



In the Matter of:

RICHARD D. HIBLER,

ARB CASE NO. 05-035

COMPLAINANT,

ALJ CASE NO. 2003-ERA-9

v.

DATE: March 30, 2006

EXELON GENERATION CO., LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard D. Hibler, pro se, Wilmington, Illinois

For the Respondent:

Donn C. Meindertsmma, Esq., Winston & Strawn, Washington, D.C.; J. Bradley Fewell, Exelon Generation Co., LLC, Kennett Square, Pennsylvania

FINAL DECISION AND ORDER

Richard D. Hibler filed a complaint under the Energy Reorganization Act (ERA)¹ alleging that the Respondent, Exelon Corporation, withdrew his security access in violation of the ERA's whistleblower protection provisions. A United States Department of Labor Administrative Law Judge (ALJ) found that Hibler deliberately violated the ERA and the Atomic Energy Act² when he initialed a work package indicating that he

¹ 42 U.S.C.A. § 5851 (West 2003). Regulations implementing the ERA's whistleblower protection provision are found at 29 C.F.R. Part 24 (2005).

² 42 U.S.C.A. § 2011 *et seq.* (West 2003).

had completed four pre-fit-up and fit-up weld inspections that he had not performed.³ Accordingly, the ALJ held that Hibler forfeited the protection of the ERA's whistleblower provisions⁴ and issued a decision recommending that Hibler's claim be dismissed.⁵ The issue before the Administrative Review Board is whether the ALJ correctly determined that when Hibler, without direction from the Respondent, attested that he had conducted four weld inspections that he admits he did not complete, he deliberately falsified a record in violation of the ERA or Atomic Energy Act of 1954, thus forfeiting the protection of the ERA's whistleblower provision. Finding that the ALJ's determination is supported by the preponderance of the evidence, we affirm it and deny Hibler's complaint.

BACKGROUND

Exelon Nuclear, a division of Exelon Generation Co., LLC, operates several nuclear power plants, including the Dresden Nuclear Power Station, located near Morris, Illinois.⁶ Exelon's nuclear power stations generate energy to provide to the distribution grid.⁷ Pursuant to Nuclear Regulatory Commission (NRC) regulations, Exelon is required to maintain independent Quality Assurance organizations.⁸ At Dresden, the Nuclear Oversight organization fulfills this requirement and is responsible for independently inspecting work performed on plant safety systems.⁹ The primary responsibility of a QV inspector is to verify that "people are doing things correctly;"¹⁰

³ Recommended Decision and Order – Dismissing Complaint (R. D. & O.) at 22-24.

⁴ The ERA provides the following exception to its whistleblower protection:

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.A. § 5851(g).

⁵ R. D. & O. at 24-25.

⁶ *Id.* at 3, n.3.

⁷ Hearing Transcript (T.) at 146 (Joseph Sipek, Nuclear Oversight Manager).

⁸ 10 C.F.R. Part 50, Appendix B (2005). The terms "Quality Assurance" (QA) and "Quality Verification" (QV) are used interchangeably. R. D. & O. at 3 n.3; T. at 144 (Sipek).

⁹ T. at 147 (Sipek).

¹⁰ *Id.* at 151.

QV inspectors “perform inspections independently of the craft and the workers, to . . . ensure that the work meets the acceptance criteria.”¹¹ NRC regulations require that communications with the NRC and documentation required by the NRC, including inspection reports prepared by QV inspectors, be complete and accurate.¹²

NRC regulations also require that nuclear power plants limit access to protected or vital areas of the plants and to provide “high assurance that individuals granted unescorted access are trustworthy and reliable.”¹³ Exelon maintains an Access Verification Program in compliance with these regulations.¹⁴ Contract QV inspectors must have the same level of access as Exelon’s house inspectors because they are required to enter the same areas of the plant to conduct inspections.¹⁵

