U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 96-013
ALJ CASE NO. 95-ERA-13
DATE: September 27, 1996

In The Matter of:

ROBERT SEATER,
COMPLAINANT,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
RESPONDENT,

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

DECISION AND ORDER OF REMAND

This case arises under Section 211, the employee protection provision, of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1994).[2/] Before this Board for review is the Recommended Decision and Order (R. D. and O.) issued on October 17, 1995, by the Administrative Law Judge (ALJ). The ALJ concluded that Complainant, Robert Seater (Seater), had failed to establish that Respondent, Southern California Edison Company (SCE), had violated the ERA by taking adverse action against Seater in retaliation for engaging in activity protected under the ERA. The ALJ therefore recommended that the complaint be dismissed.

1/ On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia,* the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1994), and the implementing regulations, 29 C.F.R. Part 24, to the newly created Administrative Review Board (ARB). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the ARB now issues final agency decisions.

2/ Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.

In this complaint, Seater has alleged that SCE's decision to terminate Seater's employment as a contract worker at the San Onofre Nuclear Generating Station (SONGS) and, subsequently, to accelerate the termination of Seater's employment at SONGS were in violation of the ERA. In addition, Seater has alleged that he suffered from a hostile work environment at SONGS.

Based on review of the record and the arguments of the parties, we conclude that the case must be remanded to the ALJ for a supplemental hearing regarding the question of whether acceleration of Seater's termination date from December 1994 to September 1994 was in violation of the ERA.[3/] Although we agree with the ALJ's conclusion that Seater has failed to establish that SCE's decision not to extend Seater's contract employment beyond December 1994 was retaliatory, we provide clarification of the ALJ's analysis on that issue. We decline to rule on the question of whether the evidence establishes a hostile work environment, pending completion of further proceedings on remand before the ALJ.

DISCUSSION

I. Procedural issues

A. Question of Bias

Initially, we reject Seater's assertion that he was deprived of a fair hearing in this case as the result of bias on the part of the ALJ. As discussed *infra,* we agree with Seater that the ALJ erred in excluding certain documentary evidence and testimony. The ALJ committed exclusionary errors affecting both parties, however, and the record does not establish that the errors prejudicial to Seater are attributable to improper bias harbored by the ALJ.

The record in this case does indicate that the ALJ directed remarks to Seater's counsel at the hearing that suggest annoyance and frustration. *See, e.g.,* T. 382, 696-97, 1313-14, 1734, 1737.[3/] The hearing transcript also indicates, however, that the ALJ made apparent efforts, through banter with counsel for both parties, to defuse the exceptional level of tension and hostility generated in the courtroom by the issues arising in this case. *See, e.g.,* T. 966-67, 1513-14, 1585-86, 1811. Moreover, various rulings in favor of Seater at hearing demonstrate the ALJ's efforts to be even-handed in conducting the hearing and to provide ample latitude for the complainant to raise issues not strictly concerned with the question of retaliatory intent in this case. *See, e.g.,* T. 559-62, 752, 815, 935-36, 965, 1037, 1107, 1109-17, 1333, 1345, 1363-64, 1556, 1638, 1814; *see also* T. 1628

[3/] The parties have filed several motions before this Board. Orders concerning the granting of extensions of time in which to file briefs have been issued. Issues pertinent to re-opening the record and to supplemental authority cited by the parties, *see* Ltrs. of 5/5/96, 7/10/96, 7/31/96, 8/5/96 from Seater; Resp. Ltrs. of 5/16/96, 7/31/96, 8/6/96, are disposed of, either expressly or in substance, in this decision. It would not serve the interests of judicial economy to address further the specifics of those motions here.

[4/] The following abbreviations are used herein for references to the record: Hearing Transcript, T.; Complainant's Exhibit, CX; Respondent's Exhibit, RX; ALJ's exhibit, ALJX.

(ALJ's explanation of his approach of being flexible with both sides regarding admission of documentary evidence not exchanged prior to hearing), 1783-84 (ALJ's response to Seater's counsel's objection to "double-teaming" by opposing counsel).

As the record does not establish that bias on the part of the ALJ deprived Seater of a fair and impartial hearing, and in view of the clear instructions to guide the ALJ in conducting the supplemental hearing in this case that we provide *infra*, we do not conclude that reassignment of the case for a new hearing before a different ALJ is warranted.[4/] *Cf. Gimbel v. Commodity Futures Trading Comm.*, 872 F.2d 196 (7th Cir. 1989)(rejecting bias contention in case in which ALJ exhibited impatience and displeasure with both counsel and ruled in favor of petitioner several times)*; Donnelly Garment Co. v. National Labor Relations Board,* 123 F.2d 215 (8th Cir. 1942)(rejecting bias contention in case in which hearing examiner "made comments which might better have been omitted").

We do note, however, that the ALJ's role in maintaining order and decorum in the courtroom may become an onerous task in some instances. *See, e.g.,* T. 1322-23, 1332-33, 1345, 1395, 1419-40, 1881-82. We recognize that the difficulties of distinguishing between the actions of a zealous advocate and those of an overzealous opponent, while attempting to ensure the efficient use of Federal resources in the adjudication of cases before him, may substantially increase the burden on the ALJ. We therefore caution counsel for both parties that denigrating statements regarding opposing counsel and overtly hostile exchanges, *see, e.g.,* T. 394, 1077, ll. 11-12 (Seater's counsel), 394, 1332, ll. 16-17 (SCE's counsel), as well as introduction of extraneous issues, T. 799 (comment,"for the record," that certain exhibits had been provided to Congressional investigators) serve only to cloud the issues at hand and to delay the completion of the adjudication of this case by the Department of Labor.[6/] *Cf. Frampton v. Dept. of the Interior,* 811 F.2d 1486 (Fed.Cir. 1987)

[5/] Seater urges that a financial transaction engaged in by the ALJ during the course of the hearing in this case poses "at least a potential appearance of impropriety." Ltr. of 1/24/96, accompanying Comp. Br. Seater states that the ALJ entered into a financial arrangement concerning the mortgage on the ALJ's residence with a subsidiary of a parent company having a significant role in the energy industry. *Id.* In support of his view, Seater cites the importance of the outcome of the debate over out-of-specification fasteners, which formed the basis for Seater's nuclear safety concern at SCE, to the nuclear industry. *Id.* Although the ALJ did err in excluding evidence relevant to the extent of the controversy at SCE over out-of-specification fasteners, *see* discussion *infra*, the ALJ also properly concluded that a determination concerning the merits of the divergent views on the fastener issue was not within his purview. R. D. and O. at 5 n.4. Furthermore, the asserted connection between the ALJ and the energy industry is too tenuous to pose a prohibited appearance of impropriety. *See generally* 18 U.S.C. Ch. 11, Bribery, Graft and Conflicts of Interest, §§ 201, 208; 29 C.F.R. § 0.735-12, Conflict-of-interest laws (1995).

[6/] These principles are equally applicable to proceedings before this Board. The parties should also be mindful that reliance on inaccurate factual statements in briefs and motions does not enhance the persuasive value of the party's corresponding contention; it merely delays the decisional process.

(continued...)

(remanding case to provide petitioner an opportunity to complete presentation of his case but cautioning the petitioner that it was his attorney's responsibility "to prepare his case in advance of the additional hearing and to avoid burdening the presiding official with irrelevant testimony or repetitive evidence.")[7]; *see generally Lockert v. United States Dept. of Labor,* 867 F.2d 513, 519 (9th Cir. 1989)(addressing broad discretion of Secretary in remanding case to ALJ).

B. Evidentiary issues

Seater initially alleges error by the ALJ in excluding various categories of evidence on relevancy grounds. Specifically, Seater challenges the ALJ's exclusion of evidence concerning the technical merits of Seater's fastener concern and the extensive debate in the nuclear industry about the fastener issue, and evidence concerning alleged collusion between the NRC and SCE. Comp. Br. at 25-30.

Seater also urges that the ALJ erred in excluding expert testimony concerning ways in which surveillance of Seater and others in the SCE test laboratory could have been effected by SCE management. Comp. Br. at 25-27. In addition, Seater urges that the ALJ erred in refusing to admit the written statement of an SCE manager who was critically ill at the time of the hearing and also erred in refusing to allow the manager's testimony to be taken telephonically at the hearing. Comp. Br. at 23-25. Further, Seater challenges the ALJ's exclusion of exhibits proffered by Seater on the last day of hearing, alleging that the ALJ improperly admitted SCE exhibits although they were also untimely proffered. Comp. Br. at 28.

Regulations concerning the investigation and adjudication of complaints filed under the ERA are found at 29 C.F.R. Part 24. Also relevant to the proceedings below are the Rules of Practice and Procedure for the Office of Administrative Law Judges (OALJ), found at 29 C.F.R. Part 18, and the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 18.1; *see also Nolder v. Kaiser Engineers, Inc.,* Case No. 84-ERA-5, Sec. Dec., June 28, 1985, slip op. at 5-6.

1. Exclusions of evidence on relevancy grounds

Pertinent to the issue of relevancy, Section 18.401 of the OALJ Rules of Practice and Procedure defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

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Cf. Avitia v. Metropolitan Club of Chicago, 49 F.3d 1219, 1224 (7th Cir. 1995)(stating that "A misleading statement of facts increases the opponent's work, our work, and the risk of error.").

[7] Similar to the circumstances in *Frampton*, Seater's counsel misjudged the length of time the hearing would take. In enthusiastically agreeing with the ALJ's estimate that the hearing could be concluded in three days, Seater's counsel noted that his "experience in recent years with employers and whistle blower cases is they try to make the trials go too long." T. 43-44; *see also* 4/19/95 OALJ staff Report of Contact regarding telephone conference with parties' counsel (Seater's counsel believed case could be heard in 3 days, SCE counsel did not).

it would be without the evidence." 29 C.F.R. § 18.401 (1995). In retaliatory intent cases that are based on circumstantial evidence, as here, fair adjudication of the complaint "requires full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Timmons v. Mattingly Testing Servs.,* Case No. 95-ERA-40, ARB Dec., June 21, 1996, slip op. at 10-11 [footnote omitted]; *see generally* K.C. Davis, Administrative Law, 2d Ed., Vol. 3, Ch. 16, Evidence (1980). In this case, Seater has alleged that SCE had an interest in silencing the fastener dispute which provided impetus for it to terminate Seater's employment in as expeditious a manner as feasible.

