose a person for a position, i.e., a candidate required a "sponsor" to have his or her name advanced. This process seemingly would not bode well for an employee who had significant run-ins with management about safety concerns that might require closing a plant or making costly repairs. DeBarba, of course, was familiar with [ ] safety-related EYC activities, as was Risley with regard to [ ] EYC

Further, the record reflects that selections for existing supervisors were based on vague terms such as "a good fit" and "customer-oriented" while information available to selecting officials for non-supervisors was the more concrete assessments of the Hay Group. Having the Hay Group interview only one group of candidates was somewhat irregular but would not have been an unreasonable choice if objective information about the incumbent supervisors, e.g., performance evaluations or personnel files, was made available to the selecting officials so as to be part of the assessment process. Unfortunately, such information was not provided. Finally, it appears that NU did not even adhere to its own process as evidenced by the selection of [redacted] a non-supervisor never interviewed by the Hay Group, [redacted] himself stated that he was surprised to learn of his promotion. E4 7C E4 7C

In addition to these questionable circumstances is the fact that some documents relating to the supervisor selection process were destroyed by NU. Opeka's claim that the documents were destroyed for confidentiality purposes is not totally convincing because the documents demonstrating the quartile rankings of non-supervisors were retained. These quartile rankings, showing the relative ranking of the more than forty non-supervisors interviewed by the Hay Group, would seem to warrant confidentiality as well. Obviously, employees ranked at the top of the list would be cast in a more positive light than those ranked at the bottom, making these documents sensitive. The missing documents might have been helpful in shedding light on the selection process since the recollections of NU officials interviewed more than two years after the selections occurred were hazy. Thus, it appears that some documents were selectively chosen to be destroyed, further supporting the overall impression that the process cannot

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[20] Although NU might assert that [redacted] was not assessed by the Hay Group because he had "supervisory" experience as an "acting" supervisor for ten months, such a claim seems to us to still emphasize further the subjective nature of the selection process. E4 7C

withstand close scrutiny. Standing alone, any one of these considerations might not raise a suspicion about the process. In totality, however, they create the impression that the selection process was less than aboveboard.

B. [ ] EJTC

1. Protected Activity

[ ] was involved in the high visibility projects of the CU-29 valve and [ ] EJTC of which gave rise to nuclear safety issues. In connection with the CU-29 valve issue, [ ] EJTC was significantly involved in an operability determination (OD) or. [ ] EJTC from 1991 through the reintegration. His technical opinion that the [ ] EJTC collided with that of Haynes, Director of Millstone Unit 1, and Richard Kacich, Director of Nuclear Licensing, who based their opinions on legal interpretations of regulations. Also, [ ] was EJTC visibly supporting [ ] who accused NU of [ ] in EJTC a manner that violated its license. This issue was an especially pressing one at the time of the reintegration because it was known that [ ] was dissatisfied with NU responses to his EJTC concerns and was thought to be considering contacting the NRC about them. These activities fall squarely in the area of protected activities.

2. Management Awareness

The record contains substantial testimonial and documentary evidence demonstrating that management officials were fully aware of the protected activity and strong positions taken by [ ] communicated regularly with [ ] and interfaced EJTC regularly with managers and directors of different departments and plants. DeBarba was aware of [ ] support of [ ] because, in [ ] that he EJTC headed and which met regularly to deal with [ ] ssues (Exh. 42, at 30-34). Also, just several EJT

weeks before the announcement of the reintegration [ ] warned DeBarba of [ ] EXC dissatisfaction with NU's lack of responsiveness to his concerns and expressed his belief that [ ] had the fortitude to go to the NRC (Exh. 53). EXC

During the course of these [ ] the issues of the CU-29 valve [ ] EXC were added to the matrix of issues that DeBarba [ ] The record shows that the CU-29 valve issue, associated with [ ] was discussed at a [ ] EXC meeting, presumably with DeBarba in attendance (Exh. 50). Also, [ ] wrote to DeBarba EXC on [ ] just days before the reintegration was announced, updating him on three EXC subjects including his intent to meet with Millstone Unit 1 officials to discuss the CU-29 valve issue [ ] (Exh. 57). EXC

It is possible that DeBarba was aware of [ ] in the CU-29 issue before EXC the task force formed because this issue reached the director level -- [ ] EXC Haynes, Director of Millstone Unit 1; and Kacich, Director of the Nuclear Licensing Department were all involved -- and it was the type of inter-departmental squabble that a director might bring to DeBarba's attention.

3. Adverse Action

On November 8, 1993 [ ] was notified that he was not reselected as a supervisor. As EXC a result, he was [ ] Pokora, a new EXC supervisor. He did not suffer a loss in salary but his salary was capped and in the long-term [ ] EXC [ ] (Exh. 2, at 12-13). EXC

4. Protected Activity/Adverse Action Causal Nexus

a. Discussion of Nexus. During the two years preceding the reintegration, [ ] had significant involvement in controversial safety matters such as the CU-29 and [ ] matters. He had been actively involved in the high-profile CU-29 issue as recently as the [ ] an issue which remained unresolved at the time of the November 1993 integration. Also [ ] in charging that [ ] at Millstone Unit 1 in a manner inconsistent with NU's license. [ ] documented his position [ ] to DeBarba on [ ] and stated his belief that [ ] would go to the NRC if NU did not resolve the issue soon (Exh. 53). If [ ] contacted the NRC with his concerns, DeBarba could expect that [ ] would be called upon to substantiate [ ] claims.

The CU-29 valve issue, originating in 1992, appears to be the most contentious issue [ ] Between 1992 and 1993, [ ] rejected the OD declaring [ ] valve operable that was prepared by Millstone Unit 1 Project Services Department, headed by Risley. [21]

These considerations suggest that [ ] while a solid performer, was someone of whom management, including DeBarba, likely would not be particularly enamored because of his positions on safety-related matters that could have had a significant impact on plant operations.

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[21] [ ] also questioned NU's interpretation of the ISAP while working on the CU-29 issue. In doing so, [ ] with Kacich, director of the Department of Nuclear Licensing, [ ] These two directors, though they did not participate in the supervisor selections, had regular access to DeBarba. While nothing in the record establishes that they briefed DeBarba on [ ] challenges to their positions, it is conceivable that they would have brought this to his attention.

The pivotal issue thus becomes whether NU's articulated reasons for its action are shown to be a pretext for discrimination.

b. NU Management's Reasons Regarding [redacted] In looking at management's reasons, Ex 7C we begin by noting that under the process used for selecting supervisors [redacted] selection Ex 7C ultimately depended upon DeBarba to propose his name given that he was the only official in [redacted] in attendance at the selection meeting and, therefore, was familiar with Ex 7C his work. This subjective process gave DeBarba the opportunity to remain silent as to [redacted] Ex 7C and thereby, deselect him, without a thought of reconciling his decision with objective criteria. DeBarba had good reason not to take the affirmative step of nominating [redacted] a person who Ex 7C challenged management and supported [redacted] who did the same. Ex 7C

NU claimed that it deselected [redacted] as part of an overall reintegration of nuclear Ex 7C engineering personnel into the plants. It contended that [redacted] was not singled out but, rather, Ex 7C was only one of nineteen supervisors who were deselected for a new organization that would have fewer supervisors (Exh. 18, at 51, 55). DeBarba stated that he was looking for someone who was customer-oriented, someone who had technical and interpersonal skills (Exh. 28, at 31). He was looking for the "best fit" and thought there were better people than [redacted] to fit the new Ex 7C organization.

Although NU officials testified that no one discussed whether any candidate or incumbent supervisor raised safety concerns, DeBarba stated that neither he nor other management officials discussed [redacted] during the supervisor selection sessions. Yet, if, as stated by DeBarba, Ex 7C the criteria for supervisors was truly customer-orientation and possession of good people skills, then [redacted] should have been considered for a supervisor position. Ex 7C

[ ]received "Exceptional" and "Quality" ratings in his last four performance evaluations EXC in the elements: customer service orientation, teamwork and interpersonal skills. Having received "Exceptional" and "Quality" ratings in the teamwork element for the[ ]prior to EXC his [ ]would seem to have qualified[ ]as a "team player," a characteristic that EXC DeBarba asserted that he sought in supervisors. Certainly, there is no evidence that NU ever apprised[ ]that he had shortcomings in these areas. Thus, nothing in the record would lead EXC one to conclude that he would not "fit " with the new organization. One would think that an employee who looked out for the best interests of the company by[ ] EXC would at least be discussed, if not reselected.

At the same time, if these attributes were so important, then it is reasonable to expect that they would be found in the new supervisors. However, the record does not show that[ ] EXC [ ]had the qualifications that NU believed[ ] Even if[ ] EXC was never mentioned aloud, DeBarba and others must have made a[ ]of EXC [ ] DeBarba never offered any explanation as to EXC why he thought[ ] EXC

While DeBarba remarked that was not good at closing issues, he provided no EXC elaboration on that score. That omission is significant given that performance evaluations EXC do not show that he was deficient in this respect. To the contrary, received the highest EXC rating in the elements, "Monitoring and Controlling Work Progress" and "Planning and Organizing" for consecutive years (Exh. 40). The clear implication was that DeBarba's EXC

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[22] In his OI interview, DeBarba did offer an explanation why he[ ]who he EXC described as having outstanding technical skills and "good insights into design changes" as well as "easy to work with" (Exh. 28, at 74-75). He never, however, indicated why[ ] EXC

concern about closing issues refers to [ ] persistence on the CU-29 issue which [ ] in a EXC sense, prolonged because he [ ] EXC This supports the inference that [ ] protected activity was a EXC contributing factor in the decision not to retain him as a supervisor.

Management reasons for its selection of someone other [ ] thus, are not EXC supported by the record, giving rise to the inference that an impermissible reason played a part in the decision.

It should be noted that the failure of DeBarba to [ ] EXC the CU-29 issue adds further substance to the inference that protected EXC activity was a contributing factor in his deselection. Even though the issue arose after [ ] EXC it is evidence of DeBarba's unenthusiastic attitude toward a person who EXC stood up to management on a safety issue. Certainly, Chatfield must have been convinced that [ ] not only was warranted but, would be well-received by or he would not have EXC suggested it to DeBarba. DeBarba's unilluminating statement that would have received the EXC [ ] negatively does not fully explain his decision not to act on Chatfield's advice (Exh. 28, EXC at 11-15).

C. [ ] EXC

1. Protected Activity

was involved in several safety-related projects between 1991 and 1993. Two of EXC them, the MOV program and the heat exchangers, [ ] EXC During the course of these projects, [ ] that were contrary to those held EXC by Risley and managers of the Millstone units involved. The record also shows that [ ] EXC

proposed actions for the MOV program would have required the expenditure of significant additional funds and resources to complete the program properly.

The heat exchanger issue was one in which [ ] EXC view that the heat exchangers were operable. [ ] EXC [ ] Events relating to this issue EXC occurred just a few months before the reintegration.

The RCP issue was another instance in which [ ] with management. Due EXC to some problems detected in the pumps [ ] EXC [ ] Management refused to accept this opinion that they were operable for only EXC one cycle and, in [ ] view, misrepresented their operability to the NRC. EXC

The above-described activities were safety-related and fall within the area of protected activities.

2. Management Awareness

The record shows that DeBarba was aware of [ ] the MOV program from EXC conversations with [ ] and memoranda from [ ] or Kupinski, [ ] EXC (Exh. 6, at 11; Exh. 28, at 39; Exh. 46, at 78). Unit directors were aware of [ ] on EXC MOV's because that program affected all of the units and he copied them on relevant correspondence. [ ] had a series of ongoing disagreements with [ ] EXC [ ] the MOV program and the RCP repairs EXC [ ] (Exh. 6, at 9-12; Exh. 78).

DeBarba stated that he was aware of [ ] RCPs and the EXC TBSCCW heat exchangers (Exh. 28, at 21, 39, 41-42). Risley, as a director at Millstone Unit 1, was aware of [ ] with the heat exchangers at his plant. Of course, it was in EXC

the context of that issue that Risley allegedly made his "make you or break you" comment. Risley and Blasioli, both directors, were directly aware of [ ] position on the heat exchangers because he interacted with them regularly on that issue at Millstone Unit 1. Risley also was familiar with [ ] activities because he [ ] just several months prior to the reintegration.

3. Adverse Action

On [ ] learned that he had been [ ] to principal engineer. As with [ ] he suffered no immediate loss in pay, although his [ ]

4. Protected Activity/Adverse Action Causal Nexus

a. Discussion of Nexus. The temporal nexus between his activities and his deselection, the fact that two safety-related projects (MOV's and heat exchangers) were [ ] and Risley's threat to his supervisor in connection with one of those projects, give rise to the inference that his protected activity was a contributing factor in his demotion. As with [ ] however, the question remains whether NU's articulated reason for its action is sufficient to overcome that inference.

b. NU Management's Reason Regarding [ ] NU management's reason for [ ] was the same as that given for [ ] was one of many who were demoted during a wide-ranging reorganization that called for fewer supervisors and that NU was looking for customer-oriented people. Also, DeBarba stated [ ] might not be accepted into the operating (plant) environment (Exh. 41, at 51, 136).

had very good performance evaluations in [3] He consistently earned EXC the following ratings in relevant elements: "Quality" in customer-orientation, "Exceptional" in interpersonal skills and "Quality" in teamwork (Exhs. 39, 61). These elements would appear to match most closely with those that DeBarba stated as being sought in supervisors. Yet, the record reflects that name was never considered for retention in a supervisor position. EXC This must be viewed in the context of the supervisor selection process that essentially required a "sponsor," once again either DeBarba or Risley. As with if the criteria as stated by EXC DeBarba was actually the deciding factor as to whether a candidate was in the running for a position, then should have been seriously considered. EXC

Nothing in the record suggests that would fall short in these areas. In fact, EXC is a prime example of a person with the "technical and interpersonal skills" that DeBarba claimed he sought. He was an received "Exceptional" and "Quality" EXC ratings in the areas of interpersonal skills and leadership, respectively. The fact that EXC was not seriously considered for a supervisor position when he possessed these desired attributes supports the inference that some other impermissible factor was a significant consideration in the decision to deselect him.

DeBarba's other stated reason for deselection was that he might not fit in at the EXC plant. However, there seems to be little basis for that fear because spent many hours at EXC the plants carrying out assignments such as the RCP assignment at Millstone Unit and was, EXC thus, familiar with plant operations (Exh. 6, at 25). Also, EXC was EXC

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[23] Between received "Quality" and "Exceptional" ratings in all elements except one. In in monitoring and EXC controlling work progress, which was raised to a "Quality" in 1993 (Exh. 61, at 2).

commended for his teamwork and responsiveness to plant needs regarding [ ] (Exh. 39, at 9, 12, 14).

c. Analysis of Other Evidence. The inference can be drawn that the MOV issue was taken away from [ ] because his suggested plan of action required more than the company wished [ ] This attitude is consistent with the "shoot the messenger" attitude described in the Executive Summary, Millstone Employees Concern Assessment Team (MECAT) Report (Exh. 90, at 3). The reason proffered by [ ] for taking the MOV program [ ] i.e., that he was too busy, does not carry much weight. If that was the real reason, then [ ] would likely have so informed [ ] at the time. Instead, [ ] gave no explanation contemporaneous with the event. It was only in 1996, when OI's investigation was underway, that [ ] presented this reason. Considering that [ ] MOV program was [ ] the reason does not seem credible. With his deselection occurring [ ] MOV program, it becomes clear that a pattern of cause and effect existed between [ ] and a change in the conditions of his employment. Taking a project away from an employee who espoused a position unpopular with management is an example of what was referred to in the NRC's October 1996 Order as NU's tendency "to punish" those raising safety issues.

The record also indicates that [ ] went beyond normal bounds when he attacked [ ] with regard to the heat exchanger issue. Though [ ] that the heat exchangers were not operable . Certainly, rejecting the opinion of [ ] without

providing contradictory support raises the question of motivation. The situation for EXC complained to EXC Kupinski about Clearly, the was in bad faith and was EXC meant to that were contrary to corporate and plant management. EXC Finally, In light of the above, it is reasonable to EXC conclude that the MOV and heat exchanger issues were retaliatory EXC actions by NU and add to the evidence that NU discriminated against EXC

Although Risley denied making the "make or break you" statement to Kupinski on it is more likely than not that he did. This follows from the fact that: (1) Kupinski EXC related the account of Risley's threat to that same day; and (2) Bonaca observed that EXC Risley was "hot" over going to Millstone Unit 1. Kupinski's sense that EXC the threat also was directed at appears to have been on target. It is not unreasonable to EXC infer that Risley followed through on his threat by not advancing name for a supervisor EXC position only one month later because he was so angered by action.[24] EXC

It should be noted that the finding of no discrimination by the NSCP supports NU's position that its reasons were legitimate. However, the investigation was shallow. Only high-level management officials involved in the selection process were interviewed and all were asked the same questions even though their functions in the selection process were diverse and their degree of familiarity with abilities varied. Chatfield, who headed the investigation, did EXC

[24] It might be suggested that, since Risley made his threat directly to Kupinski, Kupinski would have been subject to an adverse action during the reintegration as well. Although the record is not developed on this issue, two possibilities explain his retention as a manager. First, the objective assessments and ratings by the Hay Group of Kupinski may have made it harder to demote him, depending on his standing. Also, Kupinski may have been assisted by DeBarba because, according to Bonaca, Kupinski "was good friends with DeBarba going back to the early years at NU" (Exh. 8, at 2).

not review performance evaluations or personnel files to verify whether the supervisors chosen by DeBarba and the directors fit DeBarba's expressed criteria. He conducted no comparison of new supervisors or deselected supervisors for their levels of protected activity to determine whether employees who raised safety issues were treated disparately. Moreover, the tone of the report is not objective, but appears defensive of management. By merely repeating management's view of the selection process, it cannot be considered a particularly objective finding.

D. Disparate Treatment

In any case involving a personnel action of some size, evidence of invidious disparate treatment might prove useful in assessing whether pretextual management actions were involved. In this instance, although eight new supervisors were interviewed about their history of raising safety concerns at NU, it was impossible to gauge their level of participation in safety-related activities based on the cursory examination of them that was contained in the record. Even if one considered all identified safety-related activity as protected activity of the same level, only [redacted] EXC [redacted] The only other notable activity was that of [redacted] EXC who was involved in a high-profile issue with well-known whistleblower [redacted] This, EXC however, was somewhat remote in time -- five to six years -- to the reintegration. Notably, [redacted] EXC stated that no one involved with the Rosemount transmitters was involved in the selection process.

In summarizing the value of this information, the most that can be said is that a superficial review shows that only two of eight new supervisors engaged in recent (within twelve months of the reintegration) protected activity in 1993. That would lend some support to [redacted] belief that EXC new supervisors were chosen on the basis of their lack of protected activity. However, a more

thorough, in-depth analysis of the protected activity, its visibility and significance would be needed to justify such conclusion.[25]

IV. CONCLUSION

A. [redacted] EXC

The record contains no direct evidence that NU discriminated against [redacted] for his EXC protected activity by demoting him from a supervisor to a senior engineer. However, the circumstantial evidence is sufficient to support the conclusion that his participation in protected activity was a contributing factor in his deselection as a supervisor in 1993 and, thus, that NU discriminated against him in violation of 10 C.F.R. § 50.7.

[redacted] was involved in several safety-related activities [redacted] EXC [redacted] resistance to changing his stance that the CU-29 valve EXC was inoperable and his active support of [redacted] who believed that NU [redacted] EXC [redacted] were known by DeBarba, the lead NU EXC official in the supervisor selection process.

Management's reason for not selecting [redacted] - that he did not fit in -- appears pretextual EXC against the background of [redacted] performance evaluations rating him very high for the same EXC

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[25] A well-developed record of the protected activity of new supervisors and demoted supervisors would have been helpful in analyzing this case on a disparate treatment theory. The protected activity of the members of these two groups could have been compared to that of [redacted] to determine whether those not involved in protected activity were treated EXC more favorably than those who were. To do this definitively, however, would be a major undertaking, requiring the interviews of at least 35 individuals (13 known new supervisors and 22 demoted supervisors). For our purposes, the lack of comparibility was not critical because we find the record is sufficiently developed to come to a conclusion regarding discriminatory (i.e., retaliatory) intent toward the two individuals so as not to require a comparison of the complaining employee to similarly situated employees.

attributes -- customer-orientation, interpersonal skills, and teamwork -- that NU claimed it sought in a supervisor. Also supporting a discrimination finding is the unusual and irregular selection process. Nothing in the record justifies a process in which an incumbent supervisor with a strong record of eleven years was replaced by a new supervisor with only limited acting supervisory experience and who, unlike all other new supervisors, had not been interviewed by the Hay Group. These factors, along with DeBarba's later failure to give [redacted] tip the Ex 7C scales in favor of a finding of pretext.[26] Against this backdrop, it is more likely than not that NU discriminated against [redacted] for his protected activities. Ex 7C

B. [redacted] Ex 7C

The circumstantial evidence in [redacted] case similarly supports an inference of Ex 7C discrimination. Between [redacted] (MOV's Ex 7C and heat exchangers) in which he had [redacted] About one Ex 7C month before the reintegration was announced, Risley, [redacted] who Ex 7C was integrally involved in supervisor selections, had uttered the [redacted] Ex 7C [redacted] in connection with a safety-related project in which [redacted] Ex 7C [redacted] to DeBarba [redacted] of the MOV Ex 7C program shortly before he learned that [redacted] These actions suggest a pattern: Ex 7C When [redacted] took a position unpopular with management, management retaliated. The

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[26] Any lingering uncertainty as to NU's retaliatory motive can be resolved by considering the existence of a "chilling" environment at NU during 1993. The Executive Summary of the MECAT and the Executive Summary of the Report of the Fundamental Cause Assessment Team (FECAT) both stated that management was not receptive to employees' safety concerns (Exhs. 90, 91). The FECAT stated that NU's approach to employee allegations was, at times, "critical or adversarial" (Exh. 91, at 3). This environment would explain [redacted] deselection as Ex 7C supervisor as well as the inordinate amount of time that it took for NU to resolve the CU-29 valve matter.

additional evidence of the subjective selection process and management's reasons for the deselection not being borne out by [redacted] performance evaluations lead to the conclusion that [redacted] was discriminated against due to his protected activities.[27]

[27] The evidence of the chilling environment and NU's tendency to punish those who raised safety issues during 1993 as reported by MECAT and referenced in NRC's October 1996 Order only confirm this conclusion.

CASE NUMBER 1-96-007

[ALLEGATIONS OF [redacted]] EXTC

I. INTRODUCTION

On January 11, 1996, [redacted] were terminated, EXTC along with ninety-nine other employees, as part of a workforce reduction process at Northeast Utilities System (NU). At the time of their terminations, [redacted] were employed as EXTC

EXTC

Prior to their terminations, [redacted] engaged in protected activities. EXTC Specifically, [redacted] had been responsible for working on two safety-related issues involving EXTC [redacted] had EXTC been involved in the Rosemount transmitter issue at NU in the late 1980s and early 1990s, and he raised a number of concerns during the course of his work [redacted] EXTC [redacted] that he had some involvement in the Rosemount EXTC Transmitter matter and he too raised a number of safety concerns during the course of his work in the [redacted] where he had worked previously, and in the EXTC

EXTC

Within two months of the NU terminations, the NRC staff chartered a task force to review NU's workforce reduction process in response to its receipt of allegations from former

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[1] As it is pertinent to this case, the supervisory chain for these allegers is described below (infra note 8 and accompanying text).

RD

NU employees who alleged they were targeted for termination for engaging in protected activities.[1] [redacted] EX 7C

The Millstone Task Force conducted transcribed interviews with NU management officials about the workforce reduction process and with a number of individuals who were known to have been involved in protected activities at NU. [redacted], who were among this group of former employees, told Task Force members they were terminated for engaging in protected activities. EX 7C

Subsequently, the Office of Investigations (OI) initiated an investigation of the facts and circumstances surrounding the terminations of [redacted] In addition to the principals, OI also interviewed line managers and senior NU executives, and developed a substantial evidentiary record. EX 7C

In Part II of this report, we discuss the duties and responsibilities of the subject employees, their job performance and the protected activity they engaged in, NU's workforce reduction process in general, and its application to the Nuclear Engineering Department specifically. Part III contains our analysis of the facts, while in Part IV we set forth our conclusions.

On the basis of the Task Force report and accompanying information, OI's investigative report and exhibits, and other pertinent materials, we are unable to conclude that there is a reasonable expectation that it can be shown by a preponderance of the evidence that in terminating [redacted] NU discriminated against them for engaging in protected activity. EX 7C

II. BACKGROUND

A. Allegers' Employment History and Activities

EXC

1.

a. Position and Performance. an NU employee for approximately at the EXC time of his termination in 1996, was a In this EXC position, was in contact with the and with staff at the various NU EXC plants. During the course of his employment with NU, worked on any number of projects EXC relating to nuclear safety. EXC work on this issue was discussed in his EXC performance evaluation for that year (Exh. 18). Specifically, his work on a EXC that led the vendor to make revisions to its design codes was highlighted (id. at 1). EXC appraisal also noted, however, that his EXC and that during the next year would EXC attempt to address these communications problems by establishing EXC (id. at 6).

(Exh. 8, at 8). He submitted a EXC calculation file and EXC (Exh. 34, at 3). He also provided his recommendations to EXC rejected. work because of an EXC inadequate quality assurance (QA) review in changing the EXC and a desire not to bias id. at 4). Reactor EXC Engineering also concluded that EXC EXC

performance evaluation, though favorable (Q for quality, the second highest rating in the NU system, but at the "lower end of the Q range"), addressed his failure to produce [ ] (Exh. 19, at 1, 5).

performance evaluation. With respect to , he stated:

> It should be noted that the calculations and work [were] accurate and thorough, however, they were not usable. needs to ensure that when working to resolve a problem, that the methods and approach to be used are concurred [in] by the involved parties. The decision process and judgment on how to perform the evaluations resulted in work that was not as usable as it should be, resulting in an NI [(Needs Improvement)] rating for this task (id. at 5).

It was also noted in the evaluation write up that [ ] had been provided written documentation indicating that (id.). Finally, under the section of the need to improve quantity of work and were identified as areas for improvement (id. at 6).

In response to his (Exh. 7, at 41). His grievance was denied at the first step (id.). then filed an appeal to a committee of senior managers which included Eric A. DeBarba, Vice President, Nuclear Engineering Services (id. at 42-43). appeal was again denied (id.; Exh. 23).

OI interviewed [redacted] EX 7C

[redacted] as meticulous but not someone who produced a great quantity of work (Exh. 50, at 28). He also stated that [redacted] EX 7C was perceived as a very hard worker (Exh. 51, at 16). EX 7C He acknowledged a [redacted] as well, but said he did not personally have a problem EX 7C [redacted] told OI that [redacted] worked diligently, "but after a year you might EX 7C ask yourself what he has been doing" (Exh. 52, at 27). He also stated that [redacted] EX 7C (id.).[2] EX 7C

b. Relevant Safety-Related Activities. As a [redacted] EX 7C performance of his regular day-to-day duties and responsibilities often involved EX 7C him in safety-related activities. The [redacted] problem, described in section II.A.1.a EX 7C above, was one such issue that [redacted] EX 7C

The [redacted] was initially noted by a reactor engineer in 1994 (Exhs. 34, 35). EX 7C [redacted] performed an evaluation to identify the potential cause [redacted] (Exh. 34). Upon EX 7C completion of his evaluation in [redacted] he advised his supervisor of his conclusions EX 7C relative to root cause (Exh. 8, at 9-10). His conclusions were not confirmed by a more detailed [redacted] (Exh. 35, at 1). This resulted in a Plant Information Report (PIR) being written to EX 7C initiate a root cause evaluation (id.). The root cause evaluation for the PIR was performed by

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[2] also stated that [redacted] had a very narrow view and that he was very opinionated: EX 7C

> Once he formed an opinion, it was difficult -- Some people are easy to talk about it and you change your opinion. I do that all the time. Other people, once they take a position they feel really charged to stick with it forever. [redacted] was more of that school of thought (Exh. 52, at 47). EX 7C

Reactor Engineering, Nuclear Fuels Engineering and the fuel vendor (Exh. 34, at 2). These groups were unsuccessful in identifying a root cause and the PIR was closed with no recommended corrective actions (id.). Subsequent to closure of the PIR, [ ] assigned another engineer to conduct a [ ] that established [ ] conclusions about the cause of the [ ] were incorrect (Exh. 35, at 1). EX 7C

An NRC Region I inspector performed an inspection to review the actions NU had taken in response to the [ ] (Exh. 34).[3] With respect to the [ ] issue, the inspector acknowledged that the root cause had not been identified (Exh. 34, at 2). He concluded however, that technical specification (TS) limits had not been exceeded and the plant's accident analysis was valid [ ] less than the [TS] limit" (id.). With respect to the [ ] issue, the inspector found that NU's actions to improve the calculation by improving [ ] design codes was a technically sound approach for resolving the issue (id. at 4). He also concluded that the basis for rejecting the recommended [ ] changes, i.e., [ ] was appropriately documented and justified (id). EX 7C

2. EX 7C

a. Position and Performance. At the time of his interview with the Office of Investigations in March 1996, [ ] had been employed by NU for more than [ ] years (Exh. 2, at 4). He started his career as an [ ] and subsequently was promoted to a supervisor in [ ] (id.). During an NU [ ] and he was removed from his supervisory position (Exh. 3, EX 7C

[3] This inspector also reviewed a [ ] had expressed concerns about to [ ] In response, [ ] to resolve the issue, which he did to his management's satisfaction (Exh. 35, at 2).

at 10-11). He subsequently secured a position as a [redacted] (id. at 10).

[redacted] performance, as documented in performance evaluations for [redacted] were favorable (Q) (Exhs. 10, 11). In the [redacted] evaluation however, [redacted] in quality and quantity of work (Exh. 9, at 5).

[redacted] performance appraisal, told OI that [redacted] failed to grasp that he was in a new discipline and to undertake to learn and do the things necessary to come up to speed (Exh. 36, at 28-29). He also stated that [redacted] progress was extremely slow which led him to conclude that he was not committed to change (id. at 29). When asked if [redacted] ever failed to complete assigned projects, [redacted] stated that there were projects that were delayed, but not missed (id. at 32). He also said that he had to be with [redacted] on projects, i.e., handhold him, a situation he described as burdensome (id. at 32). In terms of performance, [redacted] stated that he could not give [redacted] the typical work he gave [redacted] a [redacted] (id. at 33).

In a confidential memorandum prepared to support [redacted] selection for termination as part of the 1996 workforce reduction, Donald Dube, Manager of the Safety Analysis Section, stated that [redacted] had received only one performance evaluation in the Safety Analysis Section, the [redacted] evaluation (Exh. 9, at 5). Dube further declared that [redacted] an inflated performance evaluation for [redacted] (id.).[5] Dube also pointed out as noteworthy the fact

[4] The 1993 evaluation covered the period when [redacted].

[5] In a February 15, 1996, letter to Wayne D. Lanning, NRC, on NU employee layoffs, Ted Feigenbaum, Executive Vice President and Chief Nuclear Officer, NU, stated that

(continued...)

that did not give out a single NI for a single attribute for 34 persons in the EX 7C section (id.). also had indicated to Dube that appraisal would be EX 7C low (id.). In addressing overall performance, Dube stated: EX 7C

EX 7C

The quantity and quality of work is very low. In two years I can count on one hand the number of contributions he has made, few if any that are significant compared to some who number anywhere from 20 (about once per month) EX 7C to 200 (several per week) significant contributions. There are four in the branch with only 2 to 3 years of experience who perform 5 to 10 times the volume of work produced by is not committed to change. Efforts to EX 7C increase his productivity, including one-on-one training by the supervisor have not been effective. EX 7C or several years and much of his energy is pre-occupied with that endeavor. I should note that EX 7C effort in the branch, and does display good teamwork (id.).

OI interviewed

EX 7C

told OI that and could that he was less productive than other individuals in the group (Exh. 38, at 36). He also stated that (id. at 44). During his EX 7C interview with OI, took an unusually long time to complete assignments and that there had been continued complaints about his performance from people working on projects with him (Exh. 39, at 27-28). He also told OI that EX 7C told OI he did not think tha worked that hard to catch up with the other people in the section and that he showed no interest in his work, but

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[5](...continued)
throughout the NU system, less than 2 percent of all employees typically receive NIs (needs improvement). Approximately 90 percent receive Qs (Exh. 27, encl. 1, at 5).

(Exh. 40, at 21-22, 27). He also told OI that EXC on the job "almost every day" (id. at 44-45).

b. Relevant Safety-Related Activities. Like regular duties and EXC responsibilities involved the performance of safety-related activities. During his interview with the Task Force, however, EXC (Exh. 2, at 13). These concerns involved EXC

EXC

d.

these concerns with Larry Chatfield, EXC head of the NU Nuclear Safety Concerns Program (NSCP), as well as his supervisor stated that the concerns he raised were addressed and that EXC he saw no changes in his relationships or performance evaluations for having raised these issues (id. at 17, 23, 29, 32, 37; Exh. 3, at 25, 29, 36, 39, 42).[6]

also stated that he had been involved with the Rosemount Transmitter issue "to EXC some extent" (Exh. 2, at 10). In this regard, he stated that he was interviewed by OI during its investigation of NU's handling of the Rosemount Transmitter issue, and that he chose not to have NU counsel represent him during his interview (id. at 10-11). further advised of EXC

[6] With respect to these five safety issues said he raised, OI questioned whether any of the five could be the basis for retaliation since they were satisfactorily resolved and he received no negative feedback on any of them (Exh. 3, at 42). In response, stated that EXC he was raising those issues as part of his job. OI asked, "Is that why you raised them? See, I'm doing my job" (id. at 43). replied, "I raised them because what they would be called would be protected activities. I don't know exactly why, you know, I was terminated" (id.).

hearing that his name was used throughout OI's investigative report, which he thought was made known to NU management (id. at 13).

By way of background regarding the Rosemount Transmitter matter, which also plays a role in connection with alleger[redacted] a Rosemount Transmitter is a sensing element used to EX 7C determine pressure or water level in a reactor's primary system. These transmitters became an issue at Millstone in 1986 when five out of twelve transmitters in one reactor protection system failed during cycle one operations at Millstone, Unit 3.

A technical evaluation was prepared for the purpose of determining whether the Rosemount Transmitter failures presented a significant safety hazard (SSH) requiring NRC notification. The engineer who completed the evaluation[redacted] EX 7C [redacted] This engineer concluded that an SSH was presented. The Section EX 7C Manager,[redacted] did not agree and directed revision of the EX 7C evaluation to reflect his conclusion. The engineer refused, whereupon[redacted] EX 7C [redacted] that no SSH was presented and[redacted] An NU Nuclear Review Board subsequently overturned the no SSH finding EX 7C and the matter was reported to the NRC in March 1988. (OI Case No. 1-90-001 Report (Aug. 31, 1992) at 23-24). After NRC notification, a number of activities and tasks were undertaken by NU to address the problem, and it was at this point in November 1988 that[redacted] EX 7C [redacted] requested and was granted permission by EX 7C his management at NU to work on an[redacted] EX 7C [redacted] subsequently differed with NU management over the manner of resolving the EX 7C Rosemount Transmitter issue. Thereafter, he raised concerns with the NRC about NU's

actions to address the issue. He also alleged that he had been harassed, intimidated, and discriminated against because of his efforts to resolve these issues. An OI investigation (Case No. 1-90-001) was initiated in early 1990. OI interviewed a number of NU employees including [ ] whose testimony concerned his actions to change the SSH evaluation to a non-SSH finding. In concluding his interview, [ ] also told OI he felt the problems [ ] experienced were the result of personality conflicts and he stated that he felt free to raise safety concerns directly with NU (OI Case No. 1-90-001, Exh. 11, at 7).

From the OI report on the [ ] investigation, it appears that none of the other supervisory personnel involved with the [ ] termination decisions, including DeBarba, see section II.C below, was interviewed about the [ ] discrimination matter. DeBarba indicated during his OI interview, however, that [ ] was in his group for a brief period of time in 1990 and 1991 at the "very tail end" of the Rosemont Transmitter matter (Exh. 59, at 81).

3. [ ]

a. Position and Performance. [ ] began his employment with NU as a [ ] (Exh. 5, at 4-5). He was later promoted to [ ] (id.). [ ] performance evaluations for [ ] were both favorable (Q ratings) (Exhs. 15, 16). The [ ] performance evaluation, however, contained the following statements:

[is bright and capable, and with an adjustment in emphasis can be a strong performer in the areas as well. EX 7C

. . . .

The has a different role than in previous NU organizations. In the past there had been a role for a EX 7C

(Exh. 16 at 1, 6).

When questioned by OI, EX 7C

appraisals, stated that he had been trying to get

EX 7C

full time (id.).

In a memorandum prepared to support selection for termination as part of the EX 7C 1996 workforce reduction, Matthew Kupinski, Manage , Nuclear Engineering Support, stated:

> Although received an overall Q rating, his 1994 review noted that while EX 7C ,was not as good, leading to a weaker performance overall. His areas of weakness were in the categories of Quality/Quantity, Customer Service Orientation, Monitoring & Controlling, Planning & Organizing, Initiative/Innovation as evidenced by Q [minus] ratings in these competencies. He did, however, receive an E [(Excellent)] rating in Problem Solving & Analytical Skills. The review also notes, in particular, that although in the past there had been a role for a person dedicated almost exclusively to this role EX 7C was no longer possible to maintain (Exh. 14, at 2).

OI interviewed EX 7C about his performance. stated that

~~SENSITIVE ALLEGATION INFORMATION - DO NOT DISCLOSE~~

he did not believe that [redacted] carried an equal share of the workload, and he noted that [redacted] needed close supervision (Exh. 45, at 16). He also stated that [redacted] as was expected of those who worked in his group (id.). [redacted] flexibility and versatility were limited because most of his work was [redacted] had been trying to steer [redacted] and to get him out into other areas, but [redacted] was not receptive to this (Exh. 47, at 23). He also stated that, [redacted] when he was told to do so (id).

b. Relevant Safety-Related Activities. [redacted] told the Task Force that [redacted] and that he had been "very involved" in Rosemount transmitter issues with [redacted] testified during the Rosemount transmitter investigation. In his testimony there, he was critical of NU, stating he would not raise a safety concern within NU, but would contact the NRC instead (OI Case No. 1-90-001, Exh. 62, at 3). [redacted] told OI that he also worked for [redacted] and that while [redacted] was on a crusade, he and [redacted] were not (Exh. 46, at 25-26).

When questioned by the Task Force, [redacted] recited a list of safety issues he worked on prior to his termination. These included level issues for PWRs and BWRs and some audits he was assigned to perform (Exh. 5, at 21-22). He also told the Task Force that he had raised an issue with people in the NU NSCP just before his termination involving [redacted] that may have involved an unreviewed safety problem (id. at 22). During his later interview with OI, however, [redacted] was questioned about the nature of the issue he raised with the NSCP staff before his termination. OI inquired, "[y]ou mentioned in

[redacted]

your prior testimony that it was ironic that you happened to have -- you know, right before you were terminated, the day before maybe or just before, that you had been talking with the nuclear safety concerns people. Do you remember that comment?" (Exh. 6, at 11). In response, [redacted] stated, "Yes. . . . I talked to them about some of the things that were going on real recently which was on that [redacted] where there was what I thought were irregularities in whether something was a significant safety concern or not, . . . an unanalyzed safety problem" (id. at 11-12). When OI requested the name of the person he had spoken with in the NSCP, [redacted] stated he had forgotten, but that he could come up with it (id. at 14). OI asked [redacted] to think about it and provide the name so OI could contact the person (id. at 15). Whereupon, [redacted] stated he had not talked specifically about the potential unresolved safety problem (id. at 15). Upon additional questioning by OI [redacted] admitted that he had not spoken to NSCP personnel about irregularities in the [redacted] at all, but instead about the manner in which the Plant Operations Review Committee (PORC) meetings were conducted and QA qualification of TS software (id. at 16, 20-21). [redacted] further advised that both issues were satisfactorily resolved (id. at 22-24).

B. The NU Workforce Reduction and Reengineering Processes

The Task Force and OI provided comprehensive information on NU's workforce reduction and reengineering initiatives. To summarize, in 1995 and 1996, NU developed and subsequently initiated a workforce reduction program in an effort to achieve its business plan objectives of operating efficiently and competitively in a deregulated market. (Exh. 57, at 21-22). Under the program, staff reductions were to be achieved by use of both voluntary (early retirement) and involuntary (termination) processes. Employees subject to involuntary

reduction were to be evaluated and ranked, on a matrix, with their peers against five fixed and five supplemental nuclear competencies (Exh. 27). The five fixed competencies (Education, Experience, Job Knowledge, Job Performance and Commitment to Change) were similar to the elements and standards of the performance evaluations used in the NU system. The supplemental competencies (Leadership, Teamwork, Communication, Planning/Organization/Decision-Making and Effectiveness) were developed by a task force NU chartered to formulate the workforce reduction program and approved by senior NU management (id. at 2). Managers, with input from their supervisors, were responsible for completing the matrices and were to base their scores on an employee's last two performance reviews and a prediction of how the employee was likely to perform in the future organization (id.).

An employee receiving the lowest scores on a matrix could be terminated. All NU nuclear employees were informed of the workforce reduction in a July 31, 1995, letter from John F. Opeka, then Executive Vice President, Nuclear (NRC Task Force Report, "Independent Review of [NU] Workforce Reduction Process" (Oct. 2, 1996) Attachment 1 [hereinafter Task Force Report]).

Managers were provided a detailed handout for their use in explaining the Workforce Reduction Program to their supervisors and staffs (id. Attachment 7). In this July 27, 1995 handout, the reasons for the workforce reduction and NU strategic business plan objectives were addressed (id.). This document also contained the staff reduction target numbers that had been identified by 17 functional area teams established for this purpose (id.). The target numbers identified, 250 for the entire nuclear organization for the years 1996 and 1997 and 35 for Nuclear Engineering Services for the same two-year period, were described as best

estimates and NU's early view of what would be required for it to reduce costs and be competitive (id.).

A key issue identified in the handout was the fact that NU would likely have to cut into its quality rated employees to "determine the best of quality" (id.) Subsequently, NU management decided to impose the entire 250 person reduction in one year, 1996. Nuclear Engineering Services Vice President DeBarba, who was involved in strategic business planning from the start, indicated that the decision to combine the workforce reduction numbers for 1996 and 1997 was based on "humanistic" reasons and a desire for stability (Exh. 58, at 23-24). DeBarba also stated that senior management decided it would be more appropriate to do a larger reduction early, and then wait to see what came out of reengineering and look at later reductions then (id.).

All managers responsible for completing matrices attended mandatory, workforce reduction matrix training held between September 26 and October 5, 1995. As part of the training, managers were specifically instructed not to consider in any aspect of the workforce reduction process an employee's sex, race, age, national origin, marital status, sexual orientation, disability, family leave status, or the fact that an employee may have previously engaged in protected activity (Exh. 49, at 16). The training materials distributed to managers included a competency reference guide for managers to use in ranking their employees. In this guide, the term competency was defined in terms of a behavior that is observable, measurable and trainable, and the characteristics or attributes associated with each competency were described (id.). For example, the characteristics associated with Teamwork included collaboration with peers, contribution at meetings, rapport building, and team influence while the attributes associated with Commitment to Change included ability to learn, adaptability,

flexibility, resilience, and managing change (see generally Task Force Report, Attachments 5, 8).

Completed matrices were to be reviewed and approved by functional directors and officers, then forwarded to Human Resources (HR) for a consistency review. HR reviewed all matrix evaluations of employees identified for termination. HR also reviewed the last two performance evaluations for these employees and the performance evaluations of the employee(s) having the closest score to the employee identified for termination (Exh. 27).

Following HR's review, an additional, independent review was performed by the legal staff. This review was to provide an "added assurance" that "concerned" employees had not been targeted specifically for reduction (id.) NU senior officers prepared a confidential memorandum for use by legal counsel that identified those employees slated for termination who had raised concerns (id.). A "concern" was broadly defined to include (1) any nuclear or industrial safety concern; (2) a grievance; (3) a differing professional opinion; or (4) any issue raised by an employee that remotely could be characterized as a safety concern or any employee who testified before the NRC, including the OI, as well as anyone who had been interviewed in connection with or appeared as a witness in a Department of Labor hearing (Exh. 30). Employment counsel from within the company and counsel from an outside law firm then examined the matrices and the last two performance evaluations for each concerned employee (id.). Counsel also reviewed the scores and performance evaluations of the employee rated next lowest on the matrix to ensure that the concerned employee had not been

unfairly rated. In addition, counsel reviewed a random sampling of additional matrices to confirm that the process was being fairly applied (id.).[7]

Upon completion of the added assurance review provided by legal counsel, the matrices were forwarded to an Executive Review Committee for final approval (Exh. 27). Upon final approval, the Executive Review Committee submitted the list of employees designated for termination to the Manager, Equal Employment Diversity, to assure that there was no adverse impact on any group protected by law due to race, age, or sex (id.). The matrices identifying employees to be terminated were not considered final until the review process was completed (id.).

As stated in the handout provided to managers, the goal of the work force reduction program was to achieve a properly sized workforce, comprised of employees with the right kind of skill sets, so that NU could compete successfully in the year 2000 and the years beyond (Millstone Task Force Report, Attachment 7). At the same time as the workforce reduction program was being defined and developed, NU also was exploring ways to operate its plants efficiently, competitively, and safely (Exh. 59, at 15-18). This "reengineering process", as it was called, involved looking at the best run plants in the country, and incorporating the industry's best practices into a new organization (id. at 15; Exh. 60, at 8). In looking at the best industry practices and its current nuclear organization, NU identified functional areas that would not require as many people in the future (Exh. 58, at 13.). Engineering, particularly the engineering design organization, was identified as one of the functional areas where improved

[7]According to information supplied by NU to the NRC Office of Inspector General in connection with its 1998 inquiry into the NRC staff's handling of this case, the added assurance review did not result in the removal of any employee from the termination list. However, 19 of the 43 employees on the list were not terminated.

and revised work initiatives would enable NU to produce a better product at a lower cost and with less people (Exh. 59, at 13-18).

Having concluded that its strategic business plan objectives could be achieved by adopting the best industry practices and having developed a workforce reduction process for bringing about the downsizing which was based on these best practices (Exh. 60, at 8), the company now was ready to implement the workforce reduction.

C. Nuclear Engineering Department Reduction Process

In 1996, the NU Nuclear Engineering Services Department was under the organizational responsibility of Vice President DeBarba and consisted of five engineering divisions (Exh. 26, at 2). Nuclear Engineering Services, the relevant division in this case, was under the directorship of Mario Bonaca and included Nuclear Fuel Engineering under Manager John Guerci, [redacted] Safety Analysis under Manager Dube, [redacted] and Nuclear Engineering Support under Manager Kupinski, which was [redacted] (id. at 3).[8]

Prior to completing the workforce reduction matrices for their respective sections, the [redacted] -- Dube, Kupinski, and Guerci -- met to discuss the matrixing process in order to assure that they understood the rules before proceeding (Exh. 37, at 11-12; Exh. 43, at 11-12; Exh. 49, at 19-20) . They also sought to develop a uniform and consistent approach for ranking employees (id.). Specifically, they agreed upon an average (median) rank to be assigned to employees in their sections (id.). They gave this information to the [redacted] -- and instructed them to use it, along with the

[8] Additionally, as we have already seen, [redacted]

competency descriptions and guidance, in performing the matrix evaluations (Exh. 37, at 13-14; Exh. 42, at 17).[9] In describing the managers' role in the process, Dube and Kupinski stated that upon completion of the matrices by the supervisors, the managers were to review the scores for consistency and to normalize them as appropriate (Exh. 37 at 13, Exh. 43 at 11-13).

Upon receipt of the completed matrices from the supervisors, the managers met and, as described by Kupinski and Guerci, compared matrix scores from their groups with other groups for consistency (Exh. 43, at 12-13; Exh. 49, at 19-20). The matrices for Dube's, Kupinski's, and Guerci's branches were completed as required, meaning employees had been evaluated, scored, and ranked. Employees identified for termination were to have an "X" placed in a column on the matrix next to their names. However, no employee from the EX 7C was "X'd," i.e., identified for termination. (Exh. 37, at 19; Exh. 43, EX 7C at 15-16; Exh. 49, at 19).

The managers subsequently sent these matrices to the Directors (Exh. 37, at 19; Exh. 43, at 16). Bonaca reviewed the matrices for his division and discussed with his managers the fact that all had the same median (Exh. 56, at 45). He also noted that none of his managers had identified any employee in the division for termination (id. at 49-50). In this connection, during his OI interview, Bonaca stated that he did not believe further reductions were necessary based on his view that his department had already reached its reduction target

[9] These managers' approach differed somewhat from the process described during the workforce reduction matrix training in that the supervisors were to provide input to the managers, who were responsible for completing the matrices (Exh. 27, at 2).

of seven through eight early retirements (id. at 38). Consequently, he sent the matrices forward to Jeb DeLoach, Staff Assistant,[10] who in turn submitted them to DeBarba (id. at 50).

According to Bonaca, DeBarba contacted him about the matrices for his division.[11] Bonaca indicated that he was told that there could be more cuts beyond the target numbers for the departments (id. at 58). Bonaca also stated that DeBarba said he had looked at the matrices for the branches and noted eight names that were at the bottom of the matrices, including [redacted] (id. at 59-64).[12] DeBarba discussed cutting the department by those eight employees (id. at 65). In response, Bonaca told DeBarba that eight was far too many to cut (id.). Bonaca stated that he told DeBarba he would need to consult with his managers in order to get their perspective on the cuts DeBarba was suggesting (id. at 65-66).

EY 7C

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[10] Jeb DeLoach, Executive Assistant to NU's Chief Nuclear Officer, was then serving as DeBarba's Staff Assistant on reengineering initiatives for Nuclear Engineering.

[11] DeBarba actually contacted Bonaca twice about the department matrix scores. In the first instance, DeBarba questioned the matrix score for [redacted] a well-known NU whistleblower. Bonaca admitted to DeBarba that the score had been revised upward at his suggestion because of [redacted] involvement in protected activities (Exh. 56, at 51, 87-89). After DeBarba pointed out this was contrary to the direction they were given not to consider protected activity in preparing matrix scores, Bonaca returned the [redacted] matrix to [redacted] for reassessment, and it subsequently was returned with the original, lower score (id. at 53-56, 90-92).

EY 7C

EY 7C

EY 7C

Ultimately, [redacted] became one of the five individuals whose name was put forward by the Nuclear Engineering Services managers for termination (Exh. 49, at 30). His name, however, was later pulled from the list of those to be terminated, although there is some dispute over whether this was done at the behest of DeBarba or his superior, Executive Vice President Opeka (Exh. 59, at 62-63).

EY 7C

[12] During his OI interview, DeBarba stated that he did not recall providing names to Bonaca (Exh. 59, at 57). Based on Bonaca's recollection Bonaca, who recalled DeBarba reading the names of the employees from the bottom of the matrices (Exh. 56, at 59, 78), it is likely that DeBarba provided Bonaca with the names of employees to be considered for termination from his division.

Thereafter, Bonaca contacted his managers (Exh. 56, at 71). In describing the substance of his discussion with Bonaca concerning staff cuts, Kupinski stated Bonaca told him to generate a list of employees for termination (Exh. 43, at 21-22). He also indicated Bonaca mentioned [ ] as a candidate for termination based on his matrix score (id. at 22-23). EX C Guerci stated Bonaca called him and advised that DeBarba wanted to consider cuts in each department (Exh. 49, at 26). He also said that Bonaca gave him the names of two employees from his group who should be considered for termination in that "[t]hey were the individuals with the lowest [matrix] scores in the department" (id). [ ] was one of the names. Dube declared EX C that Guerci, who was acting for Bonaca because he was splitting his time between his directorship responsibilities and reengineering activities, contacted him and identified [ ] for EX C termination (Exh. 37, at 19). [ ] was the lowest ranked [ ] (id. EX C at 19-21, Exh. 9).

In response to Bonaca's request, Kupinski went back to his four supervisors, including [ ] and advised them that they were to recommend one or two individuals they felt were the EX C lowest rated individuals who "could ultimately be thrown into a pool for workforce reduction considerations" (Exh. 43, at 26). The supervisors designated those employees, and according to Kupinski, he and the other three managers, who had similar lists from their divisions, met to identify the department employees who would be put forward for termination (id). Comparing the lowest rated individuals in their groups with the lowest rated individuals in the other groups, Nuclear Engineering Services Department managers went around the table and discussed each candidate and the impact of the candidate's loss on the organization (Exh. 42, at 46-47;

Exh. 43, at 29-30). Based on those discussions, they identified eight employees for termination (Exh. 42, at 49).[13]

The list of the lowest ranked employees was then provided to DeBarba, who met with his directors to discuss the employees identified (Exh. 56, at 74-75). Bonaca, who was in attendance at the meeting, described the process as fluid, with names being discussed and changed, including, at DeBarba's insistence, the addition of Bonaca's and DeBarba's to the list of possible terminations (Exh. 56, at 75-76). EX 7C

Following the meeting with the directors, Bonaca was contacted by DeBarba and told that DeBarba read to Bonaca the names of those employees from the bottom of the matrices who would be terminated. Among the employees identified were (id. at 77-79). EX 7C EX 7C

III. ANALYSIS

It is clear from the foregoing that all allegers engaged in protected activities; that management officials were aware of that fact; and that their terminations constituted adverse action. We need not rehearse the evidence of those elements of our inquiry because we are persuaded that the fourth required element for a discrimination determination has not been established. More particularly, we believe the Task Force and OI records provide insufficient support for a finding that the protected activities of one or more of the allegers influenced the termination decision. To the contrary, in our view, such a finding would rest on pure conjecture. EX 7C

[13]According to Guerci, of the eight names provided to DeBarba, five were the names of employees to be terminated, which included and three were additional possibilities (Exh. 49, at 29-30). EX 7C

and, as such, would not survive the preponderance of the evidence test we consider applicable in these cases.[14]

A. Protected Activity/Adverse Action Causal Nexus

As is typical in cases such as this, there is a total lack of direct evidence that might point in one direction or the other on the question whether the inclusion of these allegers on the list of 102 employees slated for termination had a discriminatory foundation. That being so, the inquiry comes down to whether there is sufficient circumstantial evidence making it more probable than not that their protected activities played at least some role in that inclusion.

In any reduction-in-force prompted by a perceived need to downsize the overall employee complement, the employer may properly take into account the relative capabilities and past performance of those individuals who might be considered for termination. In this instance, as detailed in Part II above, NU put into effect a comprehensive process for the evaluation and ranking on a matrix of employees subject to involuntary reduction.

As matters turned out, the Task Force and OI did not have available to them, in the course of their inquiries, the matrices of the employees who were not among the 102 who were terminated. Thus, an inquiry into whether there was invidious disparate treatment of the individuals here involved was effectively foreclosed by NU's destruction of these records.[15] But the record does reflect that all three of them faired poorly in the evaluation process; indeed, they ranked at the bottom of their particular rating groups.

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[14] As will be seen, in reaching this conclusion we have considered the differing results that were reached by the Task Force and an OI investigator.

[15] It cannot be inferred on this record that an improper purpose undergirded the decision not to retain the approximately 3000 matrices of employees not involuntarily separated. That decision well could have been based on a belief that there was no cause to retain such a large bulk of material that seemingly had no further useful purpose.

The record further negates any suggestion that those rankings may have had a discriminatory underpinning. For one thing, no reason appears why the management officials -- the first and second level supervisors -- responsible for completing the matrices might have desired to provide these allegers with unjustifiable low evaluations in retaliation for their engagement in protected activities.[16] More importantly, peers of all [ ]men confirmed the existence of performance shortcomings that could easily justify the rankings that were given to them. [ ]and, additionally, there was some doubt expressed as to the worth of his work product. [ ]

[ ]the length of time he took in completing assignments. For his part, [ ]was thought by peers to affect his ability to carry his share of the workload.

Against this background, the question naturally arises: what evidence is there that might nonetheless cast doubt upon the legitimacy of the inclusion of the three allegers in the group ultimately selected for termination? Given that DeBarba apparently was the ultimate decisionmaker in that regard, the focus is appropriately on him.[17]

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[16] Among the [ ]allegers, the only specific suggestion of a discriminatory motive by a first or second level supervisor was lodged by [ ]who suggested that his [ ]had expressed a dislike for [ ]and might have discriminated against [ ]because he was a [ ]. Exh. 5, at 25). As we explain below, however, in the context of this record we do not consider [ ]claims of discrimination based on their purported association with [ ]sufficient to create an inference of retaliation.

Relative to the first and second level supervisors, it is also worth noting that when their initial input into the matrixing process was completed and forwarded to Bonaca for his review, no one was "X'd" for termination.

[17] As the third level supervisor involved in the Nuclear Engineering Department workforce reduction process, Bonaca also is a potential source of any discriminatory action against the [ ]allegers. As is evidenced by his actions regarding [ ](supra note 11), (continued...)

In the case of [redacted] DeBarba was a member of the committee of senior NU managers EX 7C that ultimately rejected [redacted] performance appraisal. Standing alone, that involvement scarcely allows an inference of a retaliatory motivation. And there is no other evidence that might permit such an inference.[18]

[redacted] whose involvement in EX 7C protected activities may well have had been regarded by NU management (including DeBarba) as a substantial annoyance. But that fact, too, is not enough without more to support an inference of retaliation. Further in this connection, it does not appear that the association of these [redacted] allegers with [redacted] and his safety concerns was of such magnitude as to make it EX 7C likely that DeBarba would have taken the association as a reason to get rid of them.

That all [redacted] allegers ended up on the list of the forty-three employees who received EX 7C the so-called "added assurance" review also does not assist their claims. Presence on that list assured neither termination nor retention. According to information supplied by NU to the Office of the Inspector General at the latter's request during its 1998 inquiry into the investigative and enforcement processes followed in connection with this case, nineteen of the forty-three individuals on the "added assurance" list were eventually removed from the list of persons to be terminated, although none as the result of that review.[19]

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[17](...continued)
however, his central concern appeared to be avoiding, rather than precipitating, any protected activity-related problems.

[18] Bonaca also indicated he was involved in [redacted] which convinced him that EX 7C [redacted] was not a good performer" (Exh. 56, at 96).

[19] Other information supplied by NU to the OIG revealed the following: Of the more than 90 employees who raised safety concerns with either the Employee Concerns Program or its equivalent predecessor at Millstone from January 1990 to January 1996, five were included in (continued...)

B. Millstone Task Force/OI Investigator Concerns

What remains for consideration are the concerns expressed by (1) the Task Force in its October 2, 1996 report; and (2) the OI investigator with principal responsibility for this case in his December 10, 1997 memorandum to the Office of Enforcement (OE) (Dec. 10, 1997 Memorandum from Dan Gietl, OI, to Mike Stein, OE [hereinafter OI Investigator Memo]). On analysis, those concerns do not alter our appraisal of the record before us.

1. Workforce Reduction Process

The Task Force was critical of some aspects of the NU workforce reduction process (Task Force Report at 23-29, 40) . We need not dwell at length upon those criticisms. Suffice it to say that, to the extent meritorious, none of them will further a conclusion that these allegers' inclusion in the reduction-in-force was driven at least in part by their protected activities.

It is, of course, true that, as the Task Force emphasized, the subjective judgments were involved in evaluating and ranking employees as an integral part of the workforce reduction process. Such is inevitably the case where an appraisal of capabilities and performance is undertaken. There is, however, a total lack of a record foundation for a conclusion that the supervisors who ranked them took advantage of the subjective nature of the appraisal components to downgrade unfairly the allegers' value to the organization. Once again, that these individuals turned up at the bottom of the ranking order could be attributed to shortcomings which not only the supervisors, but also peers, had noted.

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[19](...continued)
the 1996 layoffs. Of the five, three were among the individuals on the list for "added assurance" review. In addition, two employees whose names appeared on both the Employee Concerns Program and "added assurance" lists were not laid off.

2. Backfilling/Downsizing Safety Implications

In his December 10, 1997 memorandum to OE, the OI investigator found that the scope of the NU downsizing, which at one point included the possibility of backfilling vacated positions with new employees, made the whole purpose suspect and open for abuse. In this context, the OI investigator also stated that it did not appear NU addressed the question of how many layoffs could be made before plant safety was impacted and described this as an additional indication of a desire by NU management to rid themselves of employees they did not want, including employees who had engaged in protected activity (OI Investigator Memo at 1-3). Similar concerns were expressed by the Task Force (Task Force Report at 32-33, 39-41).

Though there is evidence NU management originally may have intended to backfill some positions vacated by employees who had either retired or were terminated, the backfilling plans were abandoned when NU counsel advised that it would be inappropriate to backfill positions reduced through a downsizing (Exh. 61, at 16). NU supervisory officials, including DeBarba, clearly were aware of this fact when final termination selections were made (Exh. 59, at 39-40). The possibility of backfilling thus was not a factor in those selections. What is left then, is to determine how the aborted possibility of backfilling provides evidence supporting a finding of discrimination relative to these allegers. This is a connection we are unable to make. EXC

By utilizing an evaluation process for individual employees that relied heavily (and quite properly) on job performance factors, it was inevitable that, if the process was carried out appropriately, the poorer performers would be identified at the bottom of the matrix, thereby making them subject to termination. NU managers themselves noted this, stating that the purpose of its workforce reduction program was to terminate those employees who would be of

little value to the organization (Exh. 56, at 33; Exh. 57, at 42, 46; Exh. 58, at 19, 46), a distinct possibility with an employee who is a poor performer. Nonetheless, whether the original suggestion to use backfilling was evidence of the improper use of a reduction in force to achieve "for cause" terminations, as the OI investigator (and the Task Force) seemed to conclude,[20] it is not evidence that the employees involved were being targeted for elimination because of protected activity, the harm about which the NRC is concerned.

So too, the OI investigator's conclusion that discriminatory intent can be inferred from the fact that it did not appear NU management had addressed the question of how many layoffs could be made before plant safety was impacted is misplaced. This statement appears just after a discussion of the use of the workforce reduction to achieve more efficient, albeit safe, facility operation, in which it was noted by the OI investigator that "the safety factor was a consideration of all the individuals interviewed particularly OPEKA, [Robert] BUSCH, [President, NU Energy Resources Group], and DEBARBA" (OI Investigator Memo at 2). Clearly, this latter statement was supported by these individuals' testimony, in which they described a process by which functional areas were identified so as to achieve improved operations through implementation of best industry practices, thereby allowing more efficient but safe operation (Exh. 60, at 8-9; Exh. 61, at 9; Exh. 58, at 11). This also is consistent with the documentation NU prepared for briefing its managers and supervisors on the workforce

[20] In both the OI investigator's memorandum and the Task Force report it was suggested that NU's original intent to use backfilling and the fact that, once backfilling was abandoned, some managers, including DeBarba, changed their termination lists was evidence that the entire process was not intended as a reduction in force, but rather an attempt to eliminate unwanted employees without regard to critical personnel needs or safety considerations (OI Investigator Memo at 2-3; Task Force Report at 25-29).

reduction process which highlighted safety as a primary consideration (Task Force Report, Attachment 7).

In fact, although framed in terms of "safety," the OI investigator's ultimate concern seemed to be what he found was DeBarba's failure to justify going beyond the original "target" number of seven reductions, to mandate four terminations even in the face of sixteen positions vacated through voluntary retirements and unfilled positions (OI Investigator Memo at 2). As with backfilling, however, we are unable to perceive that this action, alone or in concert with other management activities, suggests discriminatory intent. Assuming that the target number was seven and it was exceeded as the investigator asserts,[21] there is nothing that indicates DeBarba's action in requiring terminations beyond this number was rooted in any discriminatory intent. As the evidence indicates, with one exception (which we discuss in section III.B.4 below), he identified the individuals with the lowest matrix scores in each of the four departments (Exh. 56, at 59). There is nothing to suggest that an improper factor other than the facially neutral matrix scores was the impetus for his action.

Finally, to the degree safe operation was a concern, with respect to the final determination regarding the four individuals who were slated for termination -- one from each of the four departments -- the managers of the departments were asked to identify the lowest rated individuals in their respective departments. In determining who those individuals were, the managers considered those employees they could best do without, i.e., which potential

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[21] In addition to testimony from NU officials, including DeBarba, which suggested that, within the broad goal of eliminating 250 employees, the target for any one group was flexible (Exh. 48, at 9, Exh. 58, at 25, 45), there is also DeBarba's testimony that he understood that unfilled vacancies could not be used to meet target goals (Exh. 57, at 48-49). The latter interpretation is borne out by the fact that by reason of the voluntary retirement process, 144 NU employees accepted early retirements, requiring 106 involuntary separations to reach the goal of 250 (Exh. 27). As has been noted, 102 employees eventually were terminated.

terminations would have the least impact on performance in their department (Exh. 41, at 11-12; Exh. 42, at 47, 49-50; Exh. 43, at 28; Exh. 48, at 19).[22] The four managers, based on input from first-level supervisors, made [ ] reflecting this consideration [EX 7C] (Exh. 42, at 49; Exh. 49, at 27). [ ] were [EX 7C] subsequently made part of the final termination pool of 102.[23] Again, we are unable to discern any evidence that supports an inference of section 50.7 discrimination.

3. [ ] Association [EX 7C]

We have already addressed the issue of whether there is a record basis for a finding, as the OI investigator would have it, that DeBarba "singled" out [ ] for termination [EX 7C] because of [ ] (OI Investigator Memo at 3). None of the [EX 7C] factors to which the investigator points would raise such a finding above the level of rank

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[22] The OI investigator suggests that a conflict in testimony between Bonaca and DeBarba over whether Bonaca ever told DeBarba he did not want cuts is another factor in concluding there was discriminatory intent on the part of DeBarba (OI Investigator Memo at 5). We see no such connection. As Bonaca's testimony makes clear, he protested that the eight suggested layoffs were excessive and insisted that he be able to get feedback from his managers on possible performance impacts relative to each of the eight individuals suggested by DeBarba (Exh. 56, at 65). As we note below, this was done, and the input was provided to DeBarba, who apparently considered it in arriving at the final termination figure of four (see supra note 23 and accompanying text).

[23] The other person terminated, [ ] indicated when questioned by OI that [EX 7C] [ ] was not involved in safety-related matters so that section 50.7 discrimination could not have [EX 7C] been the cause of [ ] termination (Exh. 55, at 41). As we have already indicated, the fifth individual recommended, [ ] was removed from consideration by NU management, [EX 7C] apparently because of concerns related to [ ] involvement in safety-related matters (supra note 11). Although the OI investigator suggests that inconsistencies concerning DeBarba's testimony about the removal of [ ] om consideration for termination provide further [EX 7C] support for a finding of discrimination regarding [ ] (OI Investigator [EX 7C] Memo at 5-6), in the totality of the circumstances we are unable to reach such a conclusion.

speculation.[24] To repeat, it simply does not follow from the fact that DeBarba might have known both of [ ] protected activities and of these allegers' association with him that DeBarba's termination decision likely was influenced by that association. EX 7C

4. Comparison of [ ] EX 7C

The OI investigator also suggested that questions about DeBarba's intent arise when his statements that he wanted to remove the lowest rated employees are contrasted with the fact that [ ] Kupinski had lower scores than EX 7C [ ] (OI Investigator Memo at 4-5). In reaching this conclusion, the investigator seemingly EX 7C failed to take into account the fact that the [ ] volved disciplines and EX 7C undertakings entirely different from those relevant to the other three groups: [ ] EX 7C

Exh. 26, at 4). EX 7C

As Kupinski observed, in determining which of the eight low-ranked employees in his organization should be identified for termination, he looked beyond the matrix evaluation. In addition, he inquired into the value of the particular function and effort of the group in which the individual was employed, as well as into the impact on the group of a loss of that individual (Exh. 42, at 54).

Clearly, his conclusion that termination would have minimal impact on the EX 7C functioning of his cannot be regarded as suspect given the EX 7C

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[24] The OI investigator uses [ ] termination to buttress his argument that DeBarba was EX 7C intent on using the workforce reduction process to eliminate individuals he did not want, citing a DeBarba comment that, based on his experience with [ ] during the grievance process, [ ] EX 7C was not the type of person that belonged at Millstone because [ ] (OI Investigator Memo at 7), a comment that could not be located in DeBarba's transcript of interview with OI. Like the Task Force, however, he apparently did not reach the conclusion that [ ] EX 7C

assessment of his performance by his first-level supervisor and peers alike. Nor is there anything in the OI record that might counter Kupinski's apparent further conclusion that, while their matrix scores might have been slightly lower than that of [redacted] the value of the [redacted] employees to the discrete type of work that group performed made their retention of greater importance to the overall organization. In short, on the record at hand, all that has significance in the context of this concern of the OI investigator is that no individual in a discipline akin to that possessed by [redacted] was retained notwithstanding a lower matrix score.

IV. CONCLUSION

Based on all the foregoing, we find that we are unable to conclude that discrimination was a "contributing factor" in the terminations of [redacted][25] In so concluding, we necessarily also find that, under a preponderance of the evidence standard, the staff would not have enjoyed a reasonable expectation of proving discrimination in this case.

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[25] It appears from the material furnished by NU to the OIG in November 1998 that [redacted] respectively, and that [redacted] While noting these facts for the sake of completeness, we do not believe they serve either to support or to refute an inference that their 1996 terminations were pretextual. That termination was not for cause but, rather, was part of a reduction-in-force. Moreover, some 27 of the laid-off employees subsequently [redacted] and there is nothing before us that might indicate that the reasons that led to the inclusion of [redacted] in the reduction-in-force would have precluded their satisfactory performance in the positions ~~to~~ which they were assigned upon reemployment. On the other hand, the mere fact of reemployment does not compel an inference that protected activity did not play any part in their being included in the reduction-in-force.

CASE NUMBER 1-97-007
[ALLEGATIONS OF EXTC

I. INTRODUCTION

By August 2, 1995 letter, [ ] was informed that, as of that date, his EXTC employment with Northeast Utilities System (NU) was being terminated "due to performance deficiencies and poor supervisory judgment" (Exh. 4).[1] At the time, [ ] was employed by EXTC NU in the capacity of Supervisor, Electrical Engineering, in the Engineering Services Department (ESD) for Unit 2 of the Millstone nuclear power facility. The letter was signed by [ ] immediate superior, [ ], Manager-Nuclear, Design Engineering for EXTC Unit 2.

As authorized by NU internal personnel policy and procedures, [ ] filed a grievance EXTC in which he asserted that his termination was "unwarranted and unjust." The grievance was submitted to a committee consisting of three NU vice-presidents. In an undated decision (Exh. 9), the committee EXTC [ ] The decision stated that the termination had been founded on management's belief that [ ] "had exhibited performance deficiencies and poor EXTC supervisory judgment" with regard to an untoward incident that had [ ] (a EXTC month before the termination) in connection with Anticipated Transient Without Scram (ATWS) testing. It also found tha [ ] had not demonstrated "the supervisory skills necessary for his EXTC position as a Supervisor." Nonetheless, the committee concluded that his deficiencies as a

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[1] On the same date, [redacted] of his termination by [redacted] EXTC without, according to him, any statement of reasons being provided (Exh. 12, at 13-14). (Exh. 12, at 24-25). EXTC

B/3

supervisor had not been adequately communicated to [redacted] because corporate and EX 7C
departmental guidelines had not been followed; in short, he had not been provided with an opportunity to demonstrate that he could improve his performance. It was for this reason that

[EX 7C

allegations before this Commission were the subject of an extensive EX 7C
investigation by its Office of Investigations (OI) that produced a record containing a total of 50 interview transcripts and documentary exhibits. As presented to OI, those allegations are:

1. That his employment termination on August 2, 1995 was occasioned by the raising of safety concerns in connection with an Engineered Safeguards Actuation System (ESAS) modification project to which his electrical engineering group had been assigned and, therefore, was in contravention of 10 C.F.R. § 50.7.

2. That the statements in the grievance committee decision reflecting adversely upon his performance as a supervisor constituted continuing retaliatory action on the part of the licensee.

In the ensuing sections of this report, we deal first in Part II with the facts pertaining to each of the foregoing issues. On that score, we are satisfied that the OI record is sufficiently comprehensive with the consequence that no additional factual inquiry is required. In Part III, we turn to an analysis of the facts and, in Part IV, we reach a conclusion on each issue. In sum, that conclusion is that [redacted] termination was due, at least in part, to retaliation for a EX 7C
protected activity in which he had been engaged but the same cannot be said regarding the challenged content of the grievance committee decision.

II. BACKGROUND

A. [redacted]NU Employment History and Activities EX 7C

1. Position and Performance

EX 7C

[redacted] Until his termination in 1995, he worked in essentially electrical engineering positions, rising through the ranks until becoming a supervisor in the early 1980s.[3]

Over the years that he worked in a supervisory capacity at Millstone, he reported to several different managers in the [redacted] the last two of EX 7C whom were [redacted] (Exh. 19). It was in all respects favorable and, in several respects, highly complimentary.[4]

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[3] More specifically, the following appears in the file compiled by the OI investigator that was made available to us: Prior to [redacted] where he was in [redacted] EX 7C (In that regard, the file indicates that those duties were assumed in 1982 rather than, as recalled in his 1997 OI interview (Exh. 3, at 7), in 1983.) In [redacted] that he occupied at the time of his termination.

[4] In his OI interview, however [redacted] was somewhat critical of [redacted] effectiveness as a supervisor (Exh. 39, at 9-10, 12). It might be noted that [redacted] for only four months [redacted] (id. at 7). EX 7C EX 7C EX 7C

EXC

was considerably less laudatory in that it included a needs improvement ("NI") rating in the category of "monitoring & controlling work progress" (Exh. 18).[5] In addition, under a then newly-instituted Nuclear Incentive Performance Program (NIPI) employed to determine individual 1995 salary increases based upon the quality of 1994 performance, was ranked in EXC the supervisors in his rating group (Exh. 26, at 4). EXC

As previously noted, employment was terminated on August 2, 1995 "due to performance deficiencies and poor supervisory judgment" EXC

2. Relevant Safety-Related Activities -- the ESAS and ATWS Testing Projects

As seen, endeavor to link his termination to protected activity rests upon his EXC assertion that he raised safety concerns in the course of a project involving the Engineered Safeguards Activation System (ESAS). As also noted in the Introduction, the grievance committee decision reported that the determination to separate had rested, at least in EXC part, on the belief of NU management that he "had exhibited performance deficiencies and poor supervisory judgment" in connection with Anticipated Transient Without Scram (ATWS) testing.

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[5] It should be noted, however, that, in an April 22, 1994 memorandum to Unit 2 managers and supervisors, Raymond P. Necci, made clear his EXC belief that the 1993 appraisals had not been stringent enough (Exh. 20).

The underlying basis for the [ ] claim and the ATWS event leading to the management asserted belief will be examined in turn.

a. ESAS. As explained by [redacted] the Engineered Safeguards Actuation System is used to detect pipe breaks; "in other words, a nuclear accident." Upon sensing high containment pressure, it starts the safety injection pumps in order to cool down the reactor (Exh. 12, at 28). In short, the ESAS clearly has an important safety function.

In late 1993, [ ]

certain ESAS design deficiencies that had been previously identified, as well as of effecting desired improvements in the system (Exh. 12, at 29-30; Exh. 27, at 9). A year later, for reasons that are in some dispute, the project apparently had not progressed on schedule.[6]

According to [ ] on the ESAS project it was known that a Unit 2 refueling outage had been scheduled for November 1994 (Exh. 12, at 34). Despite the fact that it was a big project -- as [ ] was being called upon [ ] the ESAS system" -- the work had to be substantially completed when the outage commenced (id. at 30-31). The outage did take place on schedule, at which time, in [redacted] view, most of the problems and flaws had been identified (although more might be discovered) and construction could be started (id. at 36-37).

It was in this setting that, on November 16, 1994, [ ] that, the prior day, [ ] had come to his office and had issued a verbal threat. Specifically, [ ] allegedly had stated that [ ] would be fired

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[6] While [ ] supervisory deficiencies were a major cause, [redacted] deemed any delay to have been beyond their control (Exh. 12, at 28-36; Exh. 21, at 60-62; Exh. 27, at 19-20).

if they extended the refueling outage because of the implementation of the ESAS project (Exh. 12, at 26, 39-40; Exh. 21, at 54).

Later on November 16, [redacted] Raymond P. Necci, then the Director of Engineering for Unit 2 (Exh. 12, at 40-41). Although [redacted] recollection is that Necci [redacted] Necci insists that he responded to a [redacted] by stating that directors, but not "working-level people," might be held accountable for ESAS-type problems (Exh. 12, at 41-42; Exh. 23, at 39).

In any event, apparently dissatisfied with the outcome of the meeting with Necci, [redacted] next immediately contacted Larry A. Chatfield, then the Director of the Nuclear Safety Concerns Program (Exh. 29, at 11-12). In that capacity, Chatfield was responsible for acting as an ombudsman with respect to employee concerns that were brought to him (id. at 9-10). On the following day, November 17, Chatfield had a meeting with [redacted] (id. at 12-17).

On behalf of the [redacted] Chatfield contacted Necci's immediate superior, Eric A. DeBarba, then NU Vice President for Nuclear Technical Services (id. at 18). Thereafter, DeBarba spoke to [redacted] understood DeBarba as providing assurance that he would not be fired "for a situation such as this" (Exh. 12, at 27; Exh. 31, at 20). This made [redacted] feel "pretty good" (Exh. 12, at 28).

DeBarba also met with Necci and [redacted] The latter informed DeBarba that it had not been his intent to [redacted] with termination. Rather, his comment had been in the context of his belief that the ESAS project was not proceeding satisfactorily and was meant to reflect his concern that there might be dire consequences for everyone associated with the project, from Necci on down, if there were not improvement on that score (Exh. 27,

at 30-34). [redacted] recalled being counseled by DeBarba respecting the need to be careful in EX 7C his choice of words. It was [redacted] impression that DeBarba thought that he had chosen EX 7C "inappropriate" words in this instance (id. at 35). DeBarba confirmed that he had been of that view (Exh. 31, at 22).

b. ATWS Testing. During the course of an Anticipated Transit Without Scram testing on July 4, 1995, errors on the part of the individuals conducting the operation caused [redacted] EX 7C [redacted] in turn, produced unnecessary work for the Unit 2 reactor operators as well as the need to furnish a report to the NRC (Exh. 12, at 61-70; Exh. 16). Although the testing was the [redacted] electrical engineering EX 7C group [redacted]

EX 7C

A root cause investigation of the [redacted] culminated in a report, issued on EX 7C [redacted] in which the untoward event was attributed to a number of shortcomings on the EX 7C part of [redacted] and certain other involved employees. One of the identified shortcomings was the EX 7C [redacted] failure to bring management "into the issue at the appropriate time" (Exh. 16, at 2).[7] EX 7C

Even before the issuance of the root cause report, [redacted] EX 7C

(id.).

[7] This will be discussed at greater length in connection with the examination of the reasons assigned by management for holding [redacted] accountable for the incident. EX 7C

[redacted] EX 7C

The [redacted] alluded to his [redacted] and purported to confirm the substance of a meeting with [redacted] EX 7C
him on that date during which there was discussed "the poor judgment" he displayed that
[redacted] Specifically, he was [redacted] EX 7C

Notwithstanding the criticism of his ATWS testing performance, immediately after [redacted] EX 7C
was terminated on August 2, 1995, [redacted] EX 7C
[redacted] (Exh. 12, at 86; Exh. 27, at 68). Subsequently, the group was split into two parts and, as of
the time of his OI interview in April 1997, [redacted] EX 7C
[redacted] for thirteen months (Exh. 12, at 86-87; Exh. 22, at 7).[8]

C. Management Explanation of [redacted] Termination EX 7C

The August 2, 1995 letter advising [redacted] of his termination did not refer to any specific EX 7C
examples of "performance deficiencies" and "poor supervisory judgment." (Exh. 4). According
to [redacted] was an underpinning of his EX 7C
termination until, some considerable time later, he encountered the notation in the grievance
committee decision to the effect that the management had acted on its belief that such
deficiencies and poor supervisory judgment had been exhibited in connection with that testing.
(Exh. 12, at 17).

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[8] Thus, he had become a supervisor [redacted] EX 7C

1. Decisional Process.

Given that [redacted] -- a substantial question arises as to the basis for the belief that [redacted] Before turning to that question, some exploration of the decisional process is warranted. Specifically, what role was played in that process by each of the three levels of supervision [redacted]

According to [redacted] he did not recommend that [redacted] be fired. His recollection was that DeBarba had first raised the issue of [redacted] termination and that his response had been that any decision should await [redacted] (Exh. 27, at 58). Thereafter, [redacted] Necci at home and advised him that DeBarba desired to terminate [redacted] (id. at 59). [redacted] had no further discussions with DeBarba on the subject but it was his impression that DeBarba and Necci were addressing it following [redacted] Ultimately, Necci notified [redacted] that it had been decided to terminate [redacted] (id.).

For his part, [redacted] he informed DeBarba of his decision to remove [redacted] from his supervisory position although he had not yet decided where to place him (Exh. 23, at 49-50). He understood DeBarba's response to be to the effect that NU was in the process of adopting a new accountability philosophy that called for the dismissal of employees on the management level (including supervisors) whose performance on that level was deficient (id. at 50-51). Necci took this new philosophy as provided to him by DeBarba and characterized as one of "no more fallen angels," as compelling the termination of [redacted] light of the perceived deficiencies of his performance as a supervisor (Exh. 37,

at 10-11). His subsequent actions towards effecting the termination were apparently based upon this understanding.

DeBarba confirmed the existence of the new accountability philosophy in these terms: "very senior levels of the organization had indicated that we were no longer going to place people who were not cutting it in supervisory jobs into staff positions or lower-level positions, that if they could not perform adequately in their positions, then we would release them" (Exh. 31, at 34). Pointing to the fact that [redacted] and Necci had concluded that [redacted] performance in his supervisory position was unsatisfactory, DeBarba implicitly, if not explicitly, placed the termination of his employment at their doorsteps (id. at 33, 35).

2. [redacted] readily acknowledged that [redacted] and, therefore, did not "have any effect on the outcome, either positive or negative" (Exh. 27, at 39). Rather, he attributed the inadvertent SIAS event to what he characterized as "arrogant behavior" on the part of [redacted] (id.) That behavior, in [redacted] view as also reflected in the root cause investigation report, was exemplified by [redacted] failure to involve the Plant Operations Review Committee (PORC) when he encountered a problem, a failure attributed by [redacted] to a belief on [redacted] part that the PORC would not "lend any credible review" (id.). [redacted] further acknowledged that he had approved [redacted] decision putting [redacted] despite the fact that [redacted] had exhibited that kind of behavior previously and other kinds of behavior that were, perhaps what I would say is undesirable and needed correction by supervision" (id. at 39, 41). As [redacted]

This was apparently so notwithstanding prior arrogant behavior, which did not involve, Ex 7c however, the deliberate withholding of important information from key personnel (id. at 43).

In response to a question as to what Ex 7c offered two words: "Quash it" (id. at 44). He readily conceded that, although he had observed such behavior himself, he had done nothing to coach or to counsel that function he seemingly deemed to be Ex 7c appropriately performed by the (id. at 44-45). Ex 7c

In a nutshell 'responsible for his people's behavior" and, thus, Ex 7c accountable for unacceptable behavior in connection (id. at 46). Ex 7c This was so even though he had not personally observed a prior instance when had Ex 7c withheld information from key personnel and did not know whether any such conduct had come to attention (id.). Ex 7c

In this regard, invoked the concept of every level in a chain of command being Ex 7c responsible for what transpires on the next lower level (id. at 47).[9] Thus, termination Ex 7c for poor supervisory judgment could be attributed to the fact that he had the opportunity to influence overall the performance of his group and had not done so (id. at 49).

Necci's view of did not differ Ex 7c materially from that of as reflecting a Ex 7c lack of leadership, training, and standard setting on part (Exh. 23, at 45-48). Ex 7c

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[9] While he had not been personally disciplined for the untoward [redacted] (Exh. 27, at 48). Ex 7c This reassignment -- which apparently involved a demotion -- might, of course, have been inconsistent with the "no fallen angels" philosophy if that philosophy were still in effect at the time.

3. Other Considerations Assigned for Termination Ex 7C

Although the grievance committee decision focused on the management's belief that had exhibited performance deficiencies and poor supervisory judgment in connection Ex 7C with Necci expressed the opinion that his supervisory Ex 7C shortcomings had been revealed in other contexts as well. Necci pointed to the previously mentioned low ranking performance in the newly- Ex 7C instituted Nuclear Incentive Performance Program (NIPI) that determined 1995 salary increases (Exh. 23, at 64-66). More generally, he characterized termination as the culmination of Ex 7C a number of years of dealing with him as a supervisor. In Necci's words, was looked at Ex 7C as someone who was finding it very difficult to be part of the management team, and this goes back as early as the first part of 1994" (id. at 12).

In this connection, Necci dismissed the thought that, prior to being terminated, Ex 7C should have been afforded an opportunity to improve his performance as a supervisor. Although not disputing that the new philosophy regarding management accountability would not have precluded resort to that option, Necci had concluded that placing on a Ex 7C would not have had affirmative results (Exh. 37, at 11-12). As Necci Ex 7C put it, a would have left in a supervisory role and it was clear that he "was not Ex 7C qualified to be a supervisor from a technical standpoint or from a leadership standpoint" (id. at 12). Necci added that, even though not documented in the NU performance improvement program, for over a year a "fair amount of time" had been devoted to working with on his Ex 7C perceived deficiencies and "we had gotten to a point where we just couldn't afford him to be a supervisor anymore" (id. at 12-13).

noted his dissatisfaction with which EX 7C

he attributed largely to the latter's weakness in the monitoring and control of work in progress (as earlier noted, this was the category in which had received a "needs improvement" EX 7C

(Exh. 27, at 18-20). That deficiency, in EX 7C

had not been confined to the ESAS project but was a "common theme" (id. at 22). EX 7C

D. Disparate Treatment

As seen, DeBarba's decision to terminate employment was said to be based on EX 7C a newly-formulated management philosophy calling for the removal, rather than simply the demotion, of employees whose performance in a supervisory capacity was found wanting. That such a philosophy in fact was in place was confirmed by Robert E. Busch, at the time the NU Chief Financial Officer. Referring to it in terms of "no fallen angels," he explained that it had been instituted sometime in 1994 and amounted to this: if an employee in a management position did not "perform up to expectations," he or she "will no longer be permitted to step down into a lower position" (Exh. 32, at 27-31).

Nonetheless, the OI investigation turned up apparent departures from the "no fallen EX 7C angels" philosophy subsequent to its adoption. were EX 7C determined to be deficient in the performance of their supervisory functions and, yet, were EX 7C allowed to assume a lower non-supervisory position.[10]

1. EX 7C

organization headed by EX 7C Necci. His immediate manager superior, however, was not, EX 7C

[10] The OI record does not disclose whether of these employees had voiced EX 7C safety concerns prior to their demotion in lieu of discharge.

(Exh. 40, at 7-10).

In common with [redacted] was regarded by both Necci and his immediate superior as not carrying out his supervisory functions satisfactorily. According to Necci, the feedback from plant management was to the effect that "some of the areas that [redacted] was responsible for were just not getting it done. He was more of an [redacted] than he was a supervisor" (Exh. 23, at 53). [redacted] "really was not good at delegating work, following up on work. He was more a better worker himself" (Exh. 40, at 10).

This evaluation was fully reflected in [redacted] and endorsed by Necci (Exh. 41). The appraisal contained three "needs improvement" ratings (in contrast to the one such rating given to [redacted] as well as this comment: "As a supervisor, [redacted] was weak in delegation, holding people accountable, and moving [redacted] (id).

At the same time, [redacted] noted that [redacted] was "an extremely valuable asset to the company when utilized at the technical level" and that he had "recently decided to [redacted] for which he was "much better suited" (id). In this regard, [redacted] took note of a number of perceived attributes: [redacted] was "extremely hard working"; possessed "excellent operational knowledge"; worked "extremely well with others"; was "customer orientated"; and had a positive "can do" attitude (id).

His OI interview reflects that [redacted] was very anxious to retain [redacted] in a non-supervisory position notwithstanding the new "no fallen angels" management philosophy (Exh. 40, at 10-11). In discussions with Necci, he communicated that desire (id. at 11). It was apparently

at [redacted] suggestion, with Necci's concurrence, that [redacted] EX 7C

id. at 12-13; Exh. 23, at 53).[11] Necci would not speculate as to whether, upon request, [redacted] would have received a similar opportunity to take a demotion in lieu of either termination or a [redacted] (Exh. 23, at 54).[12] EX 7C

2. [redacted] EX 7C

[redacted] EX 7C (Exh. 42, at 11). The operating license for the Haddam Neck facility was held by the Connecticut Yankee Atomic Power Company (CY) rather than by Northeast Utilities' Northeast Nuclear Energy Company (the holder of the Millstone operating licenses). Nonetheless, there seems to have been a very close connection between the two companies and NU procedures were used at CY for disciplinary action and performance appraisal type issues (Exh. 42, at 14; 36-40, 42).

[redacted] was terminated, on September 5, 1995, [redacted] was relieved of EX 7C his supervisory functions and assigned to a technical position (Exh. 43). This action was expressly taken by Waig as "a result of performance deficiencies [redacted] exhibited as a EX 7C [redacted] (id.). Prior to its execution, Waig had discussed EX 7C

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[11] Necci expressed uncertainty as to whether the "no fallen angels" philosophy was in effect at the time [redacted] (Exh. 23, at 54-55). But, EX 7C Riley recalled that his discussion with Necci regarding his desire to retain [redacted] was in the EX 7C context of that philosophy (Exh. 40, at 11). This squares with Busch's recollection that the philosophy surfaced in 1994.

[12] Insofar as the OI record reflects, DeBarba was not involved in the decision to allow [redacted] EX 7C

shortcomings as a supervisor, and the demotion, with his own supervisor. He also EX 7C contacted Millstone human resources personnel to determine whether the would be EX 7C consistent with company policy (Exh. 42, at 32-33).

When asked why he had him, Waig pointed out EX 7C that "outside of his supervisory capabilities, was a good employee" (id. at 34). He EX 7C went on to note that considerable time and effort had been invested in training him, that he had done very well as a EX 7C When asked about the "no fallen angels" philosophy, Waig stated that he had not been aware of it (id. at 40).

E. The Grievance Committee

The three members of the grievance committee that overturned termination EX 7C were: Francis L. Kinney - Senior Vice President Governmental Affairs; John W. Noyes - Vice President Business Strategy; and Frank P. Sabatino - Vice President Wholesale Marketing. Each was interviewed as part of the OI investigation.

As seen, had EX 7C attributed his termination to a management belief that he had exhibited performance deficiencies and poor supervisory judgment (Exh. 9). EX 7C Nonetheless, according to Kinney, the committee had concluded that had been EX 7C terminated "for poor supervisory skills, not on one incident, but overall, over time" (Exh. 47, at 11). Additionally, Kinney had no recollection of the alleged threat being raised by EX 7C the committee in the questioning of DeBarba and Necci (id. at 12).[13] Indeed, as Kinney saw it,

[13] Because of a scheduling conflict did not appear before the committee EX 7C (Exh. 49, at 16-17).

there was little need to focus on the threat because had brought his concern to DeBarba EX 7C and apparently it was "reconciled" by DeBarba's assurance would not be fired EX 7C (id. at 9). EX 7C

Noyes' recollection coincided with that of Kinney in that he had been convinced that the basis for the termination was "overall supervisory capabilities" -- i.e., he was not EX 7C "specifically fired for an event that occurred (Exh. 48, at 24). Insofar EX 7C as the alleged threat was concerned, Noyes thought that it had been handled when EX 7C brought it to the attention of DeBarba; that it had then become a resolved issue; and that it had not come back "to haunt later on" (id.) EX 7C

According to Sabatino, the management testimony put before the committee -- apparently presented largely by Necci -- disclosed "a pattern of poor supervision, and poor supervisory judgment on virtually everything" (Exh. 49, at 32-33).[14] As Sabatino saw it, the ATWS event was "sort of the straw that broke the camel's back" (id. at 33). In that regard, he noted that, after alluding to that event, the committee's decision had stated that its "investigation also revealed that did not demonstrate the supervisory skills necessary EX 7C for his position as supervisor" (id.; Exh. 9).

F. The Continuing Retaliation Claim

did not expect that the members of the grievance committee, who he EX 7C characterized as "good, honest men," would put in writing that he had been retaliated against for raising a safety concern (Exh. 12, at 87-88). Although he was persuaded that such

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[14] Necci did not recall having referred in his committee testimony specifically to a belief that had been terminated because he had exhibited performance deficiencies and poor EX 7C supervisory judgment (Exh. 23, at 60). EX 7C demonstrated lack of supervisory capability EX 7C (id. at 60-61).

retaliation had occurred, he could understand the reasons for their reluctance to expose their employer to possible "future lawsuits and NRC prosecution and all that" (id. at 88). But he was surprised by the references in the committee decision to supervisory deficiencies -- he had thought that the decision would be kept "general and neutral" and he believed that those references would serve to cloud his future (id. at 88-89, 93-94).

Specifically, although [redacted] he EX 7C regarded the reference in the decision to supervisory performance deficiencies as a message (when taken in conjunction with his [redacted] that he was "no EX 7C longer capable of being in a supervisory position" (id. at 24). Observing "there's a big difference there," he opined that the reference would prove a hindrance were he ever to seek other employment (id.).

According to Robert W. Romer, the Human Resources Director for the NU Energy Resources Group, when he met with him to review the grievance committee decision [redacted] EX 7C "did not comment negatively, or object" although he professed surprise at the mention of the [redacted] which he did not believe had been an issue in his grievance (Exh. 50, at 44, 46). EX 7C Romer also addressed the matter of [redacted] expressed desire to have the communication EX 7C advising him of his restoration (apparently in NU parlance referred to as [redacted] EX 7C [redacted] that had led to his EX 7C termination (id. at 32-34). After consultation with the legal office, Romer subsequently informed [redacted] could not go into such an issue and that the grievance committee EX 7C decision was the document that reflected the outcome of the grievance process (id. at 34, 42-44). It was in that context that the two men reviewed the decision (id. at 43-44).

III. ANALYSIS

Against the foregoing factual background, we turn to an analysis of [redacted] EX 7C (1) that his termination was the result of his engaging in protected activity (i.e., raising a safety concern); and (2) that a portion of the content of the grievance committee's decision [redacted] The EX 7C allegations will be considered seriatim.

A. [redacted] Termination

In passing judgment on [redacted] first allegation in light of the settled principles EX 7C governing this kind of inquiry, these questions are presented: (1) did [redacted] engage in a EX 7C protected activity that was sufficiently proximate in time to his termination (the asserted retaliatory action); (2) were the management officials responsible for the termination decision aware of the protected activity; (3) did [redacted] termination constitute adverse action; and (4) EX 7C was the termination decision entirely founded on the legitimate business reasons assigned for it or, rather, did it rest, in whole or in part, on a purpose to retaliate against [redacted] for having EX 7C engaged in a protected activity.

1. Protected Activity

Because [redacted] attributes his dismissal to his action in [redacted] EX 7C [redacted] the question of the existence of a protected activity comes down to whether EX 7C that action so qualifies. The answer must be in the affirmative.

As [redacted] EX 7C [redacted] were in effect being told: finish the ESAS project before the scheduled conclusion of the Unit 2 refueling outage or be fired. Under this

interpretation, [redacted] were implicitly, if not explicitly, being invited -- indeed EX 7C strongly encouraged -- to cut corners in the modification of a system that beyond cavil had safety implications.[15]

It is of no present moment whether [redacted] correctly read the [redacted] statement. It is EX 7C enough that he had a good faith belief that he was being pressured to complete the project by a certain time no matter what intended modifications in the interest of the proper functioning of the ESAS might be left unaccomplished. On that score, even if accepted, the explanation of the perceived threat given by [redacted] to DeBarba scarcely alters matters. For, according to EX 7C that explanation, the intended thrust of the message was that the careers of <u>everyone</u> associated with the ESAS project -- from Necci on down to and including [redacted] -- might be EX 7C in jeopardy if the project did not proceed more expeditiously. Had he so interpreted it, [redacted] EX 7C still would have had reason to be troubled about the effect upon his NU career should the need to complete safety-related modifications extend the ESAS project beyond the scheduled date for resumption of Unit 2 operation. This seemingly was recognized by DeBarba in admonishing [redacted] for a poor choice of words. EX 7C

It should be deemed equally irrelevant that, in reporting the perceived threat to higher authority, [redacted] may well have been motivated principally by personal, rather than safety, EX 7C concerns. Irrespective of what his purpose might have been, the fact remains that, as he

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[15] [redacted] does not appear to have understood the [redacted] message as meaning simply EX 7C that, to avoid discharge, [redacted] had to ensure that the entire ESAS project was EX 7C satisfactorily concluded by the stated deadline; i.e., that [redacted] had to work more efficiently so EX 7C that, with all safety considerations taken into account, Unit 2 could return to operation on schedule. Nor does the explanation of the asserted threat given by [redacted] to DeBarba EX 7C suggest such an intended meaning.

understood it, the statement had definite safety implications. As such, in bringing it to light, was engaging in a protected activity.[16]

2. Management Awareness

individuals -- were instrumental in effecting termination. All were fully aware of the protected activity. See supra pp. 5-7, 9-10.

3. Adverse Action

There is no question, of course, that the termination of employment constituted an adverse action.

4. Protected Activity/Adverse Action Causal Nexus

In light of the foregoing, the pivotal issue becomes whether the decision to terminate rested entirely upon legitimate business considerations or, rather, was influenced by protected activity. For his part, maintains that the reporting of the perceived threat was at the root of the termination. Unsurprisingly, the management officials deny that claim and insist that poor performance as a supervisor, taken in conjunction with NU management's newly-developed "no fallen angels" philosophy invoked by DeBarba, was the sole underpinning of the termination.

As is generally the situation in cases such as this, there is little (if any) direct evidence to assist in determining where the truth might lie. Thus, it is necessary to search for circumstantial evidence that might tend to point in one direction or the other.

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[16] The period between the protected activity and termination was less than nine months [redacted] Under any standard, that interval was sufficiently short to allow inquiry into whether there was a casual link between the two events.

a. Supervisory Skills. If one accepts the appraisal of [redacted] supervisory skills offered Ex 7C by [redacted] those skills were significantly deficient. Indeed, they were so Ex 7C substandard that, in Necci's judgment, no useful purpose would have been served in according [redacted] the opportunity to remedy the shortcomings through resort to a [redacted] Ex 7C It was, of course, the denial of that opportunity that subsequently led the grievance committee to overturn [redacted] termination and direct his restoration to NU employment.[17] Ex 7C [redacted] was not, however, a neophyte supervisor at the time he came [redacted] Ex 7C [redacted] To the contrary, he had become a [redacted] in the electrical Ex 7C engineering area in 1983 or before[18] -- at least [redacted] earlier. Ex 7C

That being so, one might justifiably be curious respecting how [redacted] had survived as a Ex 7C supervisor for over a decade if, as [redacted] asserted in 1994-95, he failed miserably Ex 7C in that role. The record at hand, however, provides no illumination in that regard.

The only other [redacted] performance appraisal at hand is that for 1993 which had been Ex 7C prepared by [redacted] Apart from the fact that [redacted] Ex 7C [redacted] on the whole [redacted] was highly complimentary of [redacted] Ex 7C performance. It was not until his OI interview that [redacted] ventured the opinion that [redacted] Ex 7C effectiveness as a supervisor was open to some criticism.

On the face of it, it seems quite improbable that, after [redacted] years of acceptable Ex 7C performance in a supervisory position, [redacted] work in that capacity would suddenly deteriorate Ex 7C to the point that the only appropriate course available to management was to remove him from

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[17] While [redacted] Ex 7C

[18] See supra note 3.

~~SENSITIVE ALLEGATION INFORMATION -- DO NOT DISCLOSE~~

his position without providing a formal opportunity to rectify the perceived deficiencies. If, however, there had been previous criticism of [redacted] supervisory performance reflected in performance appraisals prepared by prior superiors, it is reasonable to assume that NU management would have taken great pains to place those appraisals in the OI record as part of its justification for his termination. That the record is totally barren of anything of that nature supports, if it does not compel, the inference that [redacted] personnel records contain nothing that might bring into question the acceptability of his supervisory performance between [redacted][19] That inference, in turn, at least casts a considerable measure of doubt on the validity of the claim that, in [redacted] should be summarily removed from his position -- again, without being provided the opportunity to improve that apparently was mandated by company and departmental policies.

b. ATWS Testing Incident. As seen, the grievance committee decision and the recollection of the committee members are somewhat at odds regarding the role that the untoward ATWS testing incident played in [redacted] termination. According to the decision, the termination rested upon "performance deficiencies and poor supervisory judgment" exhibited in connection with that incident. The committee members, however, did not recall that the incident played quite that decisive a role although they acknowledged that it was one factor among others and, in the view of one member, represented "sort of the straw that broke that camel's back."

Regardless of whether the terms of the decision or the committee members' memories are closer to the mark, it is clear from the OI interview of [redacted] that he relied heavily upon

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[19] In a telephone conversation on February 19, 1999, the OI Special Agent who conducted the investigation, Kristen L. Monroe, confirmed that her review of [redacted] disclosed that they were all favorable.

the ATWS testing incident in seeking [redacted] removal as a supervisor. At the same time, the [redacted] reasons he assigned for that reliance are, at best, of extremely dubious substance.

Because [redacted]

Instead, as the root cause investigation report confirmed, those errors were committed by the persons actually involved in the testing, principally [redacted]

Given his [redacted] in the ATWS testing, how then could [redacted] Sudigala with the failure to have fulfilled his supervisory responsibilities with regard to the untoward incident? Sudigala seized upon the fact that, as the root cause investigation report concluded, one of [redacted] reflected "arrogant behavior" for which [redacted] and, in [redacted] words, "quash[ed] it."

The difficulty with this line of reasoning is readily apparent. To begin with, in order to hold [redacted] Yet, despite that knowledge, [redacted]

More important, not only had he never personally observed a failure on [redacted] part to provide crucial information to key personnel but also [redacted] could not say that [redacted] had

encountered such conduct. Thus, was endeavoring to lay at doorstep a EX 7C specific might well have had no reason both to anticipate and to take EX 7C preventive measures in advance of the testing.[20]

Finally, there is not an adequate, plausible explanation for the fact that EX 7C terminated and, more significantly, as of EX 7C Surely, there is at least a facial inconsistency between discharging a supervisor for failing to correct a subordinate's shortcomings and then EX 7C Whether or not that action was later regarded by him as a mistake (Exh. 27, at 68). the fact that speaks EX 7C volumes on the question of the legitimacy of (endorsed by Necci) EX 7C ATWS testing incident as a basis for Regan's

c. "No Fallen Angels" Philosophy. There appears to be no question that, at the time of termination, there was in effect a NU management philosophy that called for the EX 7C of supervisors whose performance in that capacity was found EX 7C unsatisfactory. Thus, once as a EX 7C supervisor dictated his being removed from his position, DeBarba's action in terminating him might well have been mandated.

The OI investigation uncovered, however, in which the "no fallen angels" EX 7C philosophy apparently was not followed. EX 7C

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[20] concession that, notwithstanding his previous observation of alleged EX 7C arrogant behavior, he had done nothing to correct it also is troubling. Even if he normally left such an undertaking to the first-level supervisor, one would think that he would have at least called the observation to attention. There is no record indication that he did so. EX 7C

Although not detailed in the OI record, there is an obvious close relationship between

Nonetheless, because it does not appear that any of those officials involved in termination played a role in and additionally professed a lack of awareness of the "no fallen angels" philosophy, the demotion cannot be taken as an example of invidious disparate treatment.

The who also reported to Necci. Although his was even more unfavorable than that of some point shortly before that appraisal was issued on February 6, 1995.

Despite Necci's professed uncertainty in that regard, the best evidence is that the "no fallen angels" philosophy was in place at the time and, therefore, seemingly received treatment different from that It is much less clear, however, that this consideration supports claim that the reasons assigned for his termination were pretextual. The moving force behind the decision to allow It appears that he had a high regard for and a reluctance to see him terminated. He thus successfully endeavored to convince Necci that Significantly, for whatever reason, the retention question seemingly did not reach DeBarba -- the official who ordered termination in compliance with the "no fallen angels" philosophy -- and,

consequently, there is no record basis for charging him with disparate treatment insofar as [redacted] are concerned.[21] EX 7C

d. Termination Disclaimers. No great significance should attach to the fact that [redacted] disclaimed any purpose to have [redacted] terminated, as opposed to being simply [redacted] For one thing, it is reasonable to assume that [redacted] they were aware of the "no fallen angels" philosophy at the time they sought [redacted]

In any event, any link existing between [redacted] protected activity and their desire to [redacted] cannot be deemed permissible simply because they purportedly were not pressing for his termination as well.

e. Performance Appraisal. There is a final matter to be considered on this phase of the inquiry. While standing alone it might not have large currency, the fact that [redacted] reporting of the alleged threat undoubtedly caused [redacted] considerable embarrassment should not be wholly discounted in assessing what transpired thereafter.

This is not to say that the "needs improvement" rating in one category on [redacted] performance appraisal necessarily was unwarranted. Nor is a current judgment possible regarding the justification for [redacted] ranking for the purposes of the Nuclear Incentive Performance Program (NIPP) determination of salary increases based on the quality of [redacted] While placed at the bottom of the [redacted] there is

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[21] In the circumstances, it is not of present crucial importance that the OI record does not reflect whether [redacted] had presented safety concerns in advance of being [redacted] That DeBarba was not involved in either demotion is the dispositive consideration insofar as the disparate treatment issue is concerned.

no information in the OI record respecting the other seven and their relative levels of competence and performance.

In the circumstances, the most that can be observed respecting the performance EX 7C appraisal and the NIPP ranking is that both post-dated the reporting of the threat and, as such, conceivably might have been influenced by the embarrassment it manifestly caused EX 7C (and possible Necci as well). Because any determination in that regard would have a high element of conjecture, the ultimate conclusion respecting whether termination had a EX 7C pretextual foundation is better grounded on a weighing of the other factors discussed above. In examining those factors, however, it is not amiss to bear in mind that at least had EX 7C reason to look upon with disfavor quite apart from his appraisal of the latter's abilities.[22] EX 7C

B. Continued Retaliation

second allegation, that the statements in the grievance committee decision EX 7C regarding his supervisory performance constituted continuing retaliation against him, is a short horse soon curried.

Beyond doubt, having found the termination unwarranted on procedural grounds, the grievance committee might have confined itself to a brief notation respecting the reason that had been assigned by management for taking that action. In the circumstances, no compelling necessity seemingly existed to make specific reference let alone to EX 7C provide its own conclusion that had not demonstrated necessary supervisory skills. EX 7C Rather, given the result the committee reached, it would have been enough to have stated,

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[22] For his part, Necci appeared to believe that he was included in the DeBarba admonishment (Exh. 23, at 42). Additionally, he expressed dispieasure respecting EX 7C rather than simply bringing it to the EX 7C attention of higher-level management (Exh. 24, at 4).

without elaboration, that [redacted] had been terminated because of the management's perception EX 7C that his performance as a supervisor was inadequate.

But it scarcely follows that the committee was obliged to follow that course, let alone that the choice that it made might have had a retaliatory foundation. Insofar as the OI record reflects, neither DeBarba nor Necci was involved in the fashioning of the grievance committee decision (which reached a result with which they likely were in sharp disagreement).[23]

For their part, none of the grievance committee members had apparent reason to do harm to [redacted] either stemming from [redacted] protected activity or otherwise. Indeed, the fact EX 7C that they ordered his restoration points in exactly the opposite direction. If so disposed, they likely would have encountered little difficulty in turning a blind eye to the internal guidance respecting affording an opportunity for performance improvement. Specifically, they might have endorsed the Necci position that [redacted] had received sufficient counseling on his supervisory EX 7C deficiencies and was beyond possible redemption through a [redacted] EX 7C

Nor is there a foundation for a retaliation claim in the refusal to accede to [redacted] EX 7C request that the [redacted] It appears from the EX 7C uncontroverted testimony of Romer, the Human Relations official to whom the request was presented, that such inclusion was not permissible. In any event, the denial of the request can scarcely be placed at the doorstep of any person in NU management who might have been bent on retaliating against [redacted] because he reported [redacted] perceived threat to higher EX 7C authority. Moreover, after the request denial, Romer reviewed with [redacted] the grievance EX 7C committee decision as reflective of the outcome of the grievance process and encountered no objection or negative comment.

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[23] [redacted] did not even appear before the committee. See supra note 13. EX 7C

In short, the second allegation must be rejected as totally without substance.

IV. CONCLUSION

As might be expected, there is no direct evidence in the OI investigation record bearing significantly upon whether protected activity (the reporting of the perceived threat) was a contributing factor in the decision to terminate his NU employment. Nonetheless, there is persuasive circumstantial evidence supporting the existence of an impermissible link between the two events and, therefore, a violation of 10 C.F.R. § 50.7.

That even attempted to establish the documented existence of deficiencies in performance as a supervisor in the decade preceding 1994 materially undercuts their claim that, in the his supervisory performance was so poor that it would have been unavailing to provide him with an opportunity to improve.[24] Moreover, the assigned reason for holding is demonstrably specious as formulated. In addition, that reason flies in the teeth of the fact that, after termination, the employee (Fox) who assertedly had demonstrated shortcomings that should have endeavored to remedy was himself

The OI investigation record contains nothing that might serve to counter, let alone outweigh, these considerations and thus negate the inference that his protected activity was involved in the decision to terminate It need be added only that, while that decision was made by DeBarba, it was who brought it about and should be held

[24] Even had there been such deficiencies, they manifestly were not so serious as to have occasioned the removal of as a supervisor.

accountable for it. It was their representation that [redacted] be stripped of his supervisory position EX 7C -- again without being accorded an opportunity to demonstrate improvement -- that led to his dismissal in fulfillment of the "no fallen angels" philosophy adopted by senior NU management. DeBarba seemingly did no more than give effect to that philosophy on the strength of the appraisal of [redacted] provided by his first and second level supervisors.[25] Despite its vigorous EX 7C assertion, the [redacted] claim that [redacted] was EX 7C inadequate was long on sweeping generalities but very short on concrete examples. As such, it cannot carry the day any more than can their reliance on the untoward [redacted] EX 7C as a basis for their insistence that [redacted] was a grossly inadequate supervisor. EX 7C

While the OI record thus substantiates [redacted] first allegation, the same cannot be said EX 7C for his claim that the grievance committee decision reflected continuing retaliation. That decision reached a result in his favor. And, while the decision contained language that he would have preferred not be included, there is absolutely nothing in the record to suggest that it was either in terms improper or motivated by animus on the part of the committee members -- none of whom seemingly had any involvement in his protected activity.

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[25] This conclusion is warranted notwithstanding [redacted] representation that DeBarba EX 7C had broached the subject of [redacted] termination in the wake of the [redacted] EX 7C (Exh. 27, at 58). The OI record as a whole leaves little doubt that it was the [redacted] EX 7C appraisal of [redacted] supervisory performance that was at the foundation of the termination. EX 7C Further, it was DeBarba who had taken [redacted] to task for his poor choice of words in EX 7C communicating with [redacted] EX 7C