Exelon periodically takes the Dresden Station “off-line” for refueling and maintenance.¹⁶ During these “outage” periods, Exelon hires contract QV inspectors to supplement its Exelon QV staff.¹⁷ Richard Hibler, a QV Inspector, worked for Venture, a contractor, at the Dresden Station during a 15-day refueling outage in October 2002.¹⁸

During this outage Hibler was assigned to inspect four welds on the Sensing Line Replacement Project.¹⁹ Recirculation piping carries water away from the nuclear reactor vessel, circulates it through pumps and then back into the vessel at a different location. The sensing lines monitor the water pressure and alert the control room if there is a leak in the piping.²⁰ The replacement project was necessary because, when Exelon shut down the Dresden station, it was determined that there was a crack in a weld on the piping.²¹

¹¹ T. at 282 (Michael Porter, QC Supervisor).

¹² 10 C.F.R. § 50.9; T. at 146 (Sipek); Respondent’s Exhibit (RX) 8.

¹³ 10 C.F.R. § 73.56(b).

¹⁴ T. at 194-195 (Susan C. Techau, Access Authorization Fitness for Duty Manager).

¹⁵ T. at 148 (Sipek).

¹⁶ R. D. & O. at 3.

¹⁷ *Id.* at 8, T. at 147-148 (Sipek).

¹⁸ R. D. & O. at 3; T. at 215 (Robert Speek, Jr., Employee Concerns Investigator)

¹⁹ T. at 237 (Meyer); T. at 152 (Sipek); T. at 117, 122-126 (Richard Hibler).

²⁰ T. at 152 (Sipek).

²¹ *Id.* at 152-153.

Hibler attended an ALARA radiation and pre-job briefing on October 13, 2002, at which the job steps were outlined and the work package for the job was reviewed.²² The work package includes the instructions for the craftsman to follow to accomplish his or her task. The package also contains “hold points.”²³ When the craftsman reaches a hold point, he or she should stop the work and contact the QV organization so that a QV inspector can ascertain whether the craftsman has done the work correctly.²⁴ The work package includes boxes corresponding to each task that the craftsman and inspector sign off to certify that they have completed the tasks.²⁵

The Sensing Line Replacement Project involved nine welds, each of which required a number of QV inspections. A QV inspector on the day shift inspected five of the nine welds on October 14, 2002. Hibler was responsible for inspecting the remaining four welds during the night shift.²⁶ That evening, Hibler’s assignment was to conduct a pre-fit-up inspection and a fit-up inspection on the four welds.²⁷ The pre-fit-up inspection requires the inspector to view the lines internally before they are tacked together to assure that they are clean and that there are no foreign contaminants that would interfere with the weld and create cracking or porosity.²⁸ Hibler was also required to do a fit-up inspection.²⁹ During fit-up the pipes are joined, so it is necessary for the inspector to determine that the alignment and gap requirements are met.³⁰ After this inspection is completed and the fit-up is approved, the pipes are tacked together to hold them still so that the craftsman can weld them.³¹

Although Hibler and the Exelon witnesses disagree on most of the events that followed Hibler’s arrival at the dry well area of the reactor containment vessel to conduct his inspection on the early morning of October 15, 2002, they did not dispute two crucial

²² T. at 113 (Hibler).

²³ T. at 153 (Sipek).

²⁴ T. at 76 (Hibler); T. at 153 (Sipek).

²⁵ T. at 76 (Hibler).

²⁶ *Id.* at 122-128.

²⁷ *Id.* at 76-77, 122- 128 ; R. D. & O. at 3.

²⁸ T. at 246 (Sipek); T. at 285-286 (Porter).

²⁹ T. at 122-128 (Hibler); R. D. & O. at 3.

³⁰ T. at 76-77 (Hibler); T. at 286 (Porter).

