From: "Choiniere, Paul" <P.Choiniere@newlondonday.com>
To: "'FOIA'" <FOIA@nrc.gov>
Date: Tue, Mar 23, 1999 9:26 AM
Subject: RE: FOIA/PA 99-158

See below for information you requested

> -----Original Message-----
> From: FOIA [SMTP:FOIA@nrc.gov]
> Sent: Tuesday, March 23, 1999 8:56 AM
> To: P.Choiniere@newlondonday.com
> Subject: FOIA/PA 99-158
>
> Good morning,
>
> Your e-mail to Mr. Wm. Beecher, requesting a specific ASLBP report
> relating to the NRC investigation of 1996 layoffs at Millstone, has been
> forwarded to the Freedom of Information Section for processing under the
> FOIA. The above FOIA/PA number (FOIA/PA 99-158) has been assigned to your
> request. All future communications should reference the above number.
>
> You will receive written confirmation of the receipt of your request along
> with pertinent processing information. However, the following additional
> information is necessary for the NRC to process your request:
>
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>
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>
>

ATTACHMENT 2

CASE NO. 1-96-002

[ALLEGATIONS OF [ ] EX7C

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 [ ] who were not EX7C reselected as supervisors. Although neither suffered an immediate loss of pay as a result, [ ] demoted to a senior engineer [ ] downgraded to a principal engineer. EX7C

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 [ ] had raised and championed safety issues in the two years preceding the EX7C reintegration. Review of the case file further supports the conclusion that Northeast Utilities System (NU) discriminated against [ ] in violation of 10 C.F.R EX7C

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§ 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. EX 7C

a. Position and Performance. started as an engineer with NU i. was made EX 7C a and maintained his position through reorganizations in 1989 and 1991. EX 7C In 1993, he was a a group providing support to EX 7C the Millstone and Connecticut Yankee plants. received very good evaluations during the EX 7C 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 EX 7C compliment his technical expertise and ability to monitor work. For the appraisal EX 7C dated was commended for his efforts in convincing management to EX 7C

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[1] An understanding of the relative position of vis a vis other NU EX 7C management officials before the 1993 reintegration occurred is important to understanding this case. Thus, for

a.

b.

c.

EX 7C

d.

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

Ex 7c

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. Ex 7c Ex 7c

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.). Ex 7c Ex 7c Ex 7c Ex 7c Ex 7c Ex 7c Ex 7c Ex 7c

of open and closed issues (id. at 30, 33). DeBarba, [redacted] others met four to six times EX 7C before [redacted] stopped attending because "he got fed up" with "the company's continuing desire EX 7C to circumvent the issue" (id. at 31).

On [redacted] informed DeBarba in writing that [redacted] was not satisfied EX 7C with NU's responses to his concerns and that [redacted] might "take definitive action, possibly with EX 7C the NRC" (Exh. 53; Exh. 42, at 38-39). [redacted] that the formation of an Independent Review Team (IRT) to address the spent fuel issue might satisfy [redacted] DeBarba did not EX 7C respond to [redacted] On [redacted] wrote to DeBarba, informing him EX 7C that his concerns "were not being addressed" by the task force and that he no longer [redacted] EX 7C [redacted] He stated that he would pursue his issues "through other EX 7C [redacted] thereafter communicated his concerns to NU's Nuclear Safety EX 7C 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 [redacted] involved, the CU-29 check valve issue at Millstone Unit 1,[3] was assigned to EX 7C [redacted] (see generally Exh. 2, at 38-46; Exh. 42, at 8-26; Exh. 47, EX 7C at 116-17, 119-27). Because he was allocated no money to test the check valve, [redacted] EX 7C 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 [redacted] EX 7C 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) [redacted] EX 7C

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). EX 7C EX 7C EX 7C

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). EX 7C EX 7C EX 7C

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 EX 7C

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[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, EX 7C at 21). Moreover, [ ] saw no basis for the conclusions contained in the report. The EX 7C seventeen references listed in the report had been previously considered by EX 7C [ ] and, thus, did not sway him (id. at 22-23; 25-26). [ ] manager, not EX 7C 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). EX 7C

The issue was ultimately settled in [ ] EX 7C 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, [ ] EX 7C that primary containment was not operable. H.P. "Bud" Risley, Director of Nuclear EX 7C 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] EX 7C

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 EX 7C

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[6] In 1995, Matt Kupinski, who had become [ ] EX 7C 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 [ ] CU-29 issue forward (Exh. 87, at 285-86). EX 7C

Chatfield proposed that [ ]

EX 7C

However, DeBarba never [ ] When questioned in 1996 about [ ] the [ ] DeBarba stated that he decided against it because he thought that [ ] would receive it "negatively" (Exh. 28, at 15).

2. [ ]

a. Position and Performance.

EX 7C

[ ] 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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[ ] the supervisory chain was as follows:

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

b. [ ]

c. [ ]

EX 7C

d. DeBarba, a fourth-level supervisor, was [ ] 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 [ ] 1989 performance evaluation. A different format was used then, rating the employee from one to five, the highest. [ ] was rated a four, "exceeds normal expectations" (Exh. 39, at 2-8). EX 7C EX 7C

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 EX 7C 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).

b. Relevant Safety-Related Activities. [ ] involved in several high profile EX 7C 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.

i. MOV Program. [ ] worked on the MOV-related program required by EX 7C NRC Generic Letter-89-10. When, [ ] he realized that the EX 7C 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, [ ] EX 7C [ ] also spoke EX 7C directly with DeBarba about his concerns while working on this matter in 1991 and 1992 (id. at 11).

[ ] Kupinski's signature [ ] outlining his concerns EX 7C about the MOV program. DeBarba was sent a copy. In his memorandum [ ] called for EX 7C

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 under [ ] 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.

Ex 7c

The plant staff refused to Ex 7c

acknowledge that the failures in the heat exchangers Ex 7c

(Exh. 30, at 9). Nothing was done until November 1991 when took the heat

exchanger issue away from Ex 7c

Austin claimed analysis was flawed, but never identified alleged Ex 7c

error. In performed a second analysis. noticed a mistake in Ex 7c

report, which he corrected in an memorandum. In that same time Ex 7c

frame, informed management that he could not agree with its approach Ex 7c

on the heat exchanger issue (Exh. 6, at 19; Exhs. 63, 64).

On September 15, 1993, was surprised to learn that Paul Blasioli, manager of Ex 7c

Millstone Unit 1 Technical Support, had written to Kupinski complaining about the lack of

accuracy in work (Exh. 6, at 19-20). In part, Blasioli based his complaint on the Ex 7c

mistake in Holtec's report, never acknowledging that had addressed it in his Ex 7c

memorandum. also learned that Blasioli had filed a plant incident Ex 7c

report (PIR) regarding his alleged mistakes. strongly felt that filing a PIR was a Ex 7c

serious undertaking and uncalled for in this situation, a concern echoed by Kupinski, Ex 7c

[redacted] in his memorandum to Bud Risley, Director of Millstone Unit 1 Design Engineering Ex 7c

(id. at 23).[11] According to this was the first time at NU that his Ex 7c

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[11] recalled that Kupinski wrote to Risley between September 8, 1993, and October 8, 1993, but did not have a copy of that memorandum. Ex 7c

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, [ ] Ex 7C wrote to Kupinski on [ ] In his [ ] memorandum, [ ] defended his Ex 7C 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, [ ] stated that the PIR was "probably driven by mischief on someone's Ex 7C 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 [ ] without any technical Ex 7C justification?'" (id. at 2).

Later that same day, when [ ] confirmed to Risley that his memorandum had, Ex 7C indeed, been sent out, [ ] recalled Risley saying, "Why are we doing this? Why are we Ex 7C lobbing grenades at each other?" (Exh. 72, at 8-9). [ ] stated that Risley left in a "huff Ex 7C 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 [ ] Ex 7C 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 [ ] he no longer supervised Kupinski. Ex 7C Risley, Director of Project Services Department, became Kupinski's first-line supervisor. [ ] of course, reported to Kupinski (Exh. 30, at 12). Ex 7C

"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 shortly thereafter (Exh. 6, at 23-24). EX 7C

Mario Bonaca, Director of Nuclear Engineering Services, stated that he observed Risley's anger with regard memorandum. When Bonaca happened by Risley's office "shortly before the reorganization" while Risley was discussing the memorandum with 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). EX 7C EX 7C

iii. Reactor Coolant Pumps. The RCP issue arose at Millstone Unit in the (Exh. 6, at 25-35). EX 7C

was assigned the problem of determining which of the (Exh. 6, at 25). EX 7C

Plant personnel discouraged from examining [redacted] [redacted] (id. at 26). EX 7C

also resisted any suggestion to continue the investigation (id. at 27). Finally (id.). Ideally 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 and justify EX 7C EX 7C

continued operation for a "one cycle fix," but not a permanent fix (id. at 28).[14] [ ] EX7C 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 EX7C 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 [ ] EX7C [ ] the manufacturer of the pumps, to make recommendations for a permanent fix. When the reintegration was announced, however, DeBarba informed [ ] EX7C [ ] (id. at 30). EX7C

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 EX7C (id. at 31-35). [ ] believed that the NRC letter was accurate except that it did not mention EX7C that the recommended action was only a one-cycle fix (id. at 33). [ ] later learned that EX7C Opeka had written to the NRC on [ ] problems, EX7C 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 [ ] EX7C

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 [EXC
no role at all. Those selections were made from a pool consisting of incumbent EXC
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

[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 EX 7C [redacted] DeBarba stated that he did not recall [redacted] name being proposed for a EX 7C 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 EX 7C

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 EX 7C from Mario Bonaca, [redacted] In delivering the news o [redacted] EX 7C [redacted] Bonaca stated to [redacted] he could not tell why he was not reselected as a supervisor EX 7C 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). EX 7C

[redacted] spoke to DeBarba soon after he learned of the decision. DeBarba informed him EX 7C 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 EX 7C whose experience was more broad. When Bonaca asked DeBarba the reason that [redacted] was EX 7C not reselected for a supervisor position, however, DeBarba replied that [redacted] "was not good at EX 7C closing issues" (Exh. 8, at 1).

[redacted] apparently filed no formal challenge to his deselection. EX 7C

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[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 [ ] -- NU Reasons and Aftermath Ex 7c

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

Some months after the reintegration [ ] filed a discrimination claim with NU's Ex 7c NSCP alleging that he had been demoted due to, among other things, his protected activity (Exh. 41, at 1, 13-15). In his [ ] report, Chatfield concluded that there had been no Ex 7c discrimination against [ ] in violation of 10 C.F.R. § 50.7. Chatfield based his conclusion Ex 7c on interviews with some management officials who had taken part in the selection process and Kupinski, [ ]. No interviews of new supervisors or of other Ex 7c deselected supervisors were conducted. Chatfield asked all interviewees the same ten questions based on [ ] concerns as expressed in his [ ] meeting with Ex 7c 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 [ ] was being associated Ex 7c with [ ] who was not viewed as effective by many NU directors and managers (Exh. 41, Ex 7c at 43, 53). The report also indicated that [ ] name was not mentioned with respect to a Ex 7c supervisor position but only with regard to his placement as a principal engineer (Exh. 41, at 7). When asked about his personal knowledge of [ ] DeBarba expressed doubt that Ex 7c [ ] would be accepted in the operating environment of a plant since the new organization Ex 7c 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] EX 7C 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 EX 7C experience at NU (id. at 9-10).

Regarding involvement in protected activity, [redacted] stated EX 7C that they had none (Exhs. 17, 11). [redacted] stated that they EX 7C 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 EX 7C protected activity in 1993 (Exh. 13, at 36-39; Exh. 22, at 11-12). While [redacted] claimed EX 7C

[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] EX 7C

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 EY 7C activities, as was Risley with regard to [ ] EY 7C

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 [ ] a non-supervisor never interviewed by the Hay Group, [ ] himself stated that he was surprised to learn of his promotion. E47C E47C

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 [ ] 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. E47C

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. [ ] EX 7C

1. Protected Activity

[was involved in the high visibility projects of the CU-29 valve and EX 7C
] of which gave rise to nuclear safety issues. In connection with the CU-29 valve issue, [EX 7C
was significantly involved in an operability determination (OD) or] EX 7C
from 1991 through the reintegration. His technical opinion that the EX 7C
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 EX 7C
visibly supporting [who accused NU of] in EX 7C
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 EX 7C
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 EX 7C
regularly with managers and directors of different departments and plants. DeBarba was aware of support of] because, in that he EX 7C
headed and which met regularly to deal with] ssues (Exh. 42, at 30-34). Also, just several EX 7C

weeks before the announcement of the reintegration [ ] warned DeBarba of [ ] EX 7C 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). EX 7C

During the course of these [ ] the issues of the CU-29 valve [ ] EX 7C were added to the matrix of issues that DeBarba [ ] The EX 7C record shows that the CU-29 valve issue, associated with [ ] was discussed at a [ ] EX 7C meeting, presumably with DeBarba in attendance (Exh. 50). Also, [ ] wrote to DeBarba EX 7C on [ ] just days before the reintegration was announced, updating him on three EX 7C subjects including his intent to meet with Millstone Unit 1 officials to discuss the CU-29 valve issue [ ] (Exh. 57). EX 7C

It is possible that DeBarba was aware of [ ] in the CU-29 issue before EX 7C the task force formed because this issue reached the director level -- [ ] EX 7C 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 EX 7C a result, he was [ ] Pokora, a new EX 7C supervisor. He did not suffer a loss in salary but his salary was capped and in the long-term, [ ] EX 7C [ ] (Exh. 2, at 12-13). EX 7C

4. Protected Activity/Adverse Action Causal Nexus

a. Discussion of Nexus. During the two years preceding the reintegration, [ ] had EX 7C significant involvement in controversial safety matters such as the CU-29 and [ ] EX 7C matters. He had been actively involved in the high-profile CU-29 issue as recently as the [EX 7C] an issue which remained unresolved at the time of the November 1993 integration. EX 7C Also, [ ] in charging that [EX 7C at Millstone Unit 1 in a manner inconsistent with NU's license. [EX 7C documented his position [ ] to DeBarba on [ ] and EX 7C stated his belief that [ ] would go to the NRC if NU did not resolve the issue soon (Exh. 53). EX 7C If [ ] contacted the NRC with his concerns, DeBarba could expect that would be called EX 7C upon to substantiate [ ] claims. EX 7C

The CU-29 valve issue, originating in 1992, appears to be the most contentious issue [EX 7C Between 1992 and 1993, rejected the OD declaring, EX 7C valve operable that was prepared by Millstone Unit 1 Project Services EX 7C Department, headed by Risley. [21]

These considerations suggest that while a solid performer, was someone of whom EX 7C 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 EX 7C issue. In doing so, with Kacich, director of the Department of Nuclear EX 7C 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 EX 7C 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 [ ] In looking at management's reasons, Ex 7c we begin by noting that under the process used for selecting supervisors [ ] selection Ex 7c ultimately depended upon DeBarba to propose his name given that he was the only official in [ ] 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 [ ] 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 [ ] a person who Ex 7c challenged management and supported [ ] who did the same. Ex 7c

NU claimed that it deselected [ ] as part of an overall reintegration of nuclear Ex 7c engineering personnel into the plants. It contended that [ ] 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 [ ] 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 [ ] 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 [ ] should have been considered for a supervisor position. Ex 7c

received "Exceptional" and "Quality" ratings in his last four performance evaluations EX 7C in the elements: customer service orientation, teamwork and interpersonal skills. Having received "Exceptional" and "Quality" ratings in the teamwork element for the prior to EX 7C his would seem to have qualified as a "team player," a characteristic that EX 7C 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 EX 7C 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 EX 7C 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 EX 7C had the qualifications that NU believed Even if EX 7C was never mentioned aloud, DeBarba and others must have made a of EX 7C DeBarba never offered any explanation as to EX 7C why he thought EX 7C

While DeBarba remarked that was not good at closing issues, he provided no EX 7C elaboration on that score. That omission is significant given that performance evaluations EX 7C do not show that he was deficient in this respect. To the contrary, received the highest EX 7C 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 EX 7C

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[22] In his OI interview, DeBarba did offer an explanation why he who he EX 7C 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 EX 7C

concern about closing issues refers to persistence on the CU-29 issue which in a EX 7C sense, prolonged because he, EX 7C This supports the inference that protected activity was a EX 7C contributing factor in the decision not to retain him as a supervisor.

Management reasons for its selection of someone other thus, are not EX 7C 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 EX 7C the CU-29 issue adds further substance to the inference that protected EX 7C activity was a contributing factor in his deselection. Even though the issue arose after EX 7C it is evidence of DeBarba's unenthusiastic attitude toward a person who EX 7C 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 EX 7C suggested it to DeBarba. DeBarba's unilluminating statement that would have received the EX 7C negatively does not fully explain his decision not to act on Chatfield's advice (Exh. 28, EX 7C at 11-15).

C. EX 7C

1. Protected Activity

was involved in several safety-related projects between 1991 and 1993. Two of EX 7C them, the MOV program and the heat exchangers, EX 7C During the course of these projects, that were contrary to those held EX 7C by Risley and managers of the Millstone units involved. The record also shows that EX 7C

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 EX7C

view that the heat exchangers were operable. EX7C

Events relating to this issue EX7C

occurred just a few months before the reintegration.

The RCP issue was another instance in which with management. Due EX7C

to some problems detected in the pumps, EX7C

Management refused to accept this opinion that they were operable for only EX7C

one cycle and, in view, misrepresented their operability to the NRC. EX7C

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 EX7C

conversations with and memoranda from or Kupinski, EX7C

(Exh. 6, at 11; Exh. 28, at 39; Exh. 46, at 78). Unit directors were aware of on EX7C

MOV's because that program affected all of the units and he copied them on relevant

correspondence. had a series of ongoing disagreements with EX7C

the MOV program and the RCP repairs EX7C

(Exh. 6, at 9-12; Exh. 78).

DeBarba stated that he was aware of RCPs and the EX7C

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 EX7C

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. EX 7C EX 7C

3. Adverse Action

On learned that he had been to principal engineer. As with he suffered no immediate loss in pay, although his EX 7C EX 7C EX 7C

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. EX 7C EX 7C

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). EX 7C EX 7C EX 7C

had very good performance evaluations in [3] He consistently earned EX 7C 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. EX 7C 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 EX 7C DeBarba was actually the deciding factor as to whether a candidate was in the running for a position, then should have been seriously considered. EX 7C

Nothing in the record suggests that would fall short in these areas. In fact, EX 7C 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" EX 7C ratings in the areas of interpersonal skills and leadership, respectively. The fact that EX 7C 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 EX 7C plant. However, there seems to be little basis for that fear because spent many hours at EX 7C the plants carrying out assignments such as the RCP assignment at Millstone Unit and was, EX 7C thus, familiar with plant operations (Exh. 6, at 25). Also, EX 7C was EX 7C

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[23] Between received "Quality" and "Exceptional" ratings in all elements except one. In in monitoring and EX 7C 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 [ ] EX 7C

(Exh. 39, at 9, 12, 14). EX 7C

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 EX 7C wished [ ] This attitude is consistent with the "shoot the messenger" attitude described in EX 7C the Executive Summary, Millstone Employees Concern Assessment Team (MECAT) Report (Exh. 90, at 3). The reason proffered by [ ] for taking the MOV program [ ] EX 7C i.e., that he was too busy, does not carry much weight. If that was the real reason, then [ ] EX 7C would likely have so informed [ ] at the time. Instead, [ ] gave no explanation EX 7C contemporaneous with the event. It was only in 1996, when OI's investigation was underway, that [ ] presented this reason. Considering that EX 7C [ ] MOV program was EX 7C [ ] the reason does not seem credible. With his deselection occurring [ ] EX 7C [ ] MOV program, it becomes EX 7C clear that a pattern of cause and effect existed between EX 7C [ ] and a change in the conditions of his employment. Taking a project away from EX 7C 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 EX 7C [ ] with regard to the heat exchanger issue. Though EX 7C [ ] EX 7C that the heat exchangers were not operable . Certainly, rejecting the opinion of [ ] without EX 7C

providing contradictory support raises the question of motivation. The situation for EX 7C [ ] complained to EX 7C Kupinski about Clearly, the was in bad faith and was EX 7C meant to that were contrary to corporate and plant management. EX 7C Finally, In light of the above, it is reasonable to EX 7C conclude that the MOV and heat exchanger issues were retaliatory EX 7C actions by NU and add to the evidence that NU discriminated against EX 7C

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 EX 7C related the account of Risley's threat to that same day; and (2) Bonaca observed that EX 7C Risley was "hot" over going to Millstone Unit 1. Kupinski's sense that EX 7C the threat also was directed at appears to have been on target. It is not unreasonable to EX 7C infer that Risley followed through on his threat by not advancing name for a supervisor EX 7C position only one month later because he was so angered by action.[24] EX 7C

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 EX 7C

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[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] Ex 7C [redacted] The only other notable activity was that of [redacted] Ex 7C who was involved in a high-profile issue with well-known whistleblower [redacted] This, Ex 7C however, was somewhat remote in time -- five to six years -- to the reintegration. Notably, [redacted] Ex 7C 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 Ex 7C 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. EX 7C

The record contains no direct evidence that NU discriminated against for his EX 7C 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.

was involved in several safety-related activities EX 7C resistance to changing his stance that the CU-29 valve EX 7C was inoperable and his active support of who believed that NU EX 7C were known by DeBarba, the lead NU EX 7C official in the supervisor selection process.

Management's reason for not selecting -- that he did not fit in -- appears pretextual EX 7C against the background of performance evaluations rating him very high for the same EX 7C

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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 to determine whether those not involved in protected activity were treated EX 7C 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 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 for his protected activities. EX 7C

B. EX 7C

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

[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 supervisor as well as the inordinate amount of time that it took for NU to resolve the CU-29 valve matter. EX 7C

additional evidence of the subjective selection process and management's reasons for the deselection not being borne out by performance evaluations lead to the conclusion EX 2 that was discriminated against due to his protected activities.[27] EX 2

[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.

ATTACHMENT 3

CASE NUMBER 1-96-007

[ALLEGATIONS OF [ ] Ex 7C

I. INTRODUCTION

On January 11, 1996, [ ] were terminated, Ex 7C along with ninety-nine other employees, as part of a workforce reduction process at Northeast Utilities System (NU). At the time of their terminations, [ ] were employed as Ex 7C

Ex 7C

Prior to their terminations, [ ] engaged in protected activities. Ex 7C Specifically, [ ] had been responsible for working on two safety-related issues involving Ex 7C [ ] had Ex 7C 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 [ ] Ex 7C [ ] that he had some involvement in the Rosemount Ex 7C Transmitter matter and he too raised a number of safety concerns during the course of his work in the [ ] where he had worked previously, and in the Ex 7C

Ex 7C

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).

B/2

~~SENSITIVE ALLEGATION INFORMATION - DO NOT DISCLOSE~~

Information in this record was deleted in accordance with the Freedom of Information Act, exemptions 7(C)
FOIA 99-158

NU employees who alleged they were targeted for termination for engaging in protected activities. [ ] 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. [ ], 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 [ ]. 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 [ ], NU discriminated against them for engaging in protected activity. Ex 7c

II. BACKGROUND

A. Allegers' Employment History and Activities

EX 7C

1.

a. Position and Performance. an NU employee for approximately at the EX 7C time of his termination in 1996, was a In this EX 7C position, was in contact with the and with staff at the various NU EX 7C plants. During the course of his employment with NU, worked on any number of projects EX 7C relating to nuclear safety. EX 7C work on this issue was discussed in his EX 7C performance evaluation for that year (Exh. 18). Specifically, his work on a EX 7C that led the vendor to make revisions to its design codes was highlighted (id. at 1). EX 7C appraisal also noted, however, that his EX 7C and that during the next year would EX 7C attempt to address these communications problems by establishing EX 7C (id. at 6).

(Exh. 8, at 8). He submitted a EX 7C calculation file and EX 7C (Exh. 34, at 3). He also provided his recommendations to EX 7C rejected work because of an EX 7C inadequate quality assurance (QA) review in changing the EX 7C and a desire not to bias id. at 4). Reactor EX 7C Engineering also concluded that EX 7C

EX 7C

performance evaluation, though favorable (Q for quality, the second highest EX 7C rating in the NU system, but at the "lower end of the Q range"), addressed his failure to produce [(Exh. 19, EX 7C at 1, 5). EX 7C

performance evaluation. With respect to he stated: EX 7C

> 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).

EX 7C

EX 7C

It was also noted in the evaluation write up that had been provided written documentation EX 7C indicating that (id.). Finally, under EX 7C the section of the need to improve EX 7C quantity of work and were identified as areas for improvement EX 7C (id. at 6). EX 7C

EX 7C

EX 7C

In response to his

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

OI interviewed

EX 7C

as meticulous but not someone who

produced a great quantity of work (Exh. 50, at 28). He also stated that EX 7C

was perceived as a very hard worker (Exh. 51, at 16). EX 7C

He acknowledged a as well, but said he did not personally have a problem EX 7C

told OI that 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 EX 7C

(id.).[2] EX 7C

b. Relevant Safety-Related Activities. As a EX 7C

performance of his regular day-to-day duties and responsibilities often involved EX 7C

him in safety-related activities. The problem, described in section II.A.1.a EX 7C

above, was one such issue tha EX 7C

The was initially noted by a reactor engineer in 1994 (Exhs. 34, 35). EX 7C

performed an evaluation to identify the potential cause (Exh. 34). Upon EX 7C

completion of his evaluation in 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

(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 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. 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 EX 7C another engineer to conduct a [ ] that established [ ] conclusions about the EX 7C 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 [ ] EX 7C 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 EX 7C respect to the [ ] issue, the inspector found that NU's actions to improve the EX 7C calculation by improving [ ] design codes was a technically sound approach for resolving the EX 7C issue (id. at 4). He also concluded that the basis for rejecting the recommended [ ] EX 7C 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 EX 7C (Exh. 2, at 4). He started his career as an [ ] and EX 7C subsequently was promoted to a supervisor in [ ] (id.). During an NU [ ] EX 7C [ ] and he was removed from his supervisory position (Exh. 3, EX 7C

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[3] This inspector also reviewed a [ ] had expressed concerns about to EX 7C [ ] In response, [ ] to resolve the issue, which he did to his EX 7C management's satisfaction (Exh. 35, at 2).

at 10-11). He subsequently secured a position as a [ ] EX 7C

(id. at 10).

performance, as documented in performance evaluations for [ ] EX 7C were favorable (Q) (Exhs. 10, 11). In the [ ] evaluation however, in quality and quantity of work (Exh. 9, at 5). EX 7C

performance appraisal, told OI that [ ] 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 [ ] progress was extremely slow which led him to EX 7C conclude that he was not committed to change (id. at 29). When asked if [ ] ever failed to complete assigned projects, [ ] stated that there were projects that were delayed, but EX 7C not missed (id. at 32). He also said that he had to be with [ ] on projects, i.e., handhold him, a situation he described as burdensome (id. at 32). In terms of performance, [ ] stated that he could not give [ ] the typical work he gave [ ] a EX 7C [ ] (id. at 33).

In a confidential memorandum prepared to support [ ] selection for termination as EX 7C part of the 1996 workforce reduction, Donald Dube, Manager of the Safety Analysis Section, stated that [ ] had received only one performance evaluation in the Safety Analysis EX 7C Section, the [ ] evaluation (Exh. 9, at 5). Dube further declared that

an EX 7C

inflated performance evaluation for [ ] (id.).[5] Dube also pointed out as noteworthy the fact EX 7C

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[4] The 1993 evaluation covered the period when [ ] EX 7C

[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 effort in the branch, and EX 7C 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 EX7C

on the job "almost every day" (id. at 44-45).

b. Relevant Safety-Related Activities. Like regular duties and EX7C responsibilities involved the performance of safety-related activities. During his interview with the Task Force, however, EX7C

(Exh. 2, at 13). These concerns involved

EX7C

d.

these concerns with Larry Chatfield, EX7C head of the NU Nuclear Safety Concerns Program (NSCP), as well as his supervisor

stated that the concerns he raised were addressed and that EX7C 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 EX7C 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 EX7C

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[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 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.). EX7C

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[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 EX 7C This engineer concluded that an SSH was presented. The Section EX 7C Manager, did not agree and directed revision of the EX 7C evaluation to reflect his conclusion. The engineer refused, whereupon[EX 7C that no SSH was presented and 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[EX 7C requested and was granted permission by EX 7C his management at NU to work on an EX 7C 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). EX 7C EX 7C

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). EX 7C EX 7C EX 7C

3. EX 7C

a. Position and Performance. [ ] began his employment with NU as a [ ] (Exh. 5, at 4-5). He was later promoted to [ ] EX 7C

(id.). [ ] performance evaluations for [ ] were both favorable (Q ratings) (Exhs. 15, 16). The [ ] performance evaluation, however, contained the following statements: EX 7C

> 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 al
>
> 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

he did not believe that carried an equal share of the workload, and he noted that needed close supervision (Exh. 45, at 16). He also stated that as was expected of those who worked in his group (id.). flexibility and versatility were limited because most of his work was had been trying to steer and to get him out into other areas, but was not receptive to this (Exh. 47, at 23). He also stated that, when he was told to do so (id). EX 7C

b. Relevant Safety-Related Activities. told the Task Force that and that he had been "very involved" in Rosemount transmitter issues with 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). told OI that he also worked for and that while was on a crusade, he and were not (Exh. 46, at 25-26). EX 7C

When questioned by the Task Force, 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 that may have involved an unreviewed safety problem (id. at 22). During his later interview with OI, however, was questioned about the nature of the issue he raised with the NSCP staff before his termination. OI inquired, "[y]ou mentioned in EX 7C

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, stated, "Yes. . . . I talked to them about some of the things that were going on real recently which was on that 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, stated he had forgotten, but that he could come up with it (id. at 14). OI asked to think about it and provide the name so OI could contact the person (id. at 15). Whereupon, stated he had not talked specifically about the potential unresolved safety problem (id. at 15). Upon additional questioning by OI admitted that he had not spoken to NSCP personnel about irregularities in the 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). 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

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[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, Safety Analysis under Manager Dube, EX 7C and Nuclear Engineering Support under Manager Kupinski, which was EX 7C (id. at 3).[8]

Prior to completing the workforce reduction matrices for their respective sections, the -- Dube, Kupinski, and Guerci -- met to discuss the matrixing process in EX 7C 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 EX 7C -- and instructed them to use it, along with the

[8] Additionally, as we have already seen, EX 7C

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 (id. at 59-64).[12] DeBarba discussed cutting the department EX 7C 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).

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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 a well-known NU EX 7C whistleblower. Bonaca admitted to DeBarba that the score had been revised upward at his suggestion because of involvement in protected activities (Exh. 56, at 51, 87-89). After EX 7C DeBarba pointed out this was contrary to the direction they were given not to consider protected activity in preparing matrix scores, Bonaca returned the matrix to EX 7C for reassessment, and it subsequently was returned with the original, lower score (id. at 53-56, 90-92).

Ultimately, became one of the five individuals whose name was put forward by EX 7C 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).

[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 7C 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 7C 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 7C termination (Exh. 37, at 19). was the lowest ranked [ ] (id. EX 7C 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 7C 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 EX 7C those employees from the bottom of the matrices who would be terminated. Among the employees identified were (id. at 77-79). EX 7C

III. ANALYSIS

It is clear from the foregoing that all allegers engaged in protected activities; that EX 7C 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

[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 EX 7C additional possibilities (Exh. 49, at 29-30).

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 DeBarba was a member of the committee of senior NU managers EX 7C EX 7C that ultimately rejected 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]

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 allegers with 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 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 which convinced him that EX 7C 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. EX 7C

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

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[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

[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 EX 7C termination decision likely was influenced by that association.

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 the value of the EX7C 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 was retained notwithstanding a lower matrix score. EX7C

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 [25] In so concluding, EX7C 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 EX7C respectively, and that 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 EX7C and there is nothing before us that might indicate that the reasons that led to the inclusion of in the reduction-in-force would have precluded their satisfactory performance EX7C 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.

ATTACHMENT 4

CASE NUMBER 1-97-007
[ALLEGATIONS OF] EX7C

I. INTRODUCTION

By August 2, 1995 letter, [ ] was informed that, as of that date, his EX7C 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 EX7C 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 EX7C Unit 2.

As authorized by NU internal personnel policy and procedures, [ ] filed a grievance EX7C 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 [ ] EX7C The decision stated that the termination had been founded on management's belief that [ ] "had exhibited performance deficiencies and poor EX7C supervisory judgment" with regard to an untoward incident that had [ ] (a EX7C 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 EX7C 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] EX7C without, according to him, any statement of reasons being provided (Exh. 12, at 13-14). [ ] (Exh. 12, at 24-25). EX7C

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

B/3

Information in this record was deleted in accordance with the Freedom of Information Act, exemptions: 7C
FOIA- 99-158

supervisor had not been adequately communicated to [redacted] because corporate and EX7C 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

[EX7C

allegations before this Commission were the subject of an extensive EX7C 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 EX7C 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

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 the last two of whom were EX 7C (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 where he was in [redacted] (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. EX 7C

[4] In his OI interview, however [redacted] was somewhat critical of 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

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 the supervisors in his rating group (Exh. 26, at 4). EX 7C EX 7C

As previously noted, employment was terminated on August 2, 1995 "due to performance deficiencies and poor supervisory judgment." EX 7C

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

As seen, endeavor to link his termination to protected activity rests upon his 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 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. EX 7C EX 7C

[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 belief that the 1993 appraisals had not been stringent enough (Exh. 20). EX 7C

The underlying basis for the [ ] claim and the ATWS event leading to the management asserted belief will be examined in turn. EX 7C

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. EX 7C

In late 1993, [ ] EX 7C 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). EX 7C

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 EX 7C

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[6] While [ ] supervisory deficiencies were a major cause, [ ] deemed any delay to have been beyond their control (Exh. 12, at 28-36; Exh. 21, at 60-62; Exh. 27, at 19-20). EX 7C

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] EX 7C

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 EX 7C responded to a [redacted] by stating that directors, but not "working-level EX 7C 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] EX 7C [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] EX 7C [redacted] (id. at 12-17).

On behalf of the [redacted] Chatfield contacted Necci's immediate superior, Eric A. EX 7C DeBarba, then NU Vice President for Nuclear Technical Services (id. at 18). Thereafter, DeBarba spoke to [redacted] understood DeBarba as EX 7C 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). EX 7C

DeBarba also met with Necci and [redacted] The latter informed DeBarba that it had not EX 7C been his intent to [redacted] with termination. Rather, his comment had EX 7C 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.).

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[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

EX 7C

The [redacted] alluded to his [redacted] and purported to confirm the substance of a meeting with 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 -- a substantial question EX 7C arises as to the basis for the belief that Before turning to EX 7C 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 EX 7C

According to he did not recommend that be fired. His recollection was EX 7C that DeBarba had first raised the issue of termination and that his response had been EX 7C that any decision should await (Exh. 27, at 58). Thereafter, EX 7C Necci at home and advised him that DeBarba desired to terminate (id. EX 7C at 59). had no further discussions with DeBarba on the subject but it was his EX 7C impression that DeBarba and Necci were addressing it following EX 7C Ultimately, Necci notified that it had been decided to terminate (id.). EX 7C

For his part, he informed DeBarba of EX 7C his decision to remove from his supervisory position although he had not yet decided EX 7C 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 light of the perceived deficiencies of his performance as a supervisor (Exh. 37, EX 7C

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 [ ] and Necci had concluded that [ ] EX 7C 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. EX 7C

readily acknowledged that [ ] and, EX 7C 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] EX 7C

(id.) That behavior, in view as also reflected in the root cause EX 7C investigation report, was exemplified by failure to involve the Plant Operations Review EX 7C Committee (PORC) when he encountered a problem, a failure attributed by [Sudigala] to a belief EX 7C on [ ] part that the PORC would not "lend any credible review" (id). EX 7C

further acknowledged that he had approved [redacted] decision putting EX 7C [redacted] despite the fact that [redacted] had exhibited that kind of behavior EX 7C 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 [ ] EX 7C

[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, [redacted] 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).

Necoli'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] EX 7C (Exh. 27, at 48). 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 [redacted] 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 [redacted] had received a "needs improvement" EX 7C

[redacted] (Exh. 27, at 18-20). That deficiency, in [redacted] 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 [redacted] 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 [redacted] apparent departures from the "no fallen EX 7C

angels" philosophy subsequent to its adoption. [redacted] were EX 7C

determined to be deficient in the performance of their supervisory functions and, yet, [redacted] were EX 7C

allowed to assume a lower non-supervisory position.[10]

1. EX 7C

[redacted] organization headed by EX 7C

Necci. His immediate manager superior, however, was not, [redacted] EX 7C

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

EX 7C

(Exh. 40, at 7-10).

In common with was regarded by both Necci and his immediate superior EX 7C 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 was responsible EX 7C for were just not getting it done. He was more of an than he was a supervisor" EX 7C (Exh. 23, at 53). "really was not good at EX 7C delegating work, following up on work. He was more a better worker himself" (Exh. 40, at 10).

This evaluation was fully reflected in EX 7C and endorsed by Necci (Exh. 41). The appraisal contained three "needs improvement" ratings (in contrast to the one such rating given to EX 7C as well as this comment: "As a supervisor, was weak in delegation, holding people EX 7C accountable, and moving (id). EX 7C

At the same time, noted that was "an EX 7C extremely valuable asset to the company when utilized at the technical level" and that he had "recently decided to, for EX 7C which he was "much better suited" to. In this regard, took note of a number of perceived EX 7C attributes: was "extremely hard working"; possessed "excellent operational knowledge"; EX 7C worked "extremely well with others"; was "customer orientated"; and had a positive "can do" attitude (id).

His OI interview reflects that was very anxious to retain in a non-supervisory EX 7C 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 suggestion, with Necci's concurrence, that EX 7C

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

2. EX 7C

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; 38-40, 42).

was terminated, on September 5, 1995, 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 exhibited as a EX 7C . 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 (Exh. 23, at 54-55). But, EX 7C Riley recalled that his discussion with Necci regarding his desire to retain 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 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 [redacted] had been terminated because he had exhibited performance deficiencies and poor EX 7C supervisory judgment [redacted] (Exh. 23, at 60). [redacted] EX 7C [redacted] 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 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 The EX 7C allegations will be considered seriatim.

A. Termination

In passing judgment on first allegation in light of the settled principles EX 7C governing this kind of inquiry, these questions are presented: (1) did 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 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 for having EX 7C engaged in a protected activity.

1. Protected Activity

Because attributes his dismissal to his action in EX 7C 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

EX 7C

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, [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 [correctly read the 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 [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 [-- might be EX 7C in jeopardy if the project did not proceed more expeditiously. Had he so interpreted it, [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 [for a poor choice of words. EX 7C

It should be deemed equally irrelevant that, in reporting the perceived threat to higher authority, [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 Ex 7C light, was engaging in a protected activity.[16] Ex 7C

2. Management Awareness

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

3. Adverse Action

There is no question, of course, that the termination of employment constituted Ex 7C 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 Ex 7C protected activity. For his part, maintains that the reporting of the perceived Ex 7C 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 Ex 7C 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 [redacted] termination was less than nine Ex 7C months [redacted] Under any standard, that interval was Ex 7C 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 supervisory skills offered Ex 7C by 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 the opportunity to remedy the shortcomings through resort to a Ex 7C

It was, of course, the denial of that opportunity that subsequently led the grievance committee to overturn termination and direct his restoration to NU employment.[17] Ex 7C

was not, however, a neophyte supervisor at the time he came Ex 7C To the contrary, he had become a in the electrical Ex 7C engineering area in 1983 or before[18] -- at least earlier. Ex 7C

That being so, one might justifiably be curious respecting how had survived as a Ex 7C supervisor for over a decade if, as 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 performance appraisal at hand is that for 1993 which had been Ex 7C prepared by Apart from the fact that Ex 7C on the whole was highly complimentary of Ex 7C performance. It was not until his OI interview that ventured the opinion that Ex 7C effectiveness as a supervisor was open to some criticism.

On the face of it, it seems quite improbable that, after years of acceptable Ex 7C performance in a supervisory position, 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, Ex 7C

[18] See supra note 3.

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 EX 7C 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 EX 7C that might bring into question the acceptability of his supervisory performance between [redacted] EX 7C [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 EX 7C 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 EX 7C 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 EX 7C

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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] EX 7C [redacted] disclosed that they were all favorable. EX 7C

the ATWS testing incident in seeking [redacted] removal as a supervisor. At the same time, the EX 7C reasons he assigned for that reliance are, at best, of extremely dubious substance.

Because [redacted] EX 7C Instead, as the root cause investigation report confirmed, those errors were committed by the persons actually involved in the testing, principally [redacted] EX 7C

Given his [redacted] in the ATWS testing, how then could [redacted] EX 7C 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] EX 7C reflected "arrogant behavior" for which [redacted] EX 7C [redacted] EX 7C 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] EX 7C Yet, despite that knowledge, [redacted] EX 7C

More important, not only had he never personally observed a failure on [redacted] part to EX 7C provide crucial information to key personnel but also [redacted] could not say that [redacted] had EX 7C

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 [redacted] 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, [redacted] in which the "no fallen angels" EX 7C philosophy apparently was not followed. [redacted] EX 7C

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[20] [redacted] concession that, notwithstanding his previous observation of [redacted] 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 [redacted] attention. There is no record indication that he did so. EX 7C

Although not detailed in the OI record, there is an obvious close EX 7C

relationship between EX 7C

Nonetheless, because it does not appear that any of those officials involved in

termination played a role in and additionally EX 7C

professed a lack of awareness of the "no fallen angels" philosophy, the demotion cannot be

taken as an example of invidious disparate treatment.

The EX 7C

who also reported to Necci. Although his was even more EX 7C

unfavorable than that of EX 7C

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 EX 7C

treatment different from that It is much less EX 7C

clear, however, that this consideration supports claim that the reasons assigned for his EX 7C

termination were pretextual. The moving force behind the decision to allow EX 7C

It appears that he had a high regard for EX 7C

and a reluctance to see him terminated. He thus successfully endeavored EX 7C

to convince Necci that Significantly, for EX 7C

whatever reason, the retention question seemingly did not reach DeBarba -- the official who

ordered termination in compliance with the "no fallen angels" philosophy -- and, EX 7C

consequently, there is no record basis for charging him with disparate treatment insofar as

are concerned.[21] Ex 7C

d. Termination Disclaimers. No great significance should attach to the fact that Ex 7C Ex 7C

disclaimed any purpose to have terminated, as opposed to being

simply For one thing, it is reasonable to assume that Ex 7C

they were aware of the "no fallen angels" philosophy at the time they sought Ex 7C

In any event, any link existing between protected activity and their desire Ex 7C

to cannot be deemed permissible simply because they Ex 7C

purportedly were not pressing for his termination as well.

e. Performance Appraisal. There is a final matter to be considered on this phase Ex 7C

of the inquiry. While standing alone it might not have large currency, the fact that Ex 7C

reporting of the alleged threat undoubtedly caused considerable Ex 7C

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] Ex 7C

performance appraisal necessarily was unwarranted. Nor is a current judgment possible

regarding the justification for ranking for the purposes of the Nuclear Incentive Ex 7C

Performance Program (NIPP) determination of salary increases based on the quality of [redacted] Ex 7C

While placed at the bottom of the [redacted] there is Ex 7C

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[21] In the circumstances, it is not of present crucial importance that the OI record does not reflect whether had presented safety concerns in advance of Ex 7C being [redacted] That DeBarba was not involved in Ex 7C 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 displeasure respecting EX 7C rather than simply bringing it to the EX 7C attention of higher-level management (Exh. 24, at 4).

without elaboration, that 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 either stemming from 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 had received sufficient counseling on his supervisory EX 7C deficiencies and was beyond possible redemption through a EX 7C

Nor is there a foundation for a retaliation claim in the refusal to accede to EX 7C request that the 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 because he reported perceived threat to higher EX 7C authority. Moreover, after the request denial, Romer reviewed with 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] 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. EX 7C

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] EX 7C EX 7C EX 7C

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 EX 7C EX 7C EX 7C

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 EX 7C EX 7C

[24] Even had there been such deficiencies, they manifestly were not so serious as to have occasioned the removal of as a supervisor. EX 7C

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