Considered within this context, it is clear that the magnitude of the controversy that arose, and continued, at SCE because of the protected activity engaged in by Seater for several months prior to his termination from SCE in September 1994 is relevant to the determination concerning Respondent's motivation for terminating Seater when it did. Evidence concerning the technical merits of Seater's view on out-of-specification fasteners is also relevant to the extent of the controversy concerning the fastener issue and the concomitant concern of SCE management about Seater's continuing presence and protected activity at SONGS. The more credence given the theory endorsed by Seater, at SONGS and elsewhere in the nuclear industry, the more likely it is that SCE management feared that such view would gain adherents among the SCE staff, thus increasing the tension caused by the fastener issue. Evidence of such concern by SCE management could provide support for Seater's view that SCE was anxious to ensure Seater's prompt departure.

The ALJ's statement, R. D. and O. at 5 n.4, that it is not necessary to determine the technical merit of Seater's safety concern is consistent with the well-established precept that the raising of a safety concern is protected under the ERA regardless of whether the concern is based on an actual violation of the regulatory and statutory standards applicable to the nuclear industry, *see Diaz-Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec. Dec., Jan. 19, 1996, slip op. at 11 n.7 and cases cited therein; *see also* 42 U.S.C. § 5851(a)(1)(A) ("alleged violation"), (B) ("alleged illegality") (1994). In the instant case, however, Seater seeks to introduce evidence concerning the viability of Seater's view that out-of-specification fasteners posed a safety risk as support for his theory of management's motivation in this case. The ALJ thus erred in refusing to allow testimony on this specific issue.

With regard to the merits of Seater's view on out-of-specification fasteners, it is adequate, for purposes of providing evidence relevant to the issue of retaliatory intent, to establish that others having expertise in this technological area found Seater's view to have merit. The question of who is actually correct regarding the competing views about out-of-specification fasteners is not germane to the retaliatory intent issue. The ALJ may therefore find it appropriate to exclude from consideration "unduly repetitious" evidence concerning the technical merits of Seater's view on fasteners in conducting the proceedings on remand, pursuant to 29 C.F.R. § 24.5(e)(1) and Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). *See generally Sage Development Co.,* 301 N.L.R.B. 1173, 1185 n.28 (1991)(noting ALJ's direction to a party to select its "best witness" to testify on an issue with which various witnesses were familiar, in the interest of avoiding

repetitious or cumulative testimony); *Buffalo Tank*, 6 OSHC (BNA) 1994, 1978 OSAHRC LEXIS 299, *2 (1978) and cases cited therein.[8/]

The blanket exclusion of exhibits designated CX 104-144, 159-161, 169, 173 and 175, which concern the extent of the controversy about the fastener issue among SCE staff and managers, the extent of the fastener controversy at a national, industry-wide level, and/or provide evidence of the technical merit of Seater's safety concern, was thus erroneous, *see* T. 138, 1907-28; *see also* T. 1-51 *passim* (pre-hearing teleconference). We therefore reverse the ALJ's exclusion of those exhibits.[9/] On remand, the ALJ must also allow the presentation of testimony on these issues, subject to the "unduly repetitious" standard of Section 24.5(e)(1). SCE must then be provided a meaningful opportunity to respond to the foregoing evidence and testimony. *See Land v. Consolidated Freightways,* Case No. 91-STA-28, Sec. Ord., May 6, 1992, slip op. at 5-8 and cases cited therein.

We reject Seater's contention that the ALJ committed reversible error in limiting the presentation of evidence relevant to Seater's allegation of collusion between his supervisors at SCE and specific officials at the NRC. Seater urges that the NRC engaged in conduct giving rise to a conflict of interest by accepting gratuitous assistance from SCE in the execution of a "sting" purchase from a replacement parts vendor that was suspected of engaging in fraudulent transactions. Comp. Br. at 28-30.

The ALJ did allow Seater to question several witnesses and submit documentary evidence relevant to this issue. *E.g.,* CX 102; T. 1143-53 (cross-examination of Rosenblum). Documentary evidence of record indicates that the "sting" action was being planned by SCE and NRC officials within the month of June 1994, soon after Seater was advised by SCE that his termination had been accelerated from December to September 1994. Further, such evidence indicates that two of Seater's supervisors were personally involved in planning and executing the operation with the same NRC

[8/] At hearing, the ALJ expressed concern about including evidence that would unduly burden the record. *See, e.g.,* T. 344-45, 1101. Section 18.403 of the OALJ Rules of Practice and Procedure provides that relevant evidence may be excluded if the probative value of such evidence is "substantially outweighed" by the risk of confusing the issues, misleading the trier of fact, or by concern regarding "undue delay, waste of time, or needless presentation of cumulative evidence." 29 C.F.R. § 18.403. Section 24.5(e)(1) provides, *inter alia*, that the ALJ may exclude evidence that is "immaterial, irrelevant or unduly repetitious." 29 C.F.R. § 24.5(e)(1). Section 24.5(e)(1) thus does not allow for the exclusion of probative evidence unless it is "unduly repetitious." Section 24.5(e)(1) was promulgated under Section 211 of the ERA and other statutory employee protection provisions, *see* 29 C.F.R. § 24.1(a), and is thus controlling as the specific program provision, rather than the more general provision for Department of Labor adjudications found at Section 18.403. 29 C.F.R. §§ 18.1(a), 18.1101(c). The mandate of Section 24.5(e)(1) is consistent with the nature of the evidence presented in a circumstantial evidence case of retaliatory intent, some of which may appear to be of little probative value until the evidence is considered as a whole, *see generally Timmons*, slip op. at 10-11 and cases cited therein. Section 24.5(e)(1) is also in accord with Section 7(c) of the APA, 5 U.S.C. § 556(d).

[9/] The admission of these exhibits into evidence is subject to proper identification or authentication on remand. *See* 29 C.F.R. § 18.901; *cf.* 29 C.F.R. § 18.50 (authenticity of proposed exhibits submitted in advance of hearing).

investigator who was involved in investigating the fastener controversy at SCE. CX 2, 50; RX 38, 94. In addition, Seater and two fellow whistleblowers from the SCE laboratory, Gary Telford (Telford) and Richard Clift (Clift), testified that the NRC investigator who was involved in both the "sting" operation and the fastener investigation failed to resume discussions later in 1994 with the three about the fastener issue, although he had indicated he would do so. T. 317-20 (Clift), 684-88 (Seater), 781-99 (Telford).

The foregoing evidence, if fully credited, may support a finding that Seater's supervisors, at a time proximate to advising Seater of the decision to accelerate his termination date from December to September 1994, were interested in garnering favor with the NRC investigator. Nonetheless, as concluded by the ALJ, T. 1639, 1935, evidence suggesting that SCE managers were interested in garnering favor with NRC officials does not necessarily indicate that such interest was linked to a concern about the fastener controversy or the adverse action against Seater. SCE managers could, for example, have been motivated to aid in the "sting" operation by SCE's own interest in preventing further fraud by the vendor involved. Furthermore, as noted by SCE, Resp. Br. at 29, Seater has failed to identify what salient points could be established by the presentation of further evidence on this issue, Comp. Br. at 29; *see* Comp. Post-hearing Br. at 54-57.[10/] Consequently, we find no error in limiting the further presentation of evidence relevant to the collusion allegation. *See* 29 C.F.R. § 18.103(a); *see also* 29 C.F.R. § 24.5(e)(1), discussion *supra* at n.8.

The ALJ did err, however, in limiting the parties' presentation of evidence pertinent to Seater's argument that the SCE laboratory and related training program suffered as a result of his termination from the laboratory, on relevancy grounds. *See, e.g.,* T. 1139-40, 1314-15, 1720-21, 1725, 1842-44, 1942-43. The ALJ properly stated that the retaliatory intent inquiry must focus on the mind-set of the decision-makers at the time the decision to take the adverse action was made. T. 1314-15; *see generally Timmons*, slip op. at 10-11 and cases cited therein. In the instant case, however, evidence of incidents occurring or conditions developing in the SCE laboratory and training program as a result of Seater's accelerated departure may provide valuable indicia of the supervisory mindset at the pertinent time.

On remand, therefore, the ALJ must provide the parties an opportunity to present evidence regarding the state of operations in the SCE laboratory and training program following Seater's termination in September 1994. Evidence regarding changes to the laboratory training program, including the cross-training aspect of that program, made around and since September 1994 would also fall within this category. As the ALJ excluded CX 171, which pertains to the qualifications of laboratory personnel, on relevancy grounds, T. 1925, we reverse that exclusion. *But see* n.9, *supra*.

[10/] Seater has filed a Motion to Supplement the Record with evidence that he urges is relevant to the collusion allegation in this case. As the evidence proffered -- a magazine article concerning the relationship of the NRC to the nuclear industry -- does not provide evidence that would link any interest his supervisors may have had in garnering favor with the NRC investigator to the fastener issue, we deny Seater's motion.

2. Exclusion of expert witness on surveillance potential

We reject Seater's argument that the ALJ's exclusion of expert testimony regarding the issue of how surveillance of Seater could have been effected in the SCE laboratory should be reversed. The ALJ ruled at hearing that Randy Udovich, an expert in the area of security technology, would not be allowed to testify as an expert witness. T. 304-05. The ALJ questioned Udovich's objectivity based on statements made by him that the ALJ found to be indicative of a bias in favor of the complainant and against the respondent in this case, T. 287-88, 290-304; *see* ALJX 1. The ALJ also concluded that Udovich's testimony would be of little probative value regarding the issue of whether SCE had in fact placed Seater and his coworkers in the laboratory under improper surveillance or had created an impression of such surveillance. T. 299-300.