³¹ T. at 286 (Porter).

facts: 1) when Hibler entered the reactor containment vessel to conduct the pre-fit-up and fit-up inspections on the four welds, the welder had passed the hold point and had already tacked the pipes together³² and 2) Hibler subsequently initialed the work package indicating that he had completed the pre-fit-up and fit-up inspections on each of the four welds, although he had failed to complete the inspections because the pipes were already tacked.³³

Hibler contended that certifying that he had conducted the inspections was a mistake.³⁴ He testified that a number of factors contributed to his mistake.³⁵ Earlier in his shift he had been contaminated and had had to go through a decontamination process. As a result, the Sensing Line project, a critical path job, was held up an hour and a half while the welders waited for him to conduct the inspection.³⁶ It was 3:00 a.m. and he had taken over-the-counter medicine for a cold and was somewhat disoriented.³⁷ He further stated that when he arrived at the bull pen outside of the reactor vessel there was no work package for him to review before entering the reactor vessel to conduct his inspection.³⁸ He averred that when he complained to James Meyer, the Exelon Quality Control Inspector on the evening shift that there was no work package available, Meyer screamed at him to get into the reactor and conduct the inspection.³⁹ After he conducted the inspection, he said that he waited at least 15 or 20 minutes for the original work package to arrive and then he mistakenly signed for the inspections on the four welds that he did not perform.⁴⁰ Ultimately he contended that he signed in error because he

had been contaminated, and been put through being screamed at and went inside, and it was 3:00 in the morning and had a cold. And waiting for the package. And I was somewhat disoriented and made a mistake.[⁴¹]

³² T. at 118-119 (Hibler).

³³ T. at 77, 82, 111, 122-126 (Hibler); T. at 165-169 (Sipek); R. D. & O. at 3, 22.

³⁴ T. at 111, 121, 126 (Hibler).

³⁵ *Id.* at 126-127, 129.

³⁶ T. at 152 (Sipek); T. at 72-74, 77, 129 (Hibler).

³⁷ T. at 74, 111 (Hibler).

³⁸ *Id.* at 76.

³⁹ *Id.* at 82-83, 127; T. at 248 (James A. Meyer, Quality Control Inspector).

⁴⁰ T. at 80-82 (Hibler).

⁴¹ *Id.* at 129.

Hibler testified generally that when other QV inspectors made mistakes they were permitted to correct them, but in his case, Michael Porter, Exelon's QV Supervisor, "decided to make a federal case out of it"⁴² and "they took vengeance."⁴³ Hibler opined that there were two reasons that he was treated differently than other QV inspectors who had made "mistakes." He claimed that Exelon retaliated against him because he challenged Meyer concerning the allegedly missing work package before entering the reactor vessel and because there were hard feelings between Porter and him, most recently because Hibler had obtained a transfer from the day shift to the night shift.⁴⁴

Meyer's testimony concerning the events at issue here differs significantly from Hibler's testimony. Meyer stated that once he and Porter located Hibler, he accompanied Hibler to the job site.⁴⁵ Meyer testified that there was a copy of the work package on a table just outside the bull pen area.⁴⁶ Meyer saw Hibler looking at the work package and Hibler became upset because he said that the welder had not signed off on the pre-fit-up and fit-up of the weld joints by placing his ID and date in the corresponding box in the work package.⁴⁷ Meyer reviewed the package and saw that there was no ID or date by the pre-fit-up and fit-up operations, but he did not understand why Hibler expected that the welders would have signed off on them as completed since Hibler had not yet inspected them.⁴⁸ When Meyer explained to Hibler that at this point "nothing should be on the paperwork" because Hibler had not yet conducted the required inspections, Hibler told him that he was incorrect.⁴⁹ Hibler told him that the piping was already tacked together.⁵⁰ When Meyer asked him why the piping had already been tacked, Hibler told him that it had been discussed at the ALARA pre-briefing and an arrangement had been made so that he would only inspect the piping after it had been tacked, in effect bypassing the pre-fit-up and fit-up inspections.⁵¹ Meyer told him that he would straighten

⁴² *Id.* at 84.

⁴³ *Id.* at 83.

⁴⁴ *Id.* at 98-99.

⁴⁵ T. at 243 (Meyer).

⁴⁶ *Id.* at 244.

⁴⁷ *Id.*

⁴⁸ *Id.* at 245, 246.

⁴⁹ *Id.* at 247.

⁵⁰ *Id.*

⁵¹ *Id.*

out the paperwork and that Hibler should do the inspections “he needed to do.”⁵² He testified that out of frustration, he did “raise his voice with [Hibler]” because of the length of time the project was delayed.⁵³

Hibler conducted the exterior inspection, noted some cleanliness issues and some arc stripes and required the welders to remove the stripes.⁵⁴ He left the dry well while the welders cleaned up their welds.⁵⁵ After the welders made the repairs, he re-inspected the exterior and finding it acceptable, he again left the dry well.⁵⁶ Meyer testified that while Hibler was in the dry well, he went to the foreman to make sure that the paperwork was current and accurate.⁵⁷ The foreman decided that rather than work with the copy of the work package that was at the site, he would request that the original work package be delivered to him.⁵⁸ The original arrived shortly after Hibler exited the dry well, and Hibler and the foreman sat down to work on it.⁵⁹

Meyer left the site to discuss Hibler’s inspection with Joseph Sipek, the Nuclear Oversight Manager, and Porter.⁶⁰ Sipek asked him who authorized the arrangement that Hibler had described.⁶¹ Meyer told him that he did not know who authorized the arrangement and that Hibler had told him it was discussed during the ALARA briefing.⁶² At that point Meyer had no reason to disbelieve Hibler’s account and he played no part in the decision to revoke Hibler’s security clearance.⁶³

Hibler, Sipek and Porter agree that Hibler was ordered to meet with Porter and Sipek shortly after he finished his inspection but their descriptions of the meeting differ

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 250.

⁵⁵ *Id.* at 250-51.

⁵⁶ *Id.* at 251.

⁵⁷ *Id.*

⁵⁸ *Id.* at 251-252.

⁵⁹ *Id.* at 252.

⁶⁰ *Id.*

⁶¹ *Id.* at 253.

⁶² *Id.*

⁶³ *Id.* at 253-254.

significantly. Sipek testified that he arrived at work between 5:30 and 6:00 a.m. on October 15th and shortly thereafter he attended a turnover meeting to be briefed about the night's activities.⁶⁴ Porter also attended the meeting.⁶⁵ At the meeting Meyer told him that they were late performing the weld inspections and that Hibler had told him that some weld inspections had been waived.⁶⁶ Sipek was surprised to hear that Hibler was claiming that the inspections had been waived because Sipek was the only manager authorized to waive the inspections and he had not done so.⁶⁷ Furthermore, the welds on this piping previously had failed so he wanted to assure that the QV inspectors verified that the welds were acceptable.⁶⁸

Sipek asked Porter to find out from Hibler the name of the person responsible for waiving the inspection and then to bring Hibler to meet with Sipek.⁶⁹ Porter called Hibler and Richard Todd, a day shift QV inspector, into his office.⁷⁰ When Porter asked Hibler who waived the hold points, Hibler said that there was an arrangement with WSI to waive them by a guy named Jeff.⁷¹ Hibler did not say that he was too ill to do a good inspection or that he was pressured to sign off on the welds by mistake.⁷² Hibler did not state that the work package was not available to him.⁷³ Hibler did not suggest that because he had signed off by mistake that he should be permitted to correct the mistake.⁷⁴ When Porter asked Hibler again who had waived the hold points, Hibler replied that they were not waived; that he had signed for them.⁷⁵ When Porter asked him how he could sign for

⁶⁴ T. at 154 (Sipek).

⁶⁵ *Id.* at 154, T. at 290 (Porter).

⁶⁶ T. at 154, 156 (Sipek).

⁶⁷ *Id.* at 156, 157.

⁶⁸ *Id.* at 156.

⁶⁹ T. at 290 (Porter).

⁷⁰ *Id.* at 291.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 294.

⁷⁴ *Id.*

⁷⁵ *Id.* at 292. If the hold points had been waived the proper procedure would have been to put an asterisk or the word "waived" in the acceptance box and then a note at the bottom of the document stating that per Joe Sipek the hold point was waived. *Id.* at 297. Even if the hold points had been waived it would not be proper to sign off on the inspection as if the inspections had been completed. *Id.*

them if the pipe was already tacked, he would not answer.⁷⁶ Porter testified that he held no grudge against Hibler for transferring to the night shift⁷⁷ and that he played no part in the decision to revoke Hibler's security clearance.⁷⁸

Porter took Hibler to meet with Sipek.⁷⁹ Sipek asked Hibler about waiving the hold points for the pre-fit-up and fit-up inspections and Hibler told him that his foreman, Gary Walker, told him that the inspections had been waived in an agreement between Walker and the welding contractor.⁸⁰ Hibler admitted that he had signed off on inspections he had not conducted.⁸¹ He did not claim that he was under the influence of sinus medication and simply made a mistake.⁸² He did not maintain that he was too pressured to do his job properly or that he was trying to protect Meyer.⁸³ He did not say that the work package was not available to him; although he said that it was not up to date.⁸⁴ He did not claim that he had merely made a mistake and should be permitted to correct it.⁸⁵ He did not give a rational reason for his actions.⁸⁶ When pressed for an explanation, he said that the welders had not been following the proper procedures.⁸⁷ Sipek testified that the welders' failure to do their work properly would not excuse a QV inspector from conducting a proper inspection because

QV is the, essentially, the last line of defense, you know. Nuclear plants, we rely on, on people's integrity. We rely on the welder's [sic] doing the right thing. And, and on welds that are important to safety, significant welds, those

⁷⁶ *Id.*

⁷⁷ *Id.* at 288.

⁷⁸ *Id.* at 295.

⁷⁹ *Id.*

⁸⁰ T. at 159-160 (Sipek).

⁸¹ *Id.* at 160.

⁸² *Id.*

⁸³ *Id.* at 163.

⁸⁴ T. at 294 (Porter).

⁸⁵ *Id.*

⁸⁶ T. at 161 (Sipek).

⁸⁷ *Id.*

are the weld[s] that we involve QC on, and, and so those are the ones that we verify that someone has completed the task correctly.[⁸⁸]

Sipek was surprised and disappointed that Hibler would sign off on an inspection that he did not conduct and he told Hibler that such conduct was unacceptable.⁸⁹ Hibler responded that there were other procedures that had not been completed correctly and Sipek replied that he would arrange for Hibler to speak with Bob Speek, the Employee Concerns Representative, to make sure that his concerns were addressed and entered into the Corrective Action Process.⁹⁰ Hibler met with Speek later that day.⁹¹ Sipek was not aware until the hearing before the ALJ that Hibler contended that the package was not available to him before he entered the containment vessel; he thought that Hibler had only complained that the work package was not up to date.⁹²

Hibler also testified about the meeting with Porter and Sipek. He stated that Meyer went to Porter's office and informed him that Hibler had raised safety concerns about entering the reactor vessel and that Meyer had to scream at him to get him to enter.⁹³ When Hibler entered Porter's office, Porter told him that he had signed for inspections that he had not performed. Porter took Hibler to Sipek's office. Hibler testified that they gave him "a quick hodgepodge interview" and that he could not remember what was going on.⁹⁴ He said that he could not recollect everything he said that night and initially he said he did not remember if he told Porter that the hold points had been waived⁹⁵ and then he denied telling him that they had been waived.⁹⁶ He testified that he did not remember telling Sipek that the hold points had been waived but that he told them that at the ALARA briefing waiver was mentioned and perhaps Porter and Sipek took his comments in the "wrong context."⁹⁷ He said he told Porter that he had

⁸⁸ *Id.*

⁸⁹ *Id.* at 162.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 170.

⁹³ T. at 83 (Hibler).

⁹⁴ *Id.* at 85.

⁹⁵ *Id.* at 105.

⁹⁶ *Id.*

⁹⁷ *Id.*

signed off “in error.”⁹⁸ He said that certifying the four weld inspections as completed was “a mistake, by accident.”⁹⁹

Sipek initiated two investigations of the weld “falsification.”¹⁰⁰ He requested Speek to investigate Hibler’s procedure concerns and Hibler’s incorrect weld documentation.¹⁰¹ He also brought in Joseph Klevorn, Nuclear Oversight, Braidwood Station Operations Assessor, to conduct an independent investigation into the weld incident.¹⁰²

Speek met with Hibler twice. He first interviewed Hibler on the evening of October 16th along with Tom Morini, the Employee Concerns Investigator, and Debra Erb, Venture’s HR Manager.¹⁰³ In an e-mail memorializing the interview, Speek recommended that Hibler be suspended from his work because “there was nothing in the interview that indicted that I could re-establish a trustworthiness.”¹⁰⁴ Hibler had indicated to Speek that waiving the hold points had been discussed at the pre-job briefing.¹⁰⁵ Ultimately, this claim could not be confirmed. Speek interviewed both Gary Walker, Hibler’s foreman, and Jeff Kowalewski, the only “Jeff” at the pre-job briefing, and neither individual recalled any mention of waiving hold points at the briefing.¹⁰⁶ Hibler did not state that he was too sick to realize what he was doing when he signed off on the inspections.¹⁰⁷ He concluded that Hibler had intentionally falsified the weld record because Hibler made no comments that indicated that he made a mistake.¹⁰⁸ Instead, Hibler blamed WSI because they were not following procedures and he did not accept any of the responsibility or give Speek any indication that he had made a mistake.¹⁰⁹ Hibler did not initially contend that he was being retaliated against because

⁹⁸ *Id.*

⁹⁹ *Id.* at 111.

¹⁰⁰ T. at 164 (Sipek).

¹⁰¹ *Id.*

¹⁰² *Id.* at 165.

¹⁰³ T. at 214 (Speek).

¹⁰⁴ *Id.* at 216.

¹⁰⁵ *Id.* at 216-217, 220.

¹⁰⁶ Respondent’s Exhibit (RX) 9, T. at 219 (Speek).

¹⁰⁷ T. at 217 (Speek).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

he raised safety issues.¹¹⁰ Speek met with Hibler several days later to discuss Hibler’s safety concerns.¹¹¹ Speek determined that he should follow up on Hibler’s complaints regarding the work package procedures and to take Hibler up on his offer to “come up with a whole list of problems” at Dresden.¹¹² He also recommended that Nuclear Oversight consider resetting the Department Event Free Clock based on a significant error in a Nuclear Oversight Product and that two additional condition reports be written to address WSI paperwork inadequacies and the welds Hibler rejected.¹¹³ Ultimately, he found no reason to believe that Exelon retaliated against Hibler for reporting safety concerns.¹¹⁴

Joseph Klevorn submitted his Report of Fact Finding Investigation – Possible Falsification of QV Hold Points – Condition Reports 1257502 & 127520 on October 16, 2002.¹¹⁵ Klevorn described the report as documenting “the results of an independent investigation of the facts surrounding the completion of QV weld inspections for this work activity on shift I October 15, 2002.”¹¹⁶ Klevorn concluded:

- Written statements from Sipek, Porter and Todd corroborate one another in stating that Hibler told them that he had accepted the pre-fit-up and fit-up hold points for welds in this work order even though he had not arrived at the job site until the initial tack welds had been completed. Sipek’s and Porter’s statements agreed that Hibler told them that he had accepted these hold points even though he did not perform the inspections and that Hibler did not explain his reasoning for accepting these hold points beyond complaining about the overall low quality of WSI, Inc. work activity documents.
- Walker and Meyer stated that no QV hold points in the work order had been waived nor had any special agreements with the construction welding work group been made regarding the conduct of the QV hold points.
- Review of NSWP-W-01, ASME Welding, Revision 5 paragraph 7.1.1, the Exelon standