



Issue Date: 15 December 2004

Case No. 2003-ERA-9

In the Matter of:

RICHARD D. HIBLER,  
Complainant,

v.

EXELON GENERATING  
COMPANY, LLC/5-0460-03-007,  
Respondent.

**RECOMMENDED DECISION AND ORDER — DISMISSING CLAIM**

This proceeding arises from a complaint filed by Richard Hibler (“Hibler” or “Complainant”) under the whistleblower protection provisions of the Energy Reorganization Act (“ERA” or “the Act”), 42 USC 5851.<sup>1</sup> Complainant seeks back pay and reimbursement for other

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<sup>1</sup> The Act at 42 U.S.C. 5851(a) provides:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)—

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employer" includes—

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

expenses arising from the revocation of his access privileges by Exelon Generating Company, LLC (“Exelon” or “Respondent”). Complainant alleges that he was discharged as a result of his protected whistleblowing activities while working as a contractor at Respondent’s Dresden nuclear power facility. Respondent denies liability, maintaining that (1) Complainant deliberately falsified an inspection report and then lied during a company investigation, rendering himself ineligible for protection under the ERA whistleblower sections, and (2) Respondent revoked Complainant’s access privileges for his alleged falsification of the inspection report, not for any discriminatory reason.

I held a hearing in this matter on June 29 and 30, 2004, in Chicago, Illinois. At the hearing, I afforded both parties a full opportunity to present evidence and argument as provided by the applicable law and regulations. Having heard the arguments of the parties, I admitted Complainant’s exhibits A and B and Respondent’s exhibits 1–13 and 15–17 into evidence. Both parties submitted post-hearing briefs. The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

### ISSUES PRESENTED

- 1) Are the parties covered under the ERA? If so, then:
- 2) Did Complainant engage in activity that bars his protection under the whistleblowing provisions of the ERA? If not, then:
- 3) Did Complainant show—
  - a. That he engaged in protected activity?
  - b. That Respondent was aware of the protected activity when it took the adverse employment action?
  - c. That an inference is raised that the protected activity was the cause of the adverse employment action?
- 4) Has the Respondent demonstrated by clear and convincing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons?
- 5) Has Complainant demonstrated that Respondent’s proffered reason for the adverse action is either false or a pretext for a prohibited discriminatory reason?
- 6) If the adverse action was taken for *both* legitimate and prohibited reasons, then has the Complainant demonstrated, by a preponderance of the evidence, that the discriminatory reason is the more likely the motivation for the adverse action?
- 7) If liability is established, then what will be the procedure for calculating damages in this case?

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(C) a contractor or subcontractor of such a licensee or applicant; and  
(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

## STIPULATIONS

The parties have stipulated and I find:

- 1) That Respondent owns the Dresden Nuclear Power Station (“Dresden”) in Morris, Illinois.<sup>2</sup>
- 2) That Complainant worked for Respondent as a Contractor Quality Verification (“QV”) Inspector.<sup>3</sup>
- 3) That an adverse employment action occurred; namely, that Respondent suspended Complainant’s security clearance on October 17, 2002.
- 4) That Complainant filed his whistleblower complaint on December 12, 2002, which is within the statutory time frame for such claims, and that the claim was therefore timely filed.

TR 6–7.

## OVERVIEW

So that the evidence presented below is clear, I will briefly summarize the events that led to this claim. The Complainant, Richard Hibler, was working as a QV inspector during an outage at Dresden in October, 2002. An “outage” is a scheduled period of time during which repairs and inspections are conducted at the nuclear station; during this outage, some repair work needed to be done in pipes located in a highly radioactive site. In the early morning hours of October 15, 2002, Hibler was called to inspect the connection of some of these pipes. Another QV inspector, James Meyer, was also present at the work site.

According to the “work package” (a packet of materials describing the work to be done and the safety steps and inspections required), the pipes in question were to be inspected internally for contaminating material and then checked to be sure they fit together properly before workers could weld them together. A hotly contested issue in this claim is whether a copy of the work package was present at the worksite when Hibler arrived. Regardless, James Meyer shouted at Hibler to get into the work area and perform his inspection duties. After twice entering the highly radioactive area of the worksite to perform inspections, Hibler initialed a number of inspection items in the work package as having been performed by him. It is undisputed that Hibler had not actually performed the internal “pre-fit-up” or the connection “fit-up” inspections for which he signed, because the welders had already tack-welded the pipes together when Hibler arrived. In tack-welding the pipes together, the workers had bypassed a “hold point”—a step in the work package in which they must stop and wait for an inspection to take place. Hibler did not instruct the welders to break the tacks so that he could perform the pre-fit-up and fit-up inspections.

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<sup>2</sup> In addition, Joseph Sipek testified that Respondent owns ten nuclear plants, including Dresden, and is headquartered in Warrenville, Illinois. TR 147.

<sup>3</sup> I use the abbreviation “QV” even when documents or witnesses use “QC”, or Quality Control, instead. I do so to avoid confusion, as several witnesses testified that the phrases are interchangeable and that QV is the acronym that Respondent’s facilities currently use. TR 144.

After an internal investigation into the incident had commenced, Respondent suspended Hibler's security status at Dresden on October 17, 2002, effectively barring him from entering the premises and rendering him unable to continue working there. After Respondent completed its investigation, it revoked Hibler's security clearance for any of Respondent's nuclear plants on December 4, 2002.

## EVIDENCE

### Testimony: Complainant's Witnesses

#### *Gerald J. Bitner*

Gerald Bitner worked with Hibler from 1995 to 2002, also as a QV inspector but performing different types of inspections than Hibler did. TR 12–16. Bitner testified about Hibler's work practices in general as well as about procedures and conditions at the Dresden plant.

Bitner testified that Hibler was consistently adamant that the plant should follow inspection rules and cleanliness procedures. TR 14. Bitner stated that he considers Hibler to be of high integrity; in addition, he is unaware of any previous incident that called Hibler's integrity into question. TR 16–17. In addition, Bitner explained that Hibler must have been aware of the practices and rules that QV inspectors must follow, because inspectors are tested for such knowledge due to federal Code requirements. TR 17.

Asked whether workers ever forget to call for inspections to be made at the proper time during outages, Bitner stated that it has happened "at just about every outage I've ever been on." TR 18. He also explained the function of a work package: its purpose is twofold, for both occupational (worker) safety and nuclear (public) safety. TR 20. Routinely, work packages are completed at the end of each shift, so that the worker who performed each step goes to the office and initials that step on the original copy of the work package. TR 22. The "basic rule," Bitner said, is that a copy of the work package needs to be at a work site, although he has witnessed on occasion "that rule violated for many reasons." TR 19. If the work package was not present at the worksite in question, then in Bitner's opinion Hibler should not have performed his inspections. TR 20. In fact, Bitner stated that a QV inspector *must* review the work package before conducting inspections, and that if anyone ordered Hibler to do otherwise in this case, then that person acted wrongly. TR 26–28.

Bitner has witnessed "quite a few" situations in which QV inspectors signed off on an inspection in error, or signed the wrong step. TR 25. When a QV inspector makes such a mistake, then "many times we just go back and make a correction with one line through the inappropriate entry and initial and date that entry ... and put in the proper information." TR 25–26. Also, Bitner has been aware of "quite a few" occasions in which QV inspectors have "made mistakes in their judgment calls on [the] acceptability of an item"; in such cases, Bitner reported, the inspector was written up in a condition report ("CR"). TR 24. The CR would state the unusual condition that had occurred and would outline the work steps for correcting it.

During the outage at Dresden in October 2002, Michael Porter was the QV supervisor and as such was Hibler's supervisor. TR 29. Bitner stated that he overheard Porter expressing unhappiness with Hibler's schedule, specifically with Hibler working the night shift. TR 28–29. Bitner had witnessed that Hibler "didn't have good rapport with Mr. Porter," elaborating that he had witnessed anger and raised voices between them. TR 34. Bitner further stated that Porter was not "generally liked" by the QV inspectors. TR 31–34. After the incident in question occurred, Bitner observed, Michael Porter "had the opportunity to make a point out of Mr. Hibler's mistake [and] took full advantage of it like I've never seen done before." TR 34. Finally, Bitner testified that he had been aware of other inspectors who signed off on inspections in error, none of whom were terminated by Exelon for the error. TR 36.

### ***Gerry Parker***

Gerry Parker worked in the same position as Hibler (QV inspector) at the Exelon facility. TR 48–49. He testified about the relationship between Hibler and Michael Porter, who was in charge of QV overall and non-union QV employees during the October 2002 outage. TR 50. Gerry Parker was in charge of *union* QV employees at that time, so that Michael Porter was essentially his supervisor, and in turn Parker was Hibler's supervisor. *Id.*

Parker testified that Hibler asked him for a night-shift schedule during the outage. *Id.* Further, Parker said that he was not aware that Michael Porter had any issue with Hibler working nights. TR 53.

### ***James Robert Oelschlager***

Like Hibler, James Oelschlager worked as a QV inspector for Exelon. TR 55. Oelschlager has worked in this capacity since 1975. *Id.* He testified about Hibler's work practices and about the conditions at the Dresden plant.

Oelschlager has known Hibler for approximately ten years and considers him to be an inspector of high integrity and performance. TR 55–56. In addition, he believes that Hibler maintains a high degree of safety and concern for job and public safety. TR 56.

Oelschlager stated that a copy of the job's work package should be on-site when Welding Services Incorporated ("WSI"), Exelon's subcontractor, is working in the reactor. TR 57. This copy of the original work package is called the field copy. *Id.* Although workers are supposed to sign off the steps they have completed in the original work package (kept in the office) by the end of their shift, Oelschlager testified that he had been aware of times that this did not occur. TR 58.

Oelschlager opined that a QV inspector "can't really inspect the weld without reviewing" a copy of the work package. TR 57. Although he would consider doing an inspection without a copy of the work package in front of him, Oelschlager said that the radiation level of the job would affect his decision. TR 59. Ultimately, he explained, "I would have to look at a [work] package prior to [doing] the inspection. Somehow. Either a field copy or, you know, [the] original copy. You cannot inspect ... without that." *Id.*

***Richard D. Hibler***

The Complainant testified that he had been a QV inspector in nuclear plants from 1979 until 2002. TR 67–68. He has been a member of the union since 1985. TR 68. Since starting to work for Exelon in 1995, Hibler has worked at two outages at the Dresden plant, including the one in October, 2002. TR 69–70.

During the outage in question, Hibler testified, he verbally complained of safety concerns regarding the heater bays, which were being repaired. TR 70. His concern, addressed to the WSI overseer on the job, was that the walls in the heater bays had eroded beyond minimum thickness acceptability. *Id.* Hibler acted on his concerns by bringing in an engineer to re-evaluate the thickness of the walls; the engineer found the thickness to be acceptable. *Id.*

Hibler further testified that, when the incident giving rise to this claim occurred, he complained to fellow QV inspector James Meyer about the absence of a copy of the work package at the job site. TR 71. Hibler then related his version of the events of October 15, 2002 that resulted in his termination.

Hibler explained that he was the only QV inspector available to do this job because he had been the inspector to attend the pre-job safety meeting (the “ALARA” meeting<sup>4</sup>) for it. TR 71–72. The ALARA meeting was of particular significance because this was a highly radioactive work site. *Id.* Around 3:00 a.m. on October 15, Hibler’s pager received a message that he was needed to perform an inspection at the work site. TR 72. At that time, Hibler was coming from another inspection job in which he had been contaminated with radiation and had to go through a ninety-minute process of decontamination (including time spent waiting, during which he did not have access to his pager). *Id.* By the time Hibler arrived to perform the inspection, the crew had been waiting for him and another inspector, James Meyer, had been called in by QV supervisor Michael Porter to do the inspection instead. TR 73–75. Michael Porter “hollered” at Hibler to get to the work site to do the inspection. *Id.* Hibler and James Meyer suited up and went to the work site, where Hibler was to enter the radioactive area to perform the inspection of the pipes. TR 76. Upon arriving at the work site, Hibler found that no work package was present, leaving him without the step-by-step work instructions for what work should be performed and inspected. *Id.* Hibler asked James Meyer about the location of the work package, but Meyer responded, “get in there now, they’re waiting for you ... they [have] been waiting for an hour and a half.” TR 77. Hibler testified that Meyer ordering him to go into the site without a work package was a safety violation. TR 79.

When Hibler arrived at the inspection site, the welders had already passed the “hold point” at which they were to stop to allow the pre-fit-up (internal cleanliness) and fit-up (connection) inspections. TR 77. After finishing his inspection duties, Hibler then had to sit in the work area and wait for the work package to arrive so that he could sign off for what he had

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<sup>4</sup> In his testimony, James Meyer explained that ALARA meetings cover the expected radiation and safety procedures for this job, as well as a “pre-job briefing” concerning the tasks specific to the job. TR 253. It appears from testimony that the pre-job briefing and the ALARA meeting could conceivably be held at two different times, but in the case of this particular job they were held at the same time. Although some testimony identifies the meeting in question as an ALARA/Pre-Job Briefing, I will for simplicity’s sake call it the ALARA meeting.

done. TR 82. When the work package finally arrived, Hibler explained, he mistakenly signed for more inspections than he had actually performed. *Id.* “I made an error,” he testified, “I signed the wrong boxes.” *Id.* After he had completed the work package, Hibler changed back into his clothes and returned to his office, where he found that James Meyer had already informed Michael Porter that Hibler had raised the safety concerns; in addition, “they told me that I signed off the wrong step.” TR 83. Michael Porter then took Hibler to the office of Joseph Sipek (Manager of Nuclear Oversight; Michael Porter’s supervisor). TR 84–85.

The next night, when Hibler arrived for his shift, Michael Porter met him in the parking lot and took him to another building (outside the security area), where he attended a meeting with several people, including Joseph Sipek and Robert Speek (an Employee Concerns Investigator for Respondent). TR 85–89. Hibler called the meeting “a kangaroo court ... they said, well, we’ll contact you.” Hibler learned that his security clearance had been revoked, so that he was banned from all Exelon plants. TR 86. At the time his employment with Exelon’s contractor, Venture, was terminated in late 2002 as a result of this incident, Hibler had been earning \$33.00 per hour, had been working 76–78 hours per week during outages, and had been earning more than \$100,000 per year in gross wages. TR 86–87.

Hibler reiterated that he did not intentionally sign off on the wrong items when he signed for having performed the pre-fit-up and fit-up inspections. TR 98. Hibler expressed his belief that Michael Porter and Robert Speek “made an issue” of his error because he had raised the safety concern of there being no work package at the site. TR 98–100. In addition, Hibler said, Michael Porter disliked him personally and acted out of resentment for having been overruled on Hibler’s schedule—Hibler’s immediate supervisor, Gerry Parker, had scheduled Hibler for the overnight shift rather than the day shift, as Michael Porter had desired. *Id.*

During cross-examination by Respondent, Hibler denied telling Michael Porter that the hold points for the pre-fit-up and fit-up inspections had been waived. TR 105. Hibler also did not recall telling Joseph Sipek that the hold points had been waived. *Id.* Hibler explained that, when he went to the work area in question, he did not know that he needed to perform an internal cleanliness pre-fit-up inspection because he did not have a work package; “Without a package going in, I had no idea” whether the step had already been completed. TR 119. Hibler testified that he did sign his initials intentionally, just that he had signed those items in error. TR 111. Factors Hibler attributed to making the error were a cold, the effects of the cold medication he was taking, and the rush of the situation. *Id.* He also estimated that twenty minutes elapsed between doing the inspections and signing the work package. TR 129.

Hibler testified that he did not recall telling Joseph Sipek that he had “never” signed off mistakenly on an item before. TR 111–12. Finally, Hibler acknowledged that the Nuclear Regulatory Commission (NRC) had concluded in its own investigation that Hibler had intentionally falsified the inspection record. TR 115.

I myself questioned Hibler about potential damages for this claim. Hibler testified that he has not worked since October 2002 and claims lost wages for that time. TR 306. He has continued to look for work, and has taken out a loan against his home to supplement his income. *Id.* At that time, I ruled that this claim would be bifurcated into a merits phase and a damages

phase, so that if Respondent is found to be liable for damages, I will hold a new hearing on the issue of the proper award amount.

### **Testimony: Respondent's Witnesses**

#### ***Joseph Sipek***

Joseph Sipek is the Manager of Nuclear Oversight at the Dresden station and has been an employee of Exelon since August, 1999. TR 144. Sipek oversees QV functions at the plant. *Id.* He testified about his job function and practice as well as his actions and observations relating to Hibler's termination.

Sipek explained that, under federal regulations (specifically 10 C.F.R. § 50.9), written reports such as the one in question (the work package bearing signatures) must be complete and accurate and are subject to NRC review. TR 146. He also explained that 10 C.F.R. § 50.7 prohibits discrimination against personnel for raising safety concerns in a nuclear facility; he was aware of this regulation in October, 2002. TR 150. Sipek, who has been working in the nuclear industry since 1982, was aware of the applicable federal regulations when this incident took place because he had attended classes as part of his job. *Id.* Further, Sipek testified that he believes discrimination against whistleblowers would be counterproductive to a QV program. TR 151.

During outages, Sipek explained, Dresden is obliged to supplement its in-house QV staff with contract workers (like Hibler) because of the increase in work. TR 147–148. Nobody would routinely re-inspect an item on which a QV inspector has signed off, as QV inspectors are trusted to do their job correctly. TR 148–149. If a QV inspector realizes that a worker has passed a hold point, then he has two options, according to Sipek: call in an engineer to determine the best course of action, or direct the worker to undo the improperly completed work so that the QV inspector can perform the required inspection. TR 153.

On October 15, 2002, Sipek arrived for work at approximately 6:00 a.m. and learned from James Meyer that a QV inspector was claiming that a weld inspection had been waived. TR 154. Michael Porter, the QV supervisor, was also present at this conversation. *Id.* Sipek testified that James Meyer's report surprised him, as Sipek was the only person who could waive inspections. TR 156. He was certain that he had not waived any inspections on the jobs that were being done at that time. *Id.* Sipek testified that waiver of a hold point on a safety-related procedure is "infrequent," and he reiterated that neither a welder nor a QV inspector can approve such a waiver. TR 157–58.

After learning of the claimed waiver from James Meyer, Sipek brought Hibler and Michael Porter into his office to discuss the incident. TR 158–59. After the meeting, Sipek wrote down his account of it; those notes are in evidence contained in the written incident report of Joseph Klevorn (RX-5). Sipek testified that, during the meeting, Hibler said that the job foreman, Gary Walker, had told him that the pre-fit-up and fit-up inspections had been waived pursuant to an agreement between Gary Walker and WSI. TR 159–60. According to Sipek,



Hibler then said that he had signed off for the inspections but had not performed them, but that WSI had not been following proper procedures, either. TR 160–61. Sipek recalled that Hibler could give no “logical” reason why he had signed for inspections that he had not performed; he claimed no illness, drug side-effects, or co-worker pressure. TR 163. At the meeting, Hibler then raised concerns about safety issues at the work sites, so Sipek responded that he would arrange for Hibler to meet with Robert Speek, the employee concerns representative. TR 162. The meeting between Robert Speek and Hibler took place at 6:00 p.m. that same evening, with Sipek present. *Id.*

Sipek testified that he initiated two investigations that day: one was with Robert Speek, addressing Hibler’s expressed concerns about safety as well as Hibler’s possible falsification of documentation; the second was with Joseph Klevorn, an outside assessor, to investigate the incident of possible falsification. TR 165. Joseph Klevorn completed his investigation on October 16, 2002; the report is in evidence at RX-5.

Based on the information he received from Robert Speek (contained in two e-mails from Speek to Sipek and in the record at RX-9 and RX-10), Sipek drew the conclusions (1) that Hibler was claiming that the two inspections had been waived, (2) that Hibler was claiming to have received this information at the ALARA briefing, and (3) that Hibler’s contentions could not be substantiated by anyone else known to be present at the ALARA briefing. TR 175. After consulting Joseph Klevorn’s report and Robert Speek’s e-mails, Sipek recommended that Hibler’s security status be made “inactive” so that he was barred from performing inspections. TR 176.

Sipek further concluded that Hibler had intentionally falsified the inspection report and had therefore brought his own trustworthiness into question. TR 177. The NRC has two in-plant “resident inspectors” assigned to the Dresden plant; Sipek notified one of the inspectors of his belief that a work package had been falsified and told her that Exelon would be conducting an investigation. TR 177–78. On approximately October 8, 2003, the president of Exelon received a letter from the NRC indicating that it had found a “non-cited violation” in this incident, specifically the falsification of a record by a QV inspector. TR 179. The NRC’s report of the incident, dated June 23, 2003, is in evidence at RX-16.

Sipek explained that he was involved in corrective actions that Exelon took in response to this incident. TR 182. Respondent reviewed previous inspections that Hibler had conducted, and Sipek assigned other QV inspectors to re-review the points that Hibler had inspected during this outage. TR 182. Further, Sipek conducted a “stand down” with all the QV inspectors at the Dresden plant, “to discuss the lessons learned, including employer responsibilities ... specifically ... what my expectations were regarding documentations of weld inspections ... just in case there was any question.” TR 183. Finally, relating to Hibler himself, Respondent revoked his access to all its facilities. TR 182–83.

Sipek opined that a QV inspector should not agree to perform an inspection without having a copy of the work package. TR 170. In addition, he stated that he is unaware of any Dresden employee falsifying a record who did not then have his or her access to the premises revoked. TR 185–86.

### ***Susan Techau***

Susan Techau is the Access Authorization Fitness for Duty Manager for Exelon; she has held that position since 1999. TR 194. She has been an employee of Exelon since 1991. *Id.* “Access Authorization,” Techau explained, is a program pursuant to federal regulations that require a nuclear operator to have a program in place for determining an individual’s trustworthiness and reliability to have unescorted access to the plant. TR 195. Techau described Exelon’s Access Authorization program and her role in the revocation of Hibler’s security clearance.

The Access Authorization program at Exelon, Techau elaborated, does a background investigation on individuals before granting them unescorted access into the plant; this includes criminal and credit checks, employment records, psychological evaluations, and drug and alcohol testing. TR 198. The purpose of these checks is to determine whether the individual is trustworthy and reliable enough to give him or her access to a nuclear plant—in effect, entrusting the individual with the health and safety of the public. *Id.* Techau opined that falsification of a record calls into question a person’s trustworthiness and honesty. TR 199.

Techau was the person who suspended and then revoked Hibler’s security access following the incident on October 15, 2002. TR 197–98. “Based on the information that we received from Dresden Station,” Techau explained, “we could not continue to determine that Mr. Hibler was trustworthy and reliable, based on falsification of documentation.” TR 198. Techau personally made the final decision to revoke Hibler’s security status. TR 206. Before testifying at the hearing, Techau had never heard that Hibler claimed that no work package was available at the site when he arrived to perform the inspections, or that he had to perform the inspections and then wait until later to receive a work package. TR 207.

### ***Robert Speek, Jr.***

Robert Speek is the Employee Concerns investigator for Exelon at the corporate office in Warrenville, Illinois, and is assigned to all midwestern sites. TR 210–11. Speek’s job includes managing the Employee Concerns program and performing NRC allegation reviews. TR 211. The Employee Concerns program, Speek explained, investigates issues and concerns that employees bring up, then either conducts an investigation or refers the matter to the appropriate organization for review. *Id.* Employees can ask anonymously for an investigation. *Id.*

Exelon has a company policy prohibiting retaliation against employees who bring up safety concerns. TR 212. Speek explained that “retaliation” includes harassment, intimidation, and discrimination. TR 213. Employees at the plants, including contract workers (Hibler’s status in October 2002), are provided mandatory annual training on this implementation of a federal regulation, 10 C.F.R. § 50.7. *Id.*

Speek testified concerning his role in the investigation of the incident on October 15, 2002. He stated that he became involved in the matter when Joseph Sipek, the Nuclear Oversight manager, contacted him in October 2002 to investigate the concerns that Hibler had brought up subsequent to the incident the morning of October 15. TR 214. Speek and Michael

Porter met with Hibler that same evening, when Hibler's security access had been revoked; the three met outside the main access facility. *Id.* Also present at the meeting were Tom Morini, the employee concerns investigator, and Debra Herb, the human resources manager from Venture (Hibler's employer). TR 214–15.

Based on what he heard at that meeting, Speek testified, he saw no reason to reverse the decision that Joseph Sipek had already made—to suspend Hibler's access to the facility. TR 216. Speek explained that “[t]here was nothing in the interview that indicated that I could re-establish a trustworthiness.” *Id.* Speek stated that, during the interview, Hibler told him that the job foreman “or someone named Jeff” stated at the ALARA meeting that the hold points for this job were waived. TR 217. At no time during the meeting did Hibler claim to have been too ill to know what he was doing, nor did he claim to have made a mistake in signing the work package. *Id.* Speek testified:

[T]here was nothing in the comments ... made by Mr. Hibler that indicated that he had made a mistake. It was everyone else's fault. “WSI is going rampant. They are ... not following the procedures.” ... He did not accept any of the blame, or give me any indication that he had made an error, that he had made a mistake.

*Id.* By the time the interview was over, Speek had formed the opinion that Hibler had deliberately falsified the inspection report. *Id.* Speek concluded that the hold-point inspection that Hibler had signed for had not, in fact, taken place. TR 218. Further, Speek concluded that the hold points had not been waived. TR 219. Finally, Speek reported that the other people recorded to have been present at the ALARA meeting did not recall any discussion of waiving hold points. TR 220.

### ***James Alan Meyer***

James Meyer is a QV inspector for Exelon and is currently stationed at Dresden Station, as he was in October, 2002. TR 235–36. During the October 2002 outage, Meyer worked the night shift at Dresden. *Id.* That outage, Meyer explained, was a planned refueling outage that takes place annually in the fall and typically lasts 15–30 days. TR 236–37. He recalled the specific job at issue as involving the replacement of a “recirc flow sensing line” with Hibler as the assigned QV inspector. TR 237. Meyer recounted in detail his recollection of the events of October 15, 2002.

Meyer testified that, on that morning, he received word that the crew on the job had paged the QV inspector and had been waiting forty-five minutes for him to arrive. TR 238–39. Meyer responded that he would find out what was going on; he proceeded to the OCC (outage control center) to look into the problem. TR 239. At the OCC, Meyer reported to Michael Porter (his supervisor) that the onsite workers were waiting for Hibler to perform an inspection. *Id.* Michael Porter instructed Meyer to prepare to take Hibler's place, and although Meyer had to do something else first, he was prepared to perform the inspection once he was finished. TR 240. Meyer then went to the Rad Protection desk to see about getting briefed for the job; he had not been present at the ALARA meeting. *Id.* At the Rad Protection desk, Meyer encountered

Hibler and Michael Porter. TR 241. Michael Porter and Meyer decided that, because briefing Meyer would take half an hour, they would have Hibler do the inspection because he had attended the ALARA briefing. *Id.* Meyer went with Hibler to suit up in radiation protection gear, then proceeded to the work site with him. TR 242–43.

At this work site, as Meyer explained is typical, there was a copy of the work package, sitting on a table outside the radioactive area. TR 243–44. Meyer testified that he saw Hibler look at the work package, and that Hibler then complained to Meyer that the package had not been updated for the most recent steps that the welders had completed. *Id.* Hibler’s complaint confused Meyer—he had thought that Hibler was there to work with the welders on the same step of the project that Hibler now complained was not recorded as completed. TR 245–47. When Meyer said as much to Hibler, Hibler responded that Meyer was mistaken, that the pipes had already been tack-welded into place because “an arrangement had been made” at the ALARA meeting to do the inspection *after* the tack-welding, not before. TR 247. Meyer responded by telling Hibler to go into the radioactive area and do the inspection; he admitted during testimony that he raised his voice as he did this. TR 248.

Meyer testified that Hibler then went into the radioactive area to perform his inspections; having pointed out some external marks on the pipes that the welders needed to fix, Hibler returned to the outer work area to wait for the welders to do the work. TR 250–51. Meyer observed that, while Hibler was waiting, he again had the opportunity to consult the work package copy. TR 251. Hibler then re-entered the contaminated area and approved the corrected welding work. *Id.* While Hibler was performing the inspections, Meyer spoke to the job foreman about whether the work package copy was up to date. TR 250–51. The foreman decided to request that the original work package be brought to the work area to resolve the question. *Id.* The original work package arrived from the office at the same time Hibler completed his re-inspection, so Hibler and the foreman sat down to complete the appropriate parts of the document. TR 252. At that time, Meyer testified, he was unaware of any pressure on Hibler to sign for anything he had not actually inspected. *Id.* He left the site to return to his office while Hibler and the foreman were working on the original work package. *Id.*

Meyer stated that he returned to his office with the intention of discussing what had happened with Michael Porter and Joseph Sipek. *Id.* When he did so, Joseph Sipek asked Meyer “where the arrangement had come from that [Hibler] was talking about. And I said, ‘well, I don’t know, because [Hibler] said it came up during the course of the ALARA [meeting]. ... I don’t know who possibly gave the authority’” to waive the inspections. TR 253. Only that evening, when Meyer arrived for his next shift, did he learn that Hibler had signed off as having *performed* the pre-fit-up and fit-up inspections. TR 275. At that time, Meyer believed that Hibler had not in fact performed those inspections because Hibler had told him at the work site that the pipes were tack-welded before he arrived for inspections. *Id.*

In general, Meyer testified, the WSI welders should not be working at a job without a work package. TR 258. He more emphatically opined that no inspector should perform an inspection without a work package. TR 259. Meyer stated that, at times, he has been aware of work packages not being updated from the field copy at the end of each shift, as is the proper

procedure: “sometimes [it] would take a shift or two before we could get the inspector to the original to where he could transfer his signatures.” *Id.*

Meyer reported that he has been aware of inspectors who “make an error and sign for something” incorrectly. TR 260. In such a case, he has allowed the inspector to make changes on the report to correct the situation, a procedure that includes writing a CR (condition report) about the error and its resolution. TR 259–60. At a typical outage, Meyer testified, he would expect three or four such errors to occur, although at the outage in question there was a “rare” quantity of eight or ten. TR 260.

After the incident the morning of October 15, Meyer wrote a CR about the reinspection and the issues that Hibler had raised at the work site. TR 266. Once he learned that Hibler had in fact signed for inspections that Meyer did not think he had actually performed, Meyer had few options: he could have sought the authority of managers to allow Hibler to correct his signatures on the work package, after which the WSI workers would have to have taken apart the weld to permit the work being done and inspected again. TR 277–78. Meyer said that he could not “really” have done this at that point. TR 278. What in fact occurred, Meyer explained, was that Exelon brought engineers to examine the welds and determine whether they needed to be taken apart and re-done; the engineers determined that re-doing the job was not necessary. TR 279–80.

Meyer described what would normally happen if workers pass a hold point. He explained that the QV inspector, having discovered the hold point bypass, would write a CR about it, would have the workers disassemble what work they had completed past the hold point, and then would inspect according to the work package. TR 262. If instead inspections have been waived, then Meyer would expect the QV inspector to mark those items on the work package in some way; “typically [the inspector] would have marked it ... would have put an asterisk or something and a note on the paper saying ‘waived,’ and a reason why they were waived.” TR 273.

Meyer went on to discuss his more general impressions of Hibler. He had worked with Hibler for about five years at the time of the incident and considered him to be an inspector of high integrity and performance. TR 254. More particularly, Meyer testified that he was aware of foreign-matter safety incidents during Hibler’s tenure at Dresden and that Hibler had consistently followed up on such safety concerns when he had them. TR 254–55. Further, Meyer testified that he has been aware of other incidents in which hold points were “passed by” by those performing the job. TR 258. Asked to speculate as to a motive for a QV inspector to collude with a welder to skip a hold point on a job, Meyer responded that the inspector would then avoid being accused of holding up a job. TR 267. Meyer could not think of any other possible motive. *Id.*

Meyer recalled that Hibler had originally been assigned to work the day shift during the October 2002 outage; he further recalled that Michael Porter and Richard Todd (a QV inspector assigned to schedule other inspectors during the outage) had scheduled him thus. TR 257. Meyer also remembered Richard Todd asking questions about how and why Hibler had come to work the night shift instead. *Id.* Meyer discussed his impressions of Michael Porter as a supervisor: “Sometimes he’s a little gruff with [his subordinates], sometimes he expects more

from them,” but otherwise Porter has “never really been a problem” that Meyer is aware. TR 264.

At trial, Hibler asked Meyer point-blank whether he believed that Hibler would intentionally falsify inspection documentation. “No,” was Meyer’s response. TR 265.

### ***Michael Porter***

Michael Porter has worked for Respondent for eight years, currently as Acting Lead and Assessor at Dresden. TR 281. He maintains an ECP (employee concerns program) office where employees can go to discuss their concerns without going through their immediate supervisors. *Id.* Porter is sometimes involved with employee concerns through this program. *Id.* In October of 2002, Porter was aware of the prohibition on retaliating against an employee for raising safety concerns; he had learned of this during employee training. TR 281–82. During the outage in October, 2002, Porter was the QV supervisor. TR 282. In his testimony, Porter described his relationship with Hibler and related his recollection of the events leading to the revocation of Hibler’s security status.

Porter began by providing background on some of the events in question. He explained that the American Society of Mechanical Engineers (“ASME”) has compliance requirements to which Respondent must conform in order to maintain its license. TR 284. One of those requirements is to use weld records that are used and signed off by inspectors as the work is inspected. *Id.* Under ASME requirements, it is improper for an inspector to sign off as having performed an inspection that he or she has not actually performed. TR 283.

Porter also explained the specific inspections that are at issue. The purpose of a pre-fit-up inspection when welding two pipes together is to be certain that no foreign materials are present on the inside or outside of the pipes that can get into the weld itself, therefore potentially compromising its strength. TR 286. A fit-up inspection, on the other hand, ensures the correctness of the dimensions and angles of the pipes as they come together so that all safety requirements will be met in the finished product. *Id.* Once the pre-fit-up and fit-up inspections are performed, then the pipes are tack-welded together to hold them in place for the actual welding. *Id.*

During the refueling outage of October, 2002, Hibler was utilized as a pipe fitter QV inspector. TR 287. One of the QV inspectors, Richard Todd, was given the task of scheduling QV inspectors for the outage; he scheduled Hibler for the day shift. *Id.* Porter explained that QV inspectors changing schedules is an issue because union workers must be notified within a certain time of schedule changes, or their employers must pay them their premium rate for the new shifts. TR 288. QV inspectors changing shifts can also create shortages of workers later in an outage. *Id.*

Porter described his past relationship with Hibler. He and Hibler had worked together at the LaSalle Station in 1989. TR 300. Porter proctored an exam of QV inspectors and then forwarded the exams to the main office for grading, but the main office lost the exams and, as a result, Hibler was not qualified for the pending work before it was finished. TR 300. Porter

believed that Hibler blamed him for being laid off because Hibler believed Porter was responsible for the exams being lost. TR 300–01. Later, in 1994 or '95, Porter and Hibler worked together at the Quad Cities Station; Hibler raised a complaint that resulted in Porter being called into his supervisor's office. TR 301. Then, in 1998 or '99, Hibler complained to the NRC that Porter had not hired him for a position at Dresden as a result of Hibler's complaints about conditions at the Braidwood Station. TR 302. The NRC questioned Porter about the hiring, which had been his responsibility. *Id.* Porter admitted that it was "less stressful" for him and Hibler not to work the same shifts during outages because of their history. *Id.* However, Porter stated that he had no role in deciding to revoke Hibler's security status after the incident that gave rise to this claim. TR 295.

Returning to the outage of October, 2002, Porter testified that Hibler was assigned to the "recirc sensor piping replacement" project during the outage. TR 289. The morning of October 15, during the "turnover" meeting that occurs between departing night workers and incoming day workers, Porter learned from James Meyer that Hibler had claimed the existence of a waiver of the pre-fit-up and fit-up inspections. TR 290. Porter had not been aware of any waivers on this project; when Joseph Sipek (the Nuclear Oversight manager) asked Porter whether there had been a waiver, Porter replied that, no, only Sipek was authorized to waive any hold points. *Id.* Joseph Sipek then instructed Porter to find out from Hibler who had waived the hold points and then to report back to Sipek. *Id.*

Following the turnover meeting, Porter brought Hibler and Richard Todd into his office and asked Hibler who had waived the hold points. TR 291. Porter testified that Hibler told him, "there was a prearranged deal with WSI that they would be waived." *Id.* Porter elaborated that when he asked Hibler who had made that deal, Hibler responded that it was a man named Jeff with WSI. *Id.* When Porter again asked Hibler who had waived the hold points, Hibler then responded that the hold points had *not* been waived, that he had signed off on them. TR 292. Porter testified that he then asked Hibler how he was able to perform the pre-fit-up and fit-up inspections if the pipes were already tack-welded together when he arrived. *Id.* Hibler did not respond to the question. *Id.*

At this point, Porter testified, he asked Joseph Sipek to join the meeting his office. *Id.* When Sipek arrived, he asked Hibler who had waived the hold points on this job. *Id.* Porter interjected that the issue had changed, that now it appeared that Hibler had signed off as having done inspections that he had previously claimed were waived. *Id.* Porter related that Joseph Sipek asked Hibler whether he had performed the pre-fit-up and fit-up inspections; Hibler replied that he had not. *Id.* Sipek then asked whether Hibler had signed as having performed the inspections; Hibler responded that he had. *Id.* Finally, Porter testified, Joseph Sipek asked Hibler to explain his actions, but Hibler did not respond. TR 292–93.

Porter testified that at no time during these meetings did he hear Hibler say that he was too sick to perform the inspections, that he had been pressured to sign off for inspections he had not performed, that he had signed off on the inspections by mistake, or that the work package had not been available to him at the worksite. TR 291–94. When asked what might have motivated Hibler to falsify the inspection reports, Porter speculated that he might have wanted to reduce his time on-site for this job, which in turn would have reduced his exposure to radiation in

a highly contaminated site such as the one in question. TR 298–99. Alternatively, if Hibler entered into a special agreement with the WSI workers to bypass the hold point, then he did something that he was not authorized to do. TR 303. In addition, a WSI worker who entered into such an arrangement would also be in the wrong; Porter stated that he was not aware that this possibility had ever been investigated. *Id.*

Porter explained the procedure for a QV inspector to document that a hold point has been waived. He said that the inspector would write “waived” on the signature areas for the inspections or mark them with an asterisk, then on that same sheet write the name of the person who had authorized the waiver. TR 297. Signing the spaces, Porter explained, indicates that the inspection has been performed; if an inspector signs them knowing that the inspection was waived, then the inspector’s act is improper. *Id.*

## **Documentary Evidence**

### ***Complainant’s Exhibit A***

This document consists of nine condition reports (“CR’s”) provided by Respondent to Complainant during discovery. The reports themselves are difficult to decipher, as they are filled with unfamiliar abbreviations, industry terms, and fragmented statements. All the CR’s appear to have been prepared in response to situations in which one or more QV inspectors failed to perform a task properly. In only one CR is any individual action noted to have been taken (counseling of the inspector involved); in all others, any noted response is more generalized (holding a meeting with all inspectors, investigating possible common root of problems). Two of the CR’s note the incident in which Hibler was involved, but neither notes the corrective action taken against him.

### ***Complainant’s Exhibit B***

This document consists of additional CR’s, although they are in a slightly clearer format. The relevant contents are as follows:

- CR #80904. A QV inspector who was inspecting a weld noticed defects in another weld, which had passed inspection by another QV inspector. The investigation included re-inspection of a sampling of the QV inspector’s previously inspected welds.
- CR #96366. A QV inspector failed to note a discrepancy in the correct torque value for an anchor – if the inspector had compared the work package to the check list, then he/she would have caught the error. The failure caused the QV inspector to erroneously accept the anchor even though it was over-torqued. The investigation centered on whether to re-set the event clock because of this incident.
- CR #126433. A QV inspector failed to note improperly routed conduits, with the result that the inspector accepted the conduits that were both routed and labeled incorrectly. The work package was revised to include corrections to the error, once it was caught. The cause of the QV inspector’s failure was noted as “inattention to detail.” The department then held a “stand-down” for QV inspectors “to reinforce expectations and responsibilities in proper



place keeping and inspection fundamentals.” Finally, the CR notes that “The Exelon inspector was counseled using MARC principles.”

- CR #108194. Errors in recordkeeping for a job involving boiler welds were not caught by a QV inspector, who signed off that the records were complete. The welders on the project were inexperienced and needed more oversight, the CR concluded; in addition, the QV inspector was responsible because of “lack of attention to detail .... Verifying documentation is part of final weld inspection.” The problem was only one of documentation, not of the job being performed incorrectly. The CR notes no corrective action being taken in response to the incident.
- CR #111027. QV inspectors signed for the final inspection being completed before the work was actually finished. Workers pointed out the problem to the QV inspector, and the work was performed and inspected. The QV work for that job was reviewed, but no other discrepancies were found. The remainder of the CR is somewhat cryptic, but I do not discern that any further corrective actions were taken.
- Nuclear Event Report connected to CR #127192. A QV inspector failed to identify wiring that was connected to the wrong terminals. The correct placement of the wires was detailed in a modified work package, which the QV inspector did not use. The Event Report notes that the work package was modified to correct the problem and that the QV inspector was “temporarily placed on hold from performing electrical inspections” during the investigation.
- Nuclear Event Report connected to CR #127345. A QV inspector failed to find that power cables were incorrectly installed; a corrected work package had been issued. The installation error was corrected, and the QV inspector was “temporarily placed on hold from performing electrical inspections” until the conclusion of the investigation. Details of the event were discussed with the QV inspectors, and “QV responsibilities/expectations were reinforced.” The Event Report notes that one contributing factor in the incident was “perceived time pressure” on the part of the workers. Some of the listed “lessons learned” for QV inspectors from the incident seem relevant to note, particularly as this incident seems to have taken place in very close temporal proximity to Hibler’s incident:
  - “QV inspectors must remain independent from other site organizations (especially the installers). ... If you have become involved, step back and reestablish your independent role prior to performing an inspection or ask another inspector to peer check or perform the inspection.”
  - “Don’t rely on verbal conversations from shift turnovers or installer information that is not backed up by a design document, procedure, or work instruction.”
  - “Don’t let perceived time pressure influence inspection time needed to ensure that an installation is correct.”
- Nuclear Event Report connected to CR #126433. The CR is summarized above; the Event Report does not elaborate in any way significant to this claim.

### ***Respondent’s Exhibit 1***

This document is a letter from OSHA to Richard Hibler, dated February 10, 2003. In the letter, OSHA Area Director Charles Shields sets forth his findings upon investigation into the incident. The findings are, in essence, that Hibler engaged in protected activity and suffered adverse action, but that Respondent dismissed him because he had falsified an inspection document.

### ***Respondent's Exhibit 2***

This letter from Susan Techau to Richard Hibler is dated October 28, 2002. It informs Hibler that his access to Exelon power stations has been cancelled "due to an ongoing investigation at Dresden." Techau apprises Hibler that a final decision on his status will be made once the investigation is complete.

### ***Respondent's Exhibit 3***

This letter from Susan Techau to Richard Hibler is dated December 4, 2002. It sets forth Respondent's conclusion that Hibler falsified inspection documentation, and that as a result Hibler's unescorted access to Exelon nuclear stations has been revoked. Further, the letter details steps available to Hibler to appeal Respondent's decision.

### ***Respondent's Exhibit 4***

This document is a letter from Paul Schultz to Joseph Sipek, dated October 16, 2002. It informs Sipek of the change in Hibler's "Exelon Certifications" to inactive status, for the reason that Hibler signed for inspections but did not perform them.

### ***Respondent's Exhibit 5***

Joseph Klevorn wrote this Report of Fact Finding Investigation dated October 16, 2002. Klevorn consulted statements from Joseph Sipek, Michael Porter, and Richard Todd, and he interviewed Dwight "Whitey" Barnes (the welding foreman), Gary Walker (lead QV Inspector for Venture), and James Meyer. Klevorn also examined (and attached to his report) the relevant work order, the ASME Welding rules applicable to the site, the ASME Welding record sheet that Hibler signed, the ASME Welding "Nuclear Station Work Procedures" applicable to the Dresden Station during October 2002, and the CR's attached to this incident. On the basis of his investigation, Klevorn concluded that Hibler had falsified the inspection documents by signing for inspections that he had not conducted.

### ***Respondent's Exhibit 6***

These ASME Welding "Nuclear Station Work Procedures," dated June 12, 1998, are a complete copy of the document excerpted in RX-5. Their purpose is "[t]o set the general requirements for the control and inspection of ADME Code welding." RX-6 at 4. They include step-by-step requirements for pre-fit-up and fit-up installations and inspections.

### ***Respondent's Exhibit 7***

This letter from the NRC to John Skolds, the president of Exelon, is dated October 30, 2003 and attaches the NRC's Dresden Station inspection report for the period of July 1 through September 30, 2003. The inspection report covers incidents that Dresden reported to the NRC as having occurred.

### ***Respondent's Exhibit 8***

This letter from NRC to John Skolds is dated October 8, 2003 and includes a synopsis of the NRC's conclusions after investigating the October 15, 2002 incident involving Hibler. The NRC's Office of Investigations concluded that Hibler failed to perform the pre-fit-up and fit-up inspections for four welds, then falsified the ASME weld records by signing as having performed the inspections. The NRC's letter states that Hibler's actions placed Exelon in violation of two federal regulations. Based on Exelon's report of the incident and the corrective actions it took, the NRC classified the incident as a "non-cited violation." In addition, the NRC concluded that Hibler's allegations of whistleblower discrimination by Exelon were unsubstantiated.

### ***Respondent's Exhibit 9***

Robert Speek, the ECP investigator, wrote this one-page e-mail to Joseph Sipek on the evening of October 16, 2002. Speek identified two issues for investigation: (1) discovering whether a QV Inspector signed off for inspections he had not performed and (2) addressing concerns that Hibler raised during the investigation. Speek consulted Joseph Sipek's notes from the interview he held with Hibler on the morning of October 15th; Speek cited Sipek's statement that Hibler admitted signing for the inspections but not performing them. Speek further quoted from Sipek's notes, which stated that Hibler excused his actions by saying that what he did was of no consequence because "WSI does what ever they want." Because Joseph Sipek's notes included references to Gary Walker and to others at the ALARA meeting, Speek reports that he spoke to those people and was unable to confirm that waivers to hold points were ever discussed. Because waiving hold points is "a significant issue, ... it would seem logical that someone else would recall the topic" being discussed, opines Speek. Based on this evidence, Speek concludes that "[a]n inspection was signed off that was not made," and that "[a] waived Hold Point was not confirmed or documented." Speek recommends to Joseph Sipek that "actions be taken in relation to Mr. Hibler relative to qualifications/certifications as you deem appropriate."

As to Hibler's observations about related problems at Dresden, Speek wrote that he was awaiting a written list of problems that Hibler said he would produce. Hibler did raise a few specific concerns during his conversation with Robert Speek; Speek wrote that "I will follow up on these comments to validate the concern."

### ***Respondent's Exhibit 10***

Robert Speek wrote this one-page e-mail to Joseph Sipek during the early morning of October 16, 2002. Speek wrote the e-mail following an interview with Hibler, during which Hibler was "visibly upset" and made frustrated comments. The e-mail chiefly brings up issues that Speek further addressed in RX-9.

### ***Respondent's Exhibit 11***

This ALARA meeting attendance sheet, dated October 13, 2002, documents the people in attendance at the meeting regarding the October 15, 2002 job. Hibler's is one of the names listed.

### ***Respondent's Exhibit 12***

This excerpt from the Code of Federal Regulations, Chapter 50, states applicable licensing and operating regulations for nuclear power plants under the NRC's jurisdiction.

### ***Respondent's Exhibit 13***

This document, entitled "Access Authorization Program," defines "the requirements for obtaining, maintaining, transferring and denying unescorted access to Exelon Nuclear Power Stations." According to the testimony of Susan Techau, this document includes the procedures in place during October, 2002. TR 198-202.

### ***Respondent's Exhibit 15***

This written statement by Hibler, dated December 13, 2002, provides "additional information" about his claim to the OSHA investigator.

### ***Respondent's Exhibit 16***

This NRC Report of Investigation, dated June 23, 2003, sets forth the NRC's factual and legal findings regarding (1) deliberate falsification of records by Hibler and (2) discrimination against Hibler by Exelon for raising QV concerns. The report states that, "[b]ased on the evidence developed, this investigation did substantiate that a Quality Control Inspector at [Dresden Station] deliberately falsified quality control records. Subsequently, the allegation of discrimination for raising quality control concerns was not substantiated." RX-16 at 3. Investigators with the NRC interviewed Hibler, Dwight Barnes, James Meyer, Michael Porter, Joseph Sipek, and Gary Walker.

### ***Respondent's Exhibit 17***

This NRC investigation status record, dated June 26, 2003, provides a chronology of events in the investigation process. The record includes a brief summary of Hibler's statements in an interview with the NRC investigator, William Franz. Hibler's statements as recorded are materially consistent with the account in the NRC Report of Investigation at RX-16.

## **DISCUSSION**

### **Respondent's Coverage by the Act**

Under 42 U.S.C. § 5851(a)(2), Respondent is an "employer" for purposes of the Act's whistleblower protection provisions if it is a "licensee of the Commission." Ample evidence exists in the record that Exelon Generation Company, LLC is a licensee of the NRC, including documents from the NRC (RX-17, RX-17) and testimony from employees of the Respondent (TR 146, 195, 213, 284). I find that Respondent is an "employer" as defined by the Act for purposes of this claim.

## Complainant's Eligibility for Whistleblower Protection

Respondent's closing brief states that Complainant is precluded from pursuing this claim because he deliberately engaged in a violation of regulatory requirements by knowingly falsifying records. Respondent's Post-Trial Brief at 2. In support of its contention, Exelon refers to the NRC report (RX-16), which states that the NRC concluded on October 18, 2003 that Hibler falsified DNPS quality records in violation of NRC regulations. *See* 42 U.S.C. § 5851(g); Respondent's Post-Trial Brief at 2. Respondent further refers to "the record" as a whole in support of its argument. Respondent's Post-Trial Brief at 4-5.

The Act provides the following exception to its whistleblower protection:

g) **Deliberate violations.** Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.

42 U.S.C. 5851(g). Similarly, the Regulations state that whistleblower protection to employees does not apply when a Complainant who, "acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of a Federal statute listed in [29 C.F.R.] § 24.1(a)." <sup>5</sup> 29 C.F.R. § 24.9.

The inquiry is therefore:

- (1) Did Hibler violate the ERA or the Atomic Energy Act?
- (2) Did Hibler do so deliberately?
- (3) Did Exelon or any agent thereof direct Hibler to commit the violation?

If the answers to the first two questions are affirmative, and if the answer to the third question is subsequently negative, then I must conclude that Complainant is not eligible for the protections of the Act and regulations issued thereunder. As 42 U.S.C. § 5851(g) "provides an affirmative defense on which the respondent bears the burden of proof," the preponderance of the evidence must support Exelon's contention. *Fields v. Florida Power Corp.*, 96-ERA-22, n.3 (ARB Mar. 13, 1998); *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Final Dec. and Ord., Mar. 15, 1996, slip op. at 6.

### Violation

The internal report of Joseph Klevorn, which is in the record at RX5, contains a photocopy of the "ASME Weld Record Continuation Sheet" in question; the pages show that Hibler signed for pre-fit-up and fit-up inspections of welds 4, 7, 8, and 9 of this work package.

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<sup>5</sup> The statutes listed at 29 C.F.R. § 24.1(a) include the Energy Reorganization Act of 1974, 42 U.S.C. 5851, which in turn, at Section 201, empowers the Nuclear Regulatory Commission to license and regulate nuclear power plants. Regulations promulgated by the NRC include 10 C.F.R. § 50.9 (requiring completeness and accuracy) and 10 C.F.R. Part 50, Appendix B (requiring an independent and effective Quality Assurance organization); these are the Regulations that Respondent alleges Complainant deliberately violated. Respondent's Post-Trial Brief at 5.

RX-5 26–31. At the hearing, Hibler testified that he did not perform these inspections. TR 82. Hibler has not, at any point in these proceedings, suggested that the signatures on the weld records are not his. I find that Respondent has established that Hibler signed for inspections that he did not perform.

The NRC Report states the NRC’s conclusion that deliberately falsifying quality control records is a violation of regulations at 10 C.F.R. § 50.5 and 10 C.F.R. § 50.9. RX-16 at 3. As those regulations are promulgated pursuant to the ERA and to the Atomic Energy Act, “a violation of these regulations [constitutes] a violation of the Atomic Energy Act and the ERA.” *Fields v. Florida Power Corp.*, 96-ERA-22, n.9 (ARB March 13, 1998). Therefore, if I find that the violation was deliberate, then I must also find that Hibler has violated the ERA and Atomic Energy Act.

### Deliberate Nature of Violation

Perhaps the most difficult question to resolve in this case is whether Hibler falsified the inspection documents “deliberately.” The Administrative Review Board (“ARB” or “the Board”) defined that term for purposes of an ERA claim:

[W]e find that to establish a valid Section [5851](g) defense, a respondent must show that a complainant willfully or recklessly caused a violation of the ERA or the Atomic Energy Act, that is, that the complainant acted with knowledge or with reckless disregard of whether his or her act would cause a violation.

*Fields v. Florida Power Corp.*, 96-ERA-22, 13 (ARB March 13, 1998). Several witnesses testified that, as a QV inspector, Hibler would have known of the regulatory requirements governing his job. Gerald Bitner, one of Hibler’s witnesses, stated that inspectors are tested for knowledge of QV rules and practices because of federal regulatory requirements. TR 17. Likewise, Joseph Sipek elaborated that the regulations at 10 C.F.R. Part 50 require written reports to be complete and accurate. TR 146. After hearing the testimony of the witnesses, I am satisfied that Hibler was aware that falsifying a weld record would violate federal regulations.

At the hearing, Hibler testified and emphatically restated that he signed the weld records in error. TR 82, 98, 111. He denied ever telling Michael Porter or Joseph Sipek that the hold points in question had been waived. TR 105. Further, Hibler testified that he did not know when he entered the inspection area that the pipes had already been tack-welded together, and that because he had no work package he did not know that he needed to perform pre-fit-up and fit-up inspections on the welds. TR 199. Other evidence undermines Hibler’s credibility on these issues.

The testimony of James Meyer — whom I found to be a particularly credible witness — provides evidence that Hibler knew what tasks he was to perform before he entered the radioactive area, that Hibler knew when he went to the job site that the pipes were already tack-welded together (precluding pre-fit-up and fit-up inspections), that Hibler claimed the relevant hold points had been waived, and that Hibler did not appear to be rushed or pressured when he signed the work package. TR 245–47, 252. Meyer, who accompanied Hibler to the job site the

morning of October 15, 2002, testified that Hibler told him before entering the inspection area that the pipes had been tack-welded into place because “an arrangement had been made” at the ALARA meeting to conduct the inspections this way. TR 247. Meyer went on to testify that Hibler, having read the work package copy, twice entered the radioactive area to perform inspection duties. TR 250–51. Meyer’s testimony strongly suggests that Hibler knew what inspection steps he was to be performing and knew that he could not actually do the pre-fit-up and fit-up steps. Additionally, Meyer described Hibler’s complaint that the work package copy was not up to date; Meyer said that the original work package arrived on-site at approximately the same time Hibler finished his inspections. TR 252. Finally, Meyer testified that he did not perceive any pressure on Hibler to sign for any steps that he had not performed; this undermines Hibler’s claims of error due to pressure. *Id.*

Corroborating James Meyer’s testimony that Hibler claimed waiver on the relevant hold points was the testimony of Joseph Sipek, Michael Porter, and Robert Speek. Sipek and Porter, like Meyer, testified that they were present at a meeting with Meyer at approximately 6 a.m. on the morning of October 15. TR 154, 252–53, 290. At that meeting, Meyer told Sipek and Porter that Hibler was claiming that the hold points had been waived. *Id.* Sipek and Porter testified that Hibler told them during two meetings that morning (one with Porter, Hibler and Richard Todd, the other with Sipek, Porter and Hibler) that the inspections had been waived pursuant to some kind of agreement during the ALARA meeting. TR 159–60, 291. Robert Speek testified that later, on the evening of October 15, Hibler told him the same thing. TR 217.

As so much testimony among witnesses is consistent on the issue of claimed waiver, I am satisfied that James Meyer testified truthfully and accurately concerning the remaining elements in question; namely, that Hibler already knew that the pipes were tack-welded together when he reached the work site, that a copy of the work package was present at the site, and that Hibler told several supervisors and investigators that the hold points had been waived.

Further corroborating my belief that Hibler’s is the inaccurate account of the events of October 15, 2002 is the NRC Report, which summarizes the statements of several workers who later testified at the ALJ hearing. The testimony of James Meyer, Michael Porter, and Joseph Sipek is materially consistent with the accounts of their statements in the NRC report. However, Hibler’s statement, as recorded in the NRC report, is inconsistent with his testimony at the hearing on two issues. The first is that, in the NRC report’s summary of his testimony, Hibler attributed his accidentally signing the inspection document to fatigue and stress (that he was “under duress” from being ordered back into a radioactive area after just having been contaminated at another work site). At the hearing, on the other hand, Hibler attributed his error to illness (a cold) and the effects of cold medicine, in addition to the pressure he characterized as “duress” from James Meyer. TR 111. The second inconsistency between the NRC report and Hibler’s testimony is that, in the NRC report, Hibler is reported to have claimed that he was fired because Respondent wanted to avoid blaming WSI for bypassing hold points. In his trial testimony, however, Hibler opined that Michael Porter and Robert Speek “made an issue” of the incident because Hibler had raised the safety concern of there being no work package at the job site. TR 98–100. In both the NRC report and at the hearing, Hibler also provided a secondary reason for the employment action: that Michael Porter was retaliating against him for obtaining a night-shift schedule against Porter’s wishes. *Id.*

Because I find Hibler's testimony to be untruthful, I am further inclined to credit other Exelon employees' accounts of later events. For example, Joseph Sipek and Michael Porter consistently testified that Hibler changed his explanation for his actions at the worksite on October 15. TR 160–61, 292. I am convinced that Hibler's first explanation of "waiver" was closest to the truth, that he had entered into (or acquiesced to) an informal agreement to bypass the hold points so that the WSI workers could finish the job more quickly. Hibler called this informal agreement a "waiver," although other Exelon employees consistently testified that such a waiver could not have been valid because it was not made by the Manager of Nuclear Oversight, Joseph Sipek. TR 156, 253, 290. As Exelon has demonstrated, QV inspectors do not sign for waived inspections, but instead note the waiver on the weld record. TR 273. That Hibler later changed his explanation to "I made an error, I signed the wrong boxes" only strengthens the Respondent's argument that Hibler knew he had falsified the weld record. TR 82; Respondent's Post-Trial Brief at 2.

After hearing all the testimony and reading all the documentary evidence, I am convinced that Hibler knew before entering the work site that the pipes had been tack-welded together. He knew that he was supposed to perform pre-fit-up and fit-up inspections. Finally, I am convinced that Hibler told several other Dresden workers that the hold points had been waived; his purpose in doing this was to justify having falsely signed for inspections that he had not performed. Respondent has therefore shown by a preponderance of the evidence that Hibler knowingly falsified the weld record and that this constitutes a deliberate violation of the applicable federal acts, and I so find.

#### Direction by Respondent

As Exelon has demonstrated that Hibler wilfully violated the Act and/or the Atomic Energy Act, the final inquiry in this question is whether Respondent, or any of its agents, directed Hibler to commit that violation. Hibler testified that he signed for the pre-fit-up and fit-up inspections in error; he made no allegation that anyone else directed him to do so. TR 111. Hibler attributed his mistake, in part, to the "rush situation" surrounding this particular job, but I give more credence to James Meyer's account of the situation: that when Hibler was signing the original work package, he did not appear to be under any pressure. TR 111, 252. Although Hibler testified—and Meyer confirmed—that Meyer yelled at him to *perform* the required inspections, that fact does not relate to Hibler's actions in later signing for the inspections. TR 77, 248. I therefore find that no credible evidence in the record suggests that Exelon, or any agent thereof, directed Hibler to falsify the weld record.

#### Conclusion

As explained in this section, I find that Complainant is ineligible for the whistleblower protections of the Act because the preponderance of the evidence shows that he deliberately caused a violation of the Act and/or the Atomic Energy Act. *See* 42 U.S.C. 5851(g); 29 C.F.R. § 24.9; *Fields v. Florida Power Corp.*, 96-ERA-22, n.3 (ARB Mar. 13, 1998); *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Final Dec. and Ord., Mar. 15, 1996, slip op. at 6. I will therefore not make findings regarding the merits of Hibler's claim under the ERA.



RECOMMENDED ORDER

I hereby recommend that the Secretary of Labor dismiss the complaint of Richard D. Hibler in this proceeding.

**A**

MICHAEL P. LESNIAK  
Administrative Law Judge

**NOTICE:** This recommended decision and order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this recommended decision and order, and shall be served on all parties and on the Chief