We agree with the ALJ's conclusion that the record raises questions concerning Udovich's ability to present reliable testimony in this case. *Cf. Marbled Murrelet v. Pacific Lumber Co.,* 880 F.Supp. 1343, 1363 (N.D. Ca. 1995)(discrediting experts' testimony because lacking in objectivity).[11/] The appropriate course in such circumstances, however, is to admit the evidence and consider the witness's dubious objectivity as a factor pertinent to the probative weight to be accorded such evidence. *See Fugate v. Tennessee Valley Authority,* Case No. 93-ERA-0009, Sec. Dec., Sept. 6, 1995, slip op. at 3-4 (citing *Builders Steel Co. v. Commissioner of Internal Rev.,* 179 F.2d 377 (8th Cir. 1950)(addressing lessened significance of technical rulings on evidence admissibility in non-jury trials)); *Multi-Medical Convalescent and Nursing Center v. NLRB,* 550 F.2d 974, 977-78 (4th Cir. 1977), *cert.* denied, 434 U.S. 835 (1977); see *also* 29 C.F.R. § 24.5(e)(1); *see generally* 29 C.F.R. § 18.702 (provision paralleling Fed.R.Evid. 702 regarding expert witness testimony).

As demonstrated by the following analysis, the question of whether covert surveillance could have been effected in the SCE laboratory need not be reached in disposing of the surveillance issue. Therefore any error in the ALJ's refusal to allow the Udovich testimony is harmless. *See* 29 C.F.R. § 18.103(a).

[11/] In addition to indicating a degree of sympathy toward the complainant and antipathy toward the respondent, the statements relied on by the ALJ indicated Udovich's intention to discount his fee if Seater did not prevail in this complaint. *See* ALJX 1; T. 287-88, 290-304. Any arrangement that links the amount of payment to an expert witness to the outcome of the litigation gives rise to questions concerning the reliability of the testimony of such witness. *See, e.g.,* Model Rules of Professional Conduct, Rule 3.4(b) note (1995)("The common law rule in most jurisdictions is that it is improper to pay an expert witness a contingent fee."); *see also* Proposed Amendments to the Federal Rules of Civil Procedure to Implement the Agenda for Civil Justice Reform (recommendation to amend Fed.R.Evid. 702 by adding a "Prohibition on Contingent Fee for Expert Witness"), *reprinted in* 60 U.Cin.L.Rev. 1025 (1992); Exec. Order No. 12,778, § 1(e), 56 Fed. Reg. 55195 (1991), 3 C.F.R. at 360, 362 (1992)(Guidelines to Promote Just and Efficient Government Civil Litigation -- ban on contingency fees for expert witnesses); *but see* Note, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 S.Cal.L.Rev. 1363 (1991)(proposing "nonpercentage contingency fees [for expert witnesses] as a viable alternative to the present ban" in the interest of increasing access to legal system); *see generally Ojeda v. Sharp Cabrillo Hosp.,* 8 Cal.App.4th 1 (1992)(discussing impact of various state restrictions on contingent fee agreements with expert witnesses).

An understanding of the substance of the surveillance issue is crucial to consideration of whether any prejudice resulted from exclusion of the Udovich testimony. The ERA prohibits interference, or action intended to interfere, with the exercise of protected activity. *See* 42 U.S.C. § 5851(a); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Remusat v. Bartlett Nuclear, Inc.,* Case No. 94-ERA-36, Sec. Dec., Feb. 26, 1996, slip op. at 8-10 and authorities cited therein. Surveillance of employees, or the creation of an impression of surveillance, for the purpose of monitoring participation in protected activity would thus constitute a violation of the ERA. *See generally Laidlaw Waste Systems (Michigan), Inc.,* 305 N.L.R.B. 30 (1991)(citing *J.P. Stevens & Co.,* 245 N.L.R.B. 198 (1979), *Consolidated Edison Co. of New York,* 4 N.L.R.B. 71, 94 (1937), *aff'd* 305 U.S. 197 (1938) and addressing employer's surveillance or creation of an impression of surveillance of protected activity as violations of the National Labor Relations Act)*; but see Miller v. Ebasco Services, Inc.,* Case No. 88-ERA-4, Sec. Dec., Nov. 24, 1992, appended ALJ's dec. at 17 (finding legitimate basis for surveillance engaged in by employer).

The ALJ concluded that the testimony of Seater and his fellow whistleblowers in the laboratory did not provide support for the allegation that SCE had engaged in illegal surveillance of Seater. R. D. and O. at 17 n.8. This finding is consistent with the testimony of record, which is comprised of very general assertions by Seater and his fellow whistleblowers regarding their suspicions that surveillance was being conducted, *e.g.,* SCE management "seemed to be like about a step ahead of us on several key issues that we knew we were going to be doing," T. 766 (Telford); *see* T. 357-58 (Clift), 611, 631-33, 679-80 (Seater), 761-67 (Telford). As further support for his conclusion, the ALJ noted that documents concerning the SCE Mesa Access Control System, which was installed at SONGS in 1994, RX 98, indicated that "No camera's [sic] will be located to where they are monitoring specific personnel/work activities." R. D. and O. at 17 n.8. We agree with the ALJ's conclusion that the evidence does not establish that SCE was in fact conducting improper surveillance of Seater.

Regarding the standard to be applied in determining whether SCE has created an impression of surveillance, we find case law developed under an analogous provision, Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1),[12/] to be persuasive. Section 8(a)(1) decisions turn on the question of whether employees reasonably believed that their protected activity was being monitored and that an employer was thereby attempting to discourage their participation in protected activity. *See*, *e.g., Electro-Voice, Inc.,* 320 N.L.R.B. No. 134 (1996). In the instant case, the crucial question regarding an impression of surveillance is thus whether Seater perceived that SCE had placed him under surveillance in the SCE laboratory for the purpose of interfering with his protected activity and, if so, whether such perception was reasonable.

Although not specifically addressed by the ALJ, the record does not establish that SCE created an impression of improper surveillance of Seater. The very general statements of Seater and his fellow whistleblowers in the laboratory concerning SCE management's apparent knowledge of

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[12/] Section 8(a)(1) prohibits unfair labor practices that interfere with the exercise of employee rights to organize for purposes of collective bargaining under the National Labor Relations Act. 29 U.S.C. § 158(a)(1)(1994).

matters that Seater and other laboratory staff thought they had kept private and the limiting of telephone lines to the laboratory and other problems with telephone equipment, are not adequate to establish a reasonable basis for a perception by Seater that such surveillance was being conducted. *See* T. 357-58 (Clift), 611, 631-33, 679-80 (Seater), 761-67 (Telford).

In addition, Seater has not urged that covert surveillance was threatened or even intimated by SCE management.[13/] Although a fellow whistleblower in the laboratory testified that a supervisor had told him to "Watch what you say on the phone, watch what you do, they can have cameras and stuff like that on you," T. 762 (Telford),[14/] such statement constitutes mere speculation and not a threat by management to improperly monitor protected activity. *Cf. Simmons Industries, Inc.,* 321 N.L.R.B. No. 32, 1996 NLRB LEXIS 325 (1996) (supervisor's comments to employees "calculated" and "reasonably interpreted" to indicate surveillance constituted coercion); *Electro-Voice, Inc.*, 320 NLRB No. 134, 1996 NLRB LEXIS 208, *3-5 (1996)(supervisor's comments to employee reasonably led to impression of surveillance); *Libralter Plastics, Inc.,* 1995 NLRB LEXIS 507, *20-22 (1995)(employer's "public acknowledgment of awareness of open" protected activity does not provide reasonable basis for inference of surveillance). In view of the lack of evidence to establish either that SCE was in fact engaging in improper surveillance of Seater or that Seater reasonably perceived that such surveillance was being conducted, the ALJ's refusal to hear testimony regarding the technical potential for such surveillance is harmless.[15/] *See* 29 C.F.R. § 18.103(a); *Frady v. Tennessee Valley Authority*, Case Nos. 92-ERA-19, 92-ERA-34, Sec. Dec., Oct. 23, 1995, slip op. at 9-10.

[13/] Seater's argument in regard to the surveillance issue is somewhat muddled. *See* Comp. Br. at 25-27. In addition, in his post-hearing brief before the ALJ, Seater cites a sign at the SONGS entrance which reads "For your protection, this facility is electronically monitored by video surveillance."
Comp. Post-Hearing Br. at 62; *see* CX 68; T. 767. Seater then observes, "Nothing on the sign indicates or suggests that SCE will refrain from subjecting employees to surveillance as a result of protected activity." Comp. Post-Hearing Br. at 62. Seater's reliance on the notice at the SONGS entrance is wholly misplaced in this instance, where the burden of proof is on the complainant to establish that improper surveillance did indeed occur or that Seater reasonably perceived that such surveillance was being conducted. *See* Section 7(c) of the APA, 5 U.S.C.
§ 556(d); *see generally Marien v. Northeast Nuclear Energy Co.,* Case No. 93-ERA-00049, Sec. Dec., Sept. 18, 1995, slip op. at 5-6 (addressing complainant's burden of proof under 42 U.S.C. § 5851(b)(3)(D)).

[14/] Our disposition of the surveillance issue obviates the need to address Seater's contention, Comp. Br. at 26, that the ALJ's striking of Telford's testimony in this regard should be reversed. *See* 29 C.F.R. § 18.103(a).

[15/] We do not intend to suggest by this holding that expert testimony concerning how covert surveillance could be effected would not be probative in any case. For example, in a case in which the reasonableness of a complainant's perception of surveillance were challenged on the basis that such surveillance would not have been technically possible, such expert testimony may very well be probative.

3. Exclusion of testimony of ill SCE supervisor

Seater also assigns error to the ALJ's refusal to allow the testimony of an SCE supervisor, Curtis Robert Horton (Horton), who was critically ill at the time of hearing, *see* CX 103B, to be taken by telephone. As relief Seater requests that the ALJ's exclusion of Horton's written statement, CX 103A, be reversed or that the ALJ be directed to allow Horton's testimony be taken by telephone on remand. Comp. Br. at 23-25. In support of the ALJ's ruling on the Horton evidence, SCE cites Seater's failure to schedule a pre-hearing deposition for the purpose of preserving Horton's testimony and Seater's decision not to avail himself of the opportunity to depose Horton after the hearing. Resp. Br. at 24-25; *see* Resp. [May 9, 1995] Motion to Exclude Comp. Exhibits.

We disagree with the ALJ's conclusion, T. 135-37, that taking Horton's testimony by telephone, without first providing SCE an opportunity to depose him, would have deprived SCE of an adequate opportunity to respond to such testimony. Horton had been a project engineer with supervisory responsibilities in the SCE division where Seater worked and had worked closely with Seater's second-level supervisor. T. 746-49, 872-75 (Telford); CX 157, 158. Horton had been questioned regarding Seater's complaint in November of 1994 but had not signed the statement drafted by the Department of Labor investigator, and SCE was aware of this fact. T. 119-29. Although Horton had been included on Seater's list of witnesses to be called at hearing, *see* T. 121-22 (SCE counsel), Seater became uncertain as to whether to actually call Horton as a witness, owing to Horton's ill health and the probable adverse effect on his serious heart condition that could result from the rigors of testifying at hearing or in deposition.[16/] *See id.; see also* CX 103B. One week before presentation of witness testimony was begun in the hearing on May 9, 1995, Seater provided SCE with a copy of Horton's signed statement, CX 103A. T. 125-29.[17/] When the hearing convened on May 9, 1995, the ALJ denied Seater's request to admit Horton's written statement into evidence. T. 130. The ALJ also refused to allow Horton's testimony to be taken by telephone and ruled that SCE must first be allowed to depose Horton before he could give testimony in the case. T. 135-37.

Horton's written statement provided notice to SCE of the matters on which Horton could be expected to testify. *See* CX 103A; T. 135; *see generally Malpass and Lewis v. General Electric Co.,* Case Nos. 85-ERA-38, 85-ERA-39, Sec. Dec., Mar. 1, 1994, slip op. at 13 (quoting J. Moore, Federal Practice ¶ 26.57(4), at 26-212 regarding elimination of surprise as a purpose of the discovery rules). Those matters concerned general policies regarding the employment of contractors at SCE,

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[16/] In the discussion of this issue among counsel and the ALJ at hearing, SCE counsel indicated that when Horton responded to its notice concerning their intention to schedule his deposition, he told them that he did not want to testify, that he did not want to give a deposition, that "he didn't want to go through that." T. 121-22.

[17/] In the discussion among the ALJ and counsel at hearing, Seater's counsel indicated that he had obtained the original version of the Horton statement, which was unsigned, from the files of the Department of Labor investigator pursuant to a Freedom of Information Act request; he had asked Horton to make any changes to the statement Horton felt were necessary before signing the statement; Horton's signing of the amended statement had been notarized on May 1, 1995. T. 119-25.

information regarding budget decisions by SCE and statements attributed to Seater's second-level supervisor. CX 103A. During the course of the hearing, relevant budget and employment records were not only readily accessible to SCE, but documentary evidence regarding such issues had already been designated as proposed exhibits by SCE, *see, e.g.,* RX 10-14 (admitted into evid., T. 1025-32). Moreover, the supervisor who was allegedly quoted in the Horton statement was to be called as a central witness in the presentation of SCE's defense at hearing, T. 140. The means with which to frame a rebuttal response to the proffered testimony were thus readily available to SCE. The ALJ erred, therefore, in accepting SCE's argument that its right to a fair opportunity to cross-examine Horton could be ensured only if it were allowed to first depose Horton.[18/] *Cf. Price v. Seydel,* 961 F.2d 1470, 1474 (9th Cir. 1992) (addressing the four prong test developed by the courts in determining whether to allow the testimony of a "surprise witness"[19/]).

In addition, we agree with Seater that the ALJ's refusal to hear Horton's testimony telephonically did not demonstrate a proper degree of sensitivity to the issue of Horton's critical state of health.[20/] Section 18.611 of the OALJ Rules of Practice and Procedure provides that the ALJ should control the mode and order of the questioning of witnesses in the interest of the "ascertainment of truth," the avoidance of "needless consumption of time," and the protection of witnesses from "harassment or undue embarassment." 29 C.F.R. § 18.611.[21/] Similarly, Section 18.15 provides authority for the ALJ to restrict the conditions under which discovery may be conducted as "justice requires to protect a party or person from annoyance, embarassment, or undue burden or expense . . . ." 29 C.F.R. § 18.15; *see* Fed.R.Civ.P. 26(c), Protective Orders; *see also* 29 C.F.R. § 18.22(e); Fed.R.Civ.P. 30(d), Schedule and Duration; Motion to Terminate or Limit Examination. Among the alternatives available under Section 18.15 is the denial of the discovery request. 29 C.F.R. § 18.15(a)(1).

[18/] Inasmuch as we construe Horton's written statement as serving the purpose of a discovery document, we need not reach SCE's contention that the statement does not qualify for admissibility within the pertinent evidentiary guidelines, *see* Resp. Brief at 24-5; Resp. Motion to Exclude Comp. Exhibits at 2-10; T. 119-21.

[19/] The four factors are as follows: 1)the prejudice or surprise to the opposing party; 2)the ability of that party to cure the prejudice; 3)the extent to which allowing the testimony would disrupt the orderly and efficient trial of the case at hand or other cases; 4)bad faith or willfulness in failing to comply with the pre-trial order. *Price*, 961 F.2d at 1474 and cases cited therein; *see generally* Fed.R. Civ.P. 37(c)(1), which provides sanctions for failure to disclose witness information pre-hearing "without substantial justification."

[20/] Seater's reliance on the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, is misplaced, however. *See* Comp. Br. at 24. Access for handicapped individuals to Federal agency proceedings is provided for by Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791. We also note that neither statute is controlling on the issue at hand, *i.e.,* how to strike a balance between the due process rights of the parties to this case.

[21/] Section 18.611 is based on Rule 611 of the Federal Rules of Evidence. *See* 29 C.F.R. Part 18, App. to Subpart B--Reporter's Notes.

The ALJ's ruling that Horton's testimony would be allowed only if his deposition were taken in person, either for the purpose of discovery or in lieu of hearing testimony, failed to accommodate the critical state of Horton's health. The physician's statement in evidence in this case provided ample substantiation for the contentions raised by Seater at hearing concerning the adverse effects that unrestricted, in-person questioning could have on Horton's health. *See* CX 103B; T. 120, 123-25, 129-132. Inasmuch as the ALJ's ruling regarding the Horton deposition did not provide any protective restrictions, Seater's failure to take Horton's deposition post-hearing does not constitute a waiver of his right to challenge the ALJ's action. *Cf. Price*, 961 F.2d at 1474 (holding that party did not waive right to challenge exclusion of testimony despite failure to present testimony under the conditions imposed by trial judge).

Concerning the issue of telephonic testimony, we note that neither the regulations at 29 C.F.R. Part 24 nor those at 29 C.F.R. Part 18 provide for the taking of testimony by telephone. Persuasive authority exists, however, to support the use of such practice if necessary to facilitate the presentation of Horton's testimony in these circumstances. Section 30(b) of the Federal Rules of Civil Procedure provides for the taking of depositions by telephonic means.[22/] Fed.R.Civ.P. 30(b). In civil cases involving witnesses who are unavailable to appear in court, the presentation of testimony by telephone has frequently been allowed, despite the objections of an opposing party. *See, e.g., Official Airline Guides, Inc. v. Churchfield Publications, Inc.,* 756 F.Supp. 1393, 1399 n.2 (Ore.D. 1990)(witnesses unavailable based on distance from trial location); *Ferrante v. Ferrante,* 127 Misc.2d 352, 485 N.Y.S.2d 960 (N.Y.Sup.Ct. 1985)(physically incapacitated plaintiff and witness); *Gregg v. Gregg*, 776 P.2d 1041, 1989 Alas. LEXIS 67 (Alaska Sup.Ct. 1989)(out-of-state respondent in divorce action allowed to take witness oath and to testify by telephone under state civil procedure rule allowing telephonic participation); *see also Textor v. Cheney,* 757 F.Supp. 51 (D.D.C. 1991)(rejecting APA challenge to Department of Defense debarment hearing in which petitioner participated by telephone); *but see Murphy v. Tivoli Enterprises,* 953 F.2d 354, 358-59 (8th Cir. 1992)(disagreeing with *Official Airline Guides* court conclusion that telephonic testimony constitutes "testimony taken orally in open court" as required by Fed.Civ.P.Rule 43(a)); *see generally* Schwartz, *Administrative Law Cases During 1989,* 42 Ad.L.Rev. 423, 435-36 (1990)(noting divergent Federal court rulings on parties' objections to hearings held by telephone[23/]); Comment, *Speaker-Telephone Testimony in Civil Jury Trials: the Next Best Thing to Being There?*, 1988 Wis.L.Rev. 293 (1988).

[22/] It is also noteworthy that, on April 23, 1996, the United States Supreme Court issued an order proposing an amendment to Rule 43(a) of the Federal Rules of Civil Procedure, to be effective December 1, 1996, which would, "for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."

[23/] In *Purba v. I.N.S.,* 884 F.2d 516 (9th Cir. 1989), the court agreed with the petitioner that the telephonic deportation hearing conducted by the Immigration and Naturalization Service violated the Immigration and Nationality Act provision, 8 U.S.C. § 1252(b)(1982), requiring a hearing "before" an immigration judge. In *Casey v. O'Bannon,* 536 F.Supp. 350 (E.D.Pa. 1982), the court rejected welfare applicants' constitutional challenge to telephonic hearings on their appeals, based on analysis under *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976).

Although telephonic testimony does not provide the opportunity for observation of the witness that is provided by in-person testimony, it does provide more opportunity for observation of the witness than does a deposition submitted in lieu of such testimony. *See Official Airlines Guides, Inc.*, 756 F.Supp. at 1399 n.2; *Casey v. O'Bannon*, 536 F.Supp. 350, 353-54 (E.D.Pa. 1982). Horton, the prospective witness, is an employee of SCE, the party to whose cross-examination he is to be subjected. In such circumstances, the requirement of an in-person appearance at hearing is unnecessary to impress upon the witness the seriousness of the matter in which he is giving testimony. *See generally National Labor Relations Board v. Dinion Coil Co.,* 201 F.2d 484, 487-91 (2d Cir. 1952)(addressing history of oral testimony given in open court); *7-Eleven Food Store,* 257 N.L.R.B. 108, 113 n.31 (1981)(noting well-established principle that an employee who testifies in a manner adverse to his employer's position is generally accorded greater credence) and cases cited therein.

Consequently, the manner in which Horton's testimony is taken on remand must accommodate Horton's physical condition at that time. Prior to the scheduling of a deposition or a supplemental hearing, Seater must provide medical evidence concerning Horton's *current* physical condition and any medically imposed restrictions pertinent to the taking of Horton's testimony. Based on the information provided, the ALJ then must issue an appropriate order concerning the conditions under which discovery, if appropriate, will be conducted and Horton's testimony will be taken.[24/]

4. Exclusion of evidence not timely exchanged

On the last day of hearing, the ALJ rejected several exhibits proffered by Seater, based on the ALJ's findings that the exchange with SCE was untimely and that, in some instances, the documents were irrelevant to the issues before him. T. 1907-28; *see* CX 159-163, 169-175; *see also* T. 1623-30.[25/] As discussed *supra*, we have rejected the ALJ's blanket exclusion of the exhibits CX

[24/] The possibilities range from a standard discovery deposition with live testimony at hearing, if Horton's condition has improved sufficiently to allow such participation, to prohibiting discovery and taking Horton's testimony telephonically if Horton's condition so requires. Telephonic testimony should be taken with specified safeguards to reliability in place, *e.g.,* a notary/court reporter present with the witness to administer the oath or affirmation pursuant to Section 18.603, the recording of the witness testimony on videotape, in addition to transcription of the testimony by the court reporter at the hearing site, *see Ferrante,* 127 Misc.2d at 353, 485 N.Y.S.2d at 962; *see also In re San Juan Dupont Plaza Hotel Fire Litigation,* 129 FRD 424, 429 (P.R.Dist. 1990)(Order regarding conditions for satellite transmission of witness testimony); *cf. Geneva v. Tills,* 129 Wis.2d 167, 384 N.W.2d 701 (Wis.S.Ct. 1986)(reliance of telephone witness on documents not then available to opposing party denied that party a meaningful opportunity to cross-examine the witness).

[25/] At hearing the previous day, Seater proffered the foregoing exhibits, as well as exhibits CX 164-168. T. 1623-30. SCE agreed to waive objection to Seater's proffer of CX 164-168, which had not been exchanged with SCE prior to the hearing, in exchange for Seater's agreement not to object to exhibits proposed for submission in connection with the testimony of SCE's budget expert, Garret Dokter, the following day. *Id.; see* T. 1783-85 (response of SCE counsel to Seater's objection to one

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159-161, 169, 171, 173, 175, based on relevancy grounds. Furthermore, in view of the ALJ's erroneous pre-hearing rulings concerning relevancy, T. 1-51 *passim* (pre-hearing teleconference), Seater's failure to exchange the foregoing exhibits with SCE in a timely manner under the pre-hearing guidelines does not constitute a bar to the admission of such evidence. *See generally Price,* 961 F.2d at 1474. On remand, SCE must be provided a meaningful opportunity to respond to such evidence. *See Land*, slip op. at 5-8 and cases cited therein.

With regard to the other excluded exhibits at issue, CX 162, 163, 170, 172 and 174, we reject Seater's contention that the ALJ was not even-handed in his admission of exhibits that had not been timely exchanged prior to the hearing. *See* T. 525-30, 555-66, 1628, 1783-86, 1914-30; *see generally* 29 C.F.R. § 18.47(b) [Exchange of Exhibits]. Indeed, Seater's counsel acknowledged that none of the documents that he proffered on the last day of hearing fell into the rebuttal category defined by the ALJ, *i.e.,* evidence whose relevance became apparent only after presentation of SCE's evidence in defense of the complaint.[26/] T. 1926-27.

In addition, as noted by SCE, Resp. Br. at 29, Seater has failed to assign error to the ALJ's exclusion of these exhibits on any other grounds. Comp. Br. at 28. Finally, although Seater's counsel stated that these documents "speak for themselves," T. 1918, the probative value of exhibits CX 162-163, 170, 172 and 174 is unclear as each document appears to be irrelevant or repetitious.[27/]

(...continued)
of the Dokter exhibits, reminding the ALJ of the parties' agreement the previous day; the ALJ responded that it was not his role "to enforce contracts between counsel.") The ALJ stated that he would reserve ruling on the admissibility of exhibits CX 159-163 and 169-175 until they were actually proffered. T. 1629. We note that the parties are considered to be bound by their stipulations. *See, e.g.,* 29 C.F.R. §§ 18.17, 18.51.

[26/] Seater's counsel stated that Seater had had the documents designated as CX 162, 163, 170, 172 and 174 for some months prior to the hearing, but had not provided them to his counsel until counsel requested that Seater re-review the materials in his possession, following the first week of hearing. T. 1914-15; *see* T. 1919, 1923, 1925-26.

[27/] At hearing, Seater did address the substance of CX 162, which he indicated was relevant to animus against him as a whistleblower by the SCE Nuclear Safety Concerns (NSC) office staff. T. 1915. The document designated as CX 162 represents an excerpt from the record of Seater's safety concern that was maintained by the NSC office, which is in evidence at CX 41; an almost identical version of the text of CX 162 is found at pages 10-14 of CX 41. *See* 29 C.F.R. § 24.5(e)(1); n.8 *supra*. Also repetitive of evidence already in the record is the document designated as CX 172, which concerns SCE's plan to bring Francis Brewer back to work following his termination at the end of June 1994, for the purpose of working on the fastener safety issue. Similarly, the two page exhibit marked CX 170 contains a copy of an organizational chart for the SCE division where Seater worked dated November 10, 1993, which is already in evidence at RX 26; the attached e-mail from one of Seater's supervisors presents statements testified to by that supervisor at hearing. The significance of the document designated as CX 163, which appears to be an outline for a document to be drafted by SCE management in response to the fastener safety concern, is unclear. The same is true of the document
(continued...)

We therefore reject Seater's contention that the ALJ was not even-handed in determining the admissibility of evidence not timely exchanged within the parameters provided by the pre-hearing conference.[28/]

II. The ALJ's Findings of Fact

Seater urges that the ALJ erred by failing to render credibility findings concerning the demeanor of the witnesses at hearing. Comp. Br. at 21-22. Seater also urges that the ALJ rejected evidence without adequate explanation. *Id.* To be sustained, factual findings, including credibility determinations, must be supported by substantial evidence on the record considered as a whole. *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981). Where a factfinder's "theory of credibility is based on inadequate reasons or no reasons at all, his findings cannot be upheld." *N.L.R.B. v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983). The factfinder must provide explicit statements concerning which portions of the evidence are accepted or rejected, *Dobrowlosky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979), and "cannot reject evidence for no reason or for the wrong reason," *Cotter*, 642 F.2d at 706-07.

Initially, we note that the ALJ provided a detailed narrative of pertinent events, supported by references to the record evidence. R. D. and O. at 5-29. The ALJ did, however, fail to render all credibility findings, particularly with regard to the demeanor of the witnesses at hearing, that are necessary to disposing of the allegations concerning SCE's decision to accelerate Seater's

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marked CX 174, which concerns an NSC staff interview with Seater in late August 1994 regarding objections to his termination that he had voiced to the personnel service through which he had been hired by SCE.

[28/] We note that these documents were all generated by SCE personnel and had been provided to Seater in the course of discovery. *See* CX 162-63, 170, 172, 174; T. 1914, 1918, 1922. That factor largely undermines SCE's contention that it would be subjected to unfair surprise by the admission of these documents. T. 1914-16, 1922, 1930. We also note that the ALJ correctly ruled that SCE could not properly withhold evidentiary exhibits simply because such exhibits would be used on cross-examination of witnesses. T. 559-62; *see* RX 107. Such a practice would interfere with the elimination of surprise that is the purpose of discovery and pre-hearing exchanges and disclosures. *See Malpass and Lewis*, slip op. at 13. Section 18.613 of the OALJ Rules of Practice and Procedure, modeled on Rule 613 of the Federal Rules of Evidence, *see* n.21 *supra,* does provide, however, a narrow exception for evidence of inconsistent statements by witnesses, when introduced solely for the purpose of impeaching witness testimony. T. 559-62, 587-91. Pursuant to Section 18.613, evidence of such statements may be withheld, subject to disclosure to opposing counsel at the time the witness is questioned regarding those statements. 29 C.F.R. § 18.613; *see also* 29 C.F.R. § 18.801(d)(1)(regarding admission of such statements as substantive evidence); *see generally Fun Connection,* 302 N.L.R.B. 740, 747-48 (1991)(addressing prior inconsistent statements under FRE 801(d)(1)) and authorities cited therein.

termination date and a hostile work environment.[29/] *But see* R. D. and O. at 25 (rejecting Seater's contention that SCE budget analyst was an "arrogant, pompous" witness). Such findings are crucial to the proper resolution of pertinent conflicts in the witnesses' testimony. *See Pogue v. United States Dept. of Labor,* 940 F.2d 1287, 1289, 1290 (9th Cir. 1991); *NLRB v. Cutting, Inc.,* 701 F.2d at 663.

For example, conflicting testimony was presented concerning the factual question of whether NSC staff overheard comments regarding Seater and other laboratory whistleblowers that were made by co-workers at employee meetings in September 1994. T. 333-335, 378 (Clift), 621-23, 672-78 (Seater), 738-45, 812-16 (Telford), 918-22 (Brown); *see* T. 1848-51, 1874-76, 1899-1900 (Basu, Czapski and Reynolds, testifying that they heard remarks but thought they were intended to be humorous); R. D. and O. at 13. The ALJ declined to credit the testimony of NSC staff person Steve Brown that an electronic mail message generated by Brown on June 21, 1994, CX 33, did not indicate his "displeasure" with Seater and other whistleblowers. R. D. and O. at 29. Nonetheless, the ALJ failed to explain the basis for his crediting of Brown's denial that he heard the comments at issue in the September 8, 1994 meeting. R. D. and O. at 13; *see NLRB v. Cutting, Inc.,* 701 F.2d at 667; *Cotter*, 642 F.2d at 706-07.

In rendering a decision on remand regarding the acceleration decision and the hostile work environment issue, the ALJ should provide findings concerning witness demeanor in connection with resolution of conflicts in the pertinent controverted testimony, *see, e.g.,* R. D. and O. at 9, 16, 28 (referring to testimony of Seater's second level supervisor Thomas Herring). The ALJ must also address pertinent conflicts in all the evidence of record and provide a basis for his resolution of such conflicts. *See NLRB v. Cutting, Inc.,* 701 F.2d at 667; *Cotter*, 642 F.2d at 706-07; *Dobrowlosky,* 606 F.2d at 409-10. In resolving pertinent conflicts in the testimony of record, the ALJ may also rely on factors related to the content of the witnesses' testimony, *e.g.,* internal inconsistency, inherent improbability, important discrepancies, impeachment and witness self-interest. *See Dorf v. Bowen*, 794 F.2d 896, 901-02 (3d Cir. 1986); *Kent v. Schweiker*, 710 F.2d 110, 116 (3d Cir. 1983); *NLRB v. Cutting, Inc.,* 701 F.2d at 666.

Seater notes that the R. D. and O. contains factual misstatements. Comp. Br. at 15 n.8. In rendering his additional findings on remand, the ALJ should be cognizant of the following material inaccuracies regarding the evidence of record that are contained within the R. D. and O.

The documentary evidence of record indicates that SCE sought the expertise of two outside entities in the course of addressing the fastener safety issue that was raised to the SCE Senior Vice-President's level by Seater on December 27, 1993. On December 29, 1993, Roger Reedy (Reedy), an engineering expert affiliated with the American Society of Mechanical Engineers, was contacted as a technical consultant by Michael Ramsey, the SCE engineer who had been assigned primary

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[29/] As previously indicated, we affirm the conclusion of the ALJ that the evidence does not establish that SCE's decision to terminate Seater in December 1994 was retaliatory. As reflected in our analysis of the termination issue *infra*, that conclusion is supported by uncontradicted testimony and documentary evidence. Consequently, any failure by the ALJ to resolve the conflicts in the controverted evidence of record relevant to the termination decision does not interfere with our affirmance of his conclusion regarding the termination decision. *See* n.38 *infra.*

responsibility for a technical evaluation of the fastener issue. CX 41 at 2. On January 17, 1994, a study was begun by Corporate Systemics, Inc. (CSI), of staff communications and interaction between the units of the Procurement Engineering division, including the test laboratory where Seater worked, and other inter-facing SCE units, including warehouse personnel. CX 5 at 37. This study was commissioned after the filing of Seater's fastener safety concern, and a report was issued by CSI on February 18, 1994. *See id.*[30/] On pages 8-9 and 14 of the R. D. and O., the technical consultation assistance provided by Reedy is confused with the organizational report provided by CSI.[31/]

The R. D. and O. also indicates a misunderstanding concerning the employment status of two of Seater's fellow whistleblowers in the SCE test laboratory. On page 8 of the R. D. and O., the ALJ refers to Clift and Telford as contract employees, whereas they were regular, directly hired employees of SCE. T. 308, 720; *cf.* RX 7, 8, 9 (listing PE contract employees by name). In addition, the ALJ stated, R. D. and O. at 18, that "despite having been associated with two nuclear safety concerns within one year, Clift continues to be employed in the laboratory," whereas the evidence unequivocally establishes that Clift was scheduled to be transferred from the laboratory effective July 1, 1995.[32/] T. 365 (Clift), 1695-98 (Opitz); *see* T. 378-79 (Clift).

Documentary evidence offered by SCE concerning the budget information available to Seater's supervisors around the time that they decided to accelerate Seater's termination date is also mischaracterized. On page 22 of the R. D. and O., the ALJ states that the document titled "Procurement Engineering 1994 Budget Variance Report Thru April 1994," which is designated RX 76, "projected a $167,506 deficit by the end of the year." In fact, the figure quoted by the ALJ is found on the monthly budget variance report for Procurement Engineering under the column headed "YTD variance." RX 76.[33/] The testimony of Dokter, who prepared the report, Herring, the PE supervisor, and Hadley, the unofficial budget analyst for PE, confirmed that the "YTD variance"

[30/] The record contains conflicting testimony by SCE supervisors concerning whether the decision to commission the CSI study was prompted, at least in part, by the filing of Seater's safety concern. T. 1351-52 (Reilly), 1164 (Rosenblum). The "Introduction" section of the CSI Procurement Engineering Diagnostic Report itself states that the study was requested by Herring, the Procurement Engineering supervisor, and notes that "Appendix A will highlight concerns associated with the Nuclear Safety Concern."

[31/] An understanding of the respective roles of Reedy and CSI is important to an evaluation of the extent of the industry-wide technical debate about fasteners and the extent of the internal controversy at SCE on the fastener issue; and, in turn, the role of these factors in the mindset of the SCE supervisors who made the decision to accelerate Seater's termination date. *See* discussion regarding relevancy of evidence, *supra.*

[32/] We also note that the evidence establishes that higher management was planning to transfer Telford from his regular duties in the laboratory but Opitz resisted this and retained Telford there. T. 642-43 (Seater), 755-56, 851-56 (Telford), 1698-1700, 1716-17 (Opitz).

[33/] The "Grand Total" YTD variance figure on RX 76 is actually $169,506, rather than $167,506 as indicated in the R. D. and O.

column on the monthly budget variance reports prepared by Dokter provided the *year-to-date* amount of deficit or overage for the budget categories listed on those reports, based on year-to-date spending from amounts budgeted for those months of the year, not a *projected* deficit or overage.[34/] T. 515-19, 1456, 1774; *see* T. 1457-70 (line by line disc. of RX 75, budget variance report thru 3/94, by ALJ and Herring).

III. The ALJ's Conclusions of Law

A. Termination

Section 211 of the ERA protects employees in the nuclear industry from retaliatory discrimination based on the pursuit of nuclear related safety concerns. 42 U.S.C. § 5851; *Mackowiak,* 735 F.2d at 1163. To prevail in this complaint based on circumstantial evidence of retaliatory intent, Seater must establish by a preponderance of the evidence that he engaged in activity protected under the ERA, that he was subjected to adverse action, that SCE was aware of the protected activity when it took the adverse action, and that the protected activity was a reason for the adverse action. *See Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak,* 735 F.2d at 1162; *Thomas v. Arizona Public Service Co.,* Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20 (citing *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993)).

As found by the ALJ, Seater has failed to establish by a preponderance of the relevant evidence that SCE's decision to terminate Seater in December 1994 was based, even in part, on retaliation for Seater's protected activity.[35/] We agree with the reasoning of the ALJ regarding SCE's decision to terminate Seater in December 1994, but, as previously noted, we reject the ALJ's findings regarding the decision to accelerate Seater's termination to September 1994. Particularly in the interest of distinguishing the latter from the former, we provide the following clarification of the ALJ's analysis regarding the decision to terminate Seater in December 1994.

Initially, we reject Seater's contention that the ALJ committed reversible error under Section 211 of the ERA in allocating the parties' burdens. Seater urges that the ALJ erred, under the CNEPA amendments to the ERA, by failing to require SCE to establish a legitimate basis for its termination of Seater by clear and convincing evidence. Comp. Br. at 2-3. Contrary to Seater's contention, the clear and convincing evidence standard applies only if a complainant establishes by

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[34/] The year-to-date deficit amount would become the year-end deficit amount only if actual expenditures during the remainder of the year were equal to the amounts budgeted for the remainder of the year. Pertinent documentary evidence indicates, however, that expenditures could not have been expected to remain at the budgeted level. As of early May 1994, when RX 76 would have been available to Herring, Procurement Engineering expenditures could be expected to decrease in relation to the amounts budgeted for the remainder of the year. *See* RX 10, 18; T. 511 (Hadley), 1774-75 (Dokter). The substantive significance of this error will be addressed in the discussion of the acceleration issue, *infra.*

[35/] The parties stipulated that Seater had engaged in protected activity at SONGS. *See* R. D. and O. at 5.

a preponderance of the evidence that the adverse action was motivated, at least in part, by retaliatory intent; the amended Section 211(b)(3) of the ERA heightens an employer's burden of proof only under the dual, or mixed, motive doctrine. Section 211(b)(3)(D) of the ERA, codified at 42 U.S.C. § 5851(b)(3)(D); *see Dysert v. Florida Power Corp.,* Case No. 93-ERA-21, Sec. Dec., Aug. 7, 1995, *appeal docketed Dysert v. Sec'y of Labor,* No. 95-3298 (11th Cir. Sept. 28, 1995); *Yule v. Burns International Security Service,* Case No. 93-ERA-12, Sec. Dec., May 24, 1995, slip op. at 7-13; *see also Johnson v. Bechtel Construction Co.,* Case No. 95-ERA-11, Sec. Dec., Sept. 28, 1995, slip op. at 2; *see generally Mackowiak,* 735 F.2d at 1164 (addressing dual motive doctrine in case arising under the ERA prior to the amendment by the CNEPA). Although the ALJ failed to acknowledge SCE's heightened burden if a mixed motive analysis were reached, R. D. and O. at 4, the ALJ properly concluded that a mixed, or dual, motive analysis was not reached in regard to the SCE's decision not to extend Seater's contract beyond December 1994. R. D. and O. at 30. Consequently, any error in the ALJ's misstatement regarding employer's burden under the dual motive analysis is harmless.

The determination regarding whether retaliatory intent contributed to SCE's decision to terminate Seater at the end of 1994 must focus on the time at which the decision was made and the circumstances surrounding that decision. *See Timmons*, slip op. at 10-11 and cases cited therein. The temporal relationship between a complainant's engaging in protected activity and the employer's decision to take an adverse action must be considered in assessing the motivation of the decision-maker at the pertinent time. *See, e.g., Simon,* 49 F.3d at 389 (citing *Couty v. Dole,* 886 F.2d 147, 148 (8th Cir. 1989); *Bausemer v. Tu Electric,* Case No. 91-ERA-20, Sec. Dec., Oct. 31, 1995, slip op. at 10-12; *but see Jackson and Roskam v. Ketchikan Pulp Co.,* Case Nos. 93-WPC-007, 93-WPC-008, Sec. Dec., Mar. 4, 1996, slip op. at 9-11 (discussing temporal proximity as only one factor to be considered in case of intentional retaliation based on circumstantial evidence). In the instant case, the ALJ found that the decision to terminate Seater in December 1994 had been made prior to December 27, 1993, when Seater raised the fastener safety concern to the attention of the SCE Senior Vice-President. R. D. and O. at 18-21, 25.[36/] This conclusion is amply supported by the record.

Uncontroverted testimony and documentary evidence establish that in early 1992, soon after a decision was made to close one of the SONGS generating units later that year, a staff reduction and reassignment plan was developed by SCE management. *E.g.,* RX 21, 22, 30; *see* R. D. and O. at 19-21 and testimony cited therein. In order to find other jobs for regularly employed SCE personnel who would be displaced upon the Unit 1 closing, management announced its intention to cut consultants, part-time, temporary and supplemental personnel. RX 24. By August 1992, the impact that the plans for "non-SCE staffing reduction" would have on the PE budget was being actively discussed. RX 89, 90. In the last few months of 1992 and the early months of 1993, SCE employees from Unit 1 were being reassigned to PE to replace contract employees there, including employees in the test laboratory, where Seater worked. RX 69, 70, 71. In December 1992, the laboratory's

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[36/] The record unequivocally establishes that Seater's immediate, second level and third level supervisor, in addition to others in higher management, were aware of Seater's December 27, 1993 protected activity within a few days thereafter. *See* R. D. and O. at 6-8, 14; *see generally Samodurov v. General Physics Corp.,* Case No. 89-ERA-20, Sec. Dec., Nov. 15, 1993 (a complainant may establish knowledge of protected activity by either direct or circumstantial evidence).

immediate supervisor, David Opitz, was transitioned from Unit 1 to the laboratory. T. 338-41 (Clift), 1371, 1562 (Herring). Two other regular employees from Unit 1 transitioned to the laboratory in 1993 and one contractor working in the laboratory was terminated. T. 363-64 (Clift), 655-57 (Seater), 1375-76 (Herring); RX 70, 71. Herring's testimony, T. 1375-76, that contract employees were also released from other PE units in 1993 is uncontradicted.

In addition to the plan to transition employees from Unit 1, in June 1993 SCE management was also considering a staffing study authored by Brian Katz, a SCE manager, that recommended further cuts in SCE staffing, including the staff in PE.[37/] T. 1011-14, 1126-36 (Rosenblum), 1274-78 (Reilly); *see* RX 19; R. D. and O. at 20. In August 1993, Herring was planning to cut contractors in PE during 1994, in order to meet the request of higher management that he operate in 1994 on approximately 10% less than his 1994 budget. RX 7, 8; T. 1277-78 (Reilly), 1391-97 (Herring). Plans prepared by Herring in November 1993 indicate that he was planning to terminate some contractors from PE during 1994 in order to operate within a budget amount equal to 90.8% of the 1993 PE budget. RX 9. Seater testified that he and other contract workers were told in a meeting with Opitz in December 1993 that they would be needed in the laboratory through 1994. T. 619-20. An electronic mail message from Hadley, the PE engineer who kept division budget records for Herring, dated December 17, 1993, requested that the first-line supervisors working under Herring in PE prepare budgetary estimates for a meeting on January 4, 1994, and noted that budgetary changes "will significantly impact the PE payroll and the ability to retain contractors." RX 102; *see* T. 500-02 (Hadley).

A memorandum from Herring to Reilly and Rosenblum, dated January 5, 1994, providing a schedule for termination of the twelve contract employees in PE, "[a]s requested in November of 1993," indicates that Seater was scheduled to work through December 1994. RX 10. The foregoing testimony and documentary evidence provide ample support for the conclusion that, although the Herring memorandum is dated a few days after Seater's protected activity of December 27, 1993, the decision to terminate contract personnel in the test laboratory and elsewhere in PE during 1994 was based on personnel and budget decisions made prior to December 27.

Also significant is the lack of evidence indicating hostility toward Seater and his fellow whistleblowers in the laboratory prior to Seater's action on December 27, 1993. Seater began voicing his concerns to Opitz and Herring regarding the fastener issue in the latter part of 1993. T. 251-53 (Brewer), 308-09 (Clift), 602-04, 612-14 (Seater), 726-27 (Telford), 1650-53 (Herring), 1713 (Opitz). There is no evidence, however, of demonstrations of retaliatory animus by Opitz or Herring, or other SCE supervisory personnel, during that time. Rather, the evidence of hostility toward Seater and his fellow whistleblowers follows the developments in the fastener controversy at SCE during 1994. *See, e.g,* T. 254-55 (Brewer), 311-12 (Clift), 610-11 (Seater), 758-59 (Telford); R. D. and O. at 9, 16 (regarding Herring's hostile demeanor toward whistleblowers in 1994). The uncontroverted evidence also indicates that Herring initially shared Seater's view that SCE should be utilizing the newer technology, known as System 22, to gauge the acceptability of fasteners under pertinent

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[37/] The Katz study was based in part on a staffing study produced by consultant T.D. Martin. RX 19; *see* T. 1011-14, 1126-36 (Rosenblum). At the time that he conducted the study, Katz was head of the Nuclear Oversight Division. T. 1223-24 (Slagle).

specifications. T. 541-43 (Hadley), 1537-38, 1543-45 (Herring); *see* T. 147 (Johnson), 612-14 (Seater), 727-29 (Telford); CX 9 at SCE2420.

We also agree with the ALJ that the evidence does not support Seater's contention that the decision to transfer certain budget costs to the PE budget for 1994 was made in response to Seater's protected activity of December 27, 1993. R. D. and O. at 25. Documentary evidence of record establishes that the transfer of certain budget costs to the PE budget for 1994 was discussed by SCE supervisory personnel beginning in mid-1993. RX 103, 110, 114.

In sum, Seater has failed to establish a sequence of events that supports the conclusion that the decision to terminate his contract employment with SCE at the end of 1994 was based, even in part, on retaliatory intent. *See Miller v. ThermalKem, Inc.,* Case No. 94-SWD-1, Sec. Dec., Nov. 9, 1995, slip op. at 5-6, *aff'd sub nom., Miller v. Sec'y of Labor,* No. 95-3174 (4th Cir. Aug. 15, 1996), 1996 U.S.App. LEXIS 20446; *cf. Bausemer,* slip op. at 10-12 (holding temporal proximity between protected activity and subsequent adverse action supported conclusion of retaliatory intent). We thus agree with the ALJ that Seater failed to demonstrate, by a preponderance of the evidence, that SCE's decision not to extend Seater's contract beyond December 1994 was based, even in part, on a discriminatory motive.[38/] *See Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996); *Pillow v. Bechtel Construction, Inc.,* Case No. 87-ERA-35, Sec. Dec., July 19, 1993, slip op. at 13 (citing *St. Mary's Honor Center,* 113 S.Ct. at 2749, 125 L.Ed.2d at 419), *appeal docketed,* No. 94-5061 (11th Cir. Oct. 13, 1994).

B. Acceleration of termination date

The ALJ found that SCE articulated a legitimate reason, *i.e.,* budget pressures, for its acceleration of Seater's termination date from December 1994 to September 1994. R. D. and O. at 24-25. [39/] The ALJ further found that Seater had failed to establish, by a preponderance of all relevant evidence, that retaliatory intent contributed to SCE's decision to accelerate the date of Seater's termination. R. D. and O. at 25-30. In so doing, the ALJ credited the explanations of Herring and Reilly that the decision to accelerate Seater's termination date was based on budget considerations. R. D. and O. at 27-28. In addition to the evidentiary errors discussed *supra,* the

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[38/] Our reliance on uncontradicted testimony and documentary evidence as support for the foregoing analysis obviates the need for us to review further findings of fact and evidence relied on by the ALJ in drawing his conclusion that Seater had not established that the decision to terminate him in December 1994 was retaliatory.

[39/] In a case such as this, in which the respondent has proffered evidence to rebut the complainant's *prima facie* case, the ALJ may simply proceed to weigh all the relevant evidence to determine whether complainant's ultimate burden of establishing retaliatory intent by a preponderance of the evidence has been met. *See Erb v. Schofield Mgmt., Inc.,* ARB No. 96-056, Sept. 12, 1996, slip op. at 3 (citing *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Sec. Dec., Feb. 15, 1985, slip op. at 11 n.9, *aff'd sub nom., Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996)).

ALJ also committed the following errors in analyzing the question of whether Seater had demonstrated retaliatory intent in regard to the acceleration decision.

A major flaw in the ALJ's analysis of the acceleration issue is his failure to focus on the timeframe spanning March and April 1994. R. D. and O. at 27-28. Herring and Reilly testified that they agreed upon the decision to accelerate Seater's termination in April 1994, T. 1279-96 (Reilly), 1454-71, 1645-46 (Herring), and examination of the events occurring proximate to that time is crucial to a proper determination regarding any role that retaliatory intent may have played in the acceleration decision, *see, e.g.,* CX 11, 24, 25, 48, 53, 56, 152; RX 34. *See Bausemer*, slip op. at 10-12; *see also* Timmons, slip op. at 10-11 and cases cited therein.

The ALJ also misinterpreted the budget information available to Herring and Reilly in April 1994. Herring and Reilly testified that their decision to accelerate Seater's termination date had been prompted by receipt of certain budgetary information. T. 1286-89 (Reilly), 1455-57, 1645-46 (Herring); *see* RX 75; *see also* T. 1284-85, 1290-99, 1309-10, 1321-23 (Reilly), 1412, 1471-73 (Herring); RX 12. Herring testified that the year-to-date performance of PE for the first quarter of 1994 indicated that PE "would not be able to meet [its] 1994 budget requirement." T. 1455; *see* T. 1646.

In reviewing the monthly budget variance reports referred to in the testimony of Herring and Reilly, the ALJ, as discussed *supra,* misconstrued the monthly budget variance report at RX 76 as providing a year-end deficit projection that was not included in that report. R. D. and O. at 27-28; *see* RX 76. The ALJ also erred in concluding that the unofficial budget reports prepared by Hadley provide support for the acceleration decision made by Reilly and Herring in April 1994. R. D. and O. at 22. Although Hadley's reports dated March 7 and April 4, 1994 contain year-end deficit projections, the reports indicate that those projections are based on the current "spending rate." RX 104, 105. Hadley's testimony, as well as a monthly budget report that he prepared later in 1994, establish that these earlier reports were based on a faulty premise, *i.e.,* that PE spending would continue at the then current rate; the projections provided in those reports did not reflect the diminished costs that were already planned for by the contractor release schedule implemented January 5, 1994. T. 504-13; RX 106 (noting that the year-end projection--a surplus--is based on the current spending rate *and* "the current schedule for departure of contract personnel."); *see* RX 10 (Herring's 1/5/94 memo regarding contractor termination dates in 1994).[40/]

On remand, the ALJ should re-evaluate the evidence regarding the PE budget that was available to Herring and Reilly in April 1994 to determine whether such information supported the year-end deficit projection these supervisors attested to. Such analysis must address all budget information then available to those supervisors, not merely that which was contained within the official and unofficial monthly budget reports prepared, respectively, by Dokter and Hadley. Thus, in determining whether the testimony of Herring and Reilly regarding the role of budget

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[40/] Despite SCE's counsel's suggestion to the contrary, T. 517, Herring did not testify that he was relying on the Hadley year-end projections in making the decision to accelerate Seater in April 1994.

concerns in the April 1994 acceleration decision is substantiated by other evidence of record, the ALJ must consider budgetary factors that would have been taken into account by those supervisors in their review of the budget documents in evidence. *Cf.* R. D. and O. at 21-23.

The analysis provided by the ALJ does not clearly differentiate between the evidence relevant to two distinct events, *viz.,* the decision to accelerate Seater's termination date from December to September 1994, which was made by Reilly and Herring in April 1994, and the decision *not* to accelerate Seater's termination date from September to July, which was made by Richard Rosenblum, SCE Vice-President for Engineering and Technical Services at that time, in June 1994. R. D. and O. at 11-13; *see* T. 1645-46 (Herring), 1285-98, 1304-06 (Reilly), 1025-35, 1193-94 (Rosenblum); CX 2, 55, 166; RX 38, 39, 40; *see also* T. 1275-80 (Reilly), 1442-44, 1455-57, 1471, 1473-74, 1639-41 (Herring). Uncontradicted evidence establishes that the decision not to accelerate Seater's termination date in June was made by Rosenblum, who rejected Herring's recommendation that Seater's termination be further accelerated to July. T. 1030, 1034-35 (Rosenblum), 1304-06 (Reilly); CX 2, 55, 166; RX 38, 39, 40 (same 3 documents). The evidence also indicates that Reilly specifically consulted with Rosenblum concerning the proposal that Seater's termination be further accelerated in June 1994, but there is no evidence that Reilly or Herring called Rosenblum's attention to the fact that Seater was included in the group of PE contractors whose termination dates Herring and Reilly decided to accelerate in April 1994. *Compare* T. 1279-80, 1296-98, 1455-57, 1473-74 (accounts by Reilly and Herring regarding 4/94 decision), RX 12 *with* T. 1475-76, 1304-06 (their accounts regarding 6/94 decision), RX 39; *see* T. 1645-46 (Herring). Particularly in view of these factors, the question of whether retaliatory intent played any role in the April 1994 decision by Reilly and Herring must be considered on its own merits. *See generally Timmons*, slip op. at 10-11 and cases cited therein.

Finally, in re-examining the acceleration decision on remand, the ALJ must give due consideration to evidence establishing hostility toward whistleblower activity on the part of SCE supervisory personnel. *See Pillow*, slip op. at 22 (citing *Pogue*, 940 F.2d at 1290 in support of principle that it is not permissible for an employer to find fault with an employee for failing to observe established channels when making a safety complaint); *see also Harrison v. Stone & Webster Engineering Group,* Case No. 93-ERA-44, Sec. Dec., Aug. 22, 1995, slip op. at 8-9.[41/] We reject, however, Seater's contention that the refusal of Willis Frick, head of SCE's NSC office, to provide data regarding the number of SCE employees who had engaged in whistleblowing activity that were still employed by SCE constitutes an admission. Comp. Reply Br. at 6-7 n.7; *see* T. 219-20. Pursuant to Section 18.20, the failure of a party to answer a

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[41/] The ALJ recognized the evidence of Herring's hostility toward Seater and other whistleblowers in the laboratory, R. D. and O. at 28; *see* R. D. and O. at 9, as well as the hostility harbored by NSC office personnel toward Seater, R. D. and O. at 29. He also noted the testimony of various witnesses, including SCE managers, that Seater's action of December 27, 1993 was "unprecedented." R. D. and O. at 6. On remand, the ALJ must carefully consider the foregoing factors, in addition to SCE's response to the meeting of Seater and other whistleblowers with the NRC in Washington, D.C. in April 1994, in determining whether retaliatory animus contributed to the decision to accelerate Seater's termination.

request for "admission of the truth of any specified relevant fact," in a timely manner will be deemed an admission of such fact. 29 C.F.R. § 18.20(a), (b). Similarly, pursuant to Section 18.6(d)(2), the failure of a party to comply with an ALJ's order for production of documents, answers to interrogatories or requests for admissions may be relied on, *inter alia,* to draw an adverse inference regarding the information that would have been provided. 29 C.F.R. § 18.6(d)(2). In the instant case, however, the record provides no indication that Seater pursued production of the aforesaid personnel information from Frick's office by means of a request for admission or sought the issuance of an order to compel discovery, *see* 29 C.F.R. § 18.21, by the ALJ in an effort to obtain this information. We therefore reject Seater's argument in this regard.[42/]

C. Hostile work environment

Seater challenges the ALJ's finding that the evidence did not establish that SCE had created a hostile work environment in violation of the ERA. Comp. Br. at 17-18; *see* R. D. and O. at 15-17. To establish retaliatory discrimination in the form of a hostile work environment in this case, Seater must establish five factors. *See Smith v. Esicorp, Inc.,* Case No. 93-ERA-00016, Sec. Dec., Mar 13, 1996, slip op. at 23-27 and cases cited therein. Those factors are as follows: the complainant must establish that he engaged in protected activity and was intentionally retaliated against for such activity; that such retaliation was pervasive and regular; that the retaliation detrimentally affected the complainant; that the retaliation would have detrimentally affected a reasonable person under the same circumstances; and that respondeat superior liability is appropriate. *Smith*, slip op. at 24 n. 18; *see also Fuller v. City of Oakland*, 47 F.3d 1523, 1527 (9th Cir. 1995)(addressing hostile work environment factors within context of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*). After resolving the conflicts in the pertinent evidence on remand, as discussed *supra,* the ALJ must re-evaluate the evidence of record under the foregoing standard and in view of other pertinent points addressed in this decision, *e.g.*, n.41 *supra.*

[42/] Seater also contends that SCE demonstrated its hostility toward activity protected under the ERA by basing its policy toward SCE employees who appeared as witnesses in this case on the content of each witness' testimony. Comp. Br. at 22-23. This contention is refuted by the record, which indicates that SCE paid all employees that appeared at the hearing their regular salary but limited reimbursement for expenses related to appearing at hearing to only those employees who were called by SCE as witnesses. T. 1155-60 (Rosenblum), 1955-58 (Hadley); *see* T. 1636-38, 1940-42. By rejecting Seater's contention in this regard, we do not suggest that the intimidation of witnesses in an ERA hearing is not a serious matter. *See Remusat*, slip op. at 8-9 and authorities cited therein; *see also* T. 1941-42 (Seater's counsel's discussion with ALJ regarding the foregoing issue).

CONCLUSION

Accordingly, this case is remanded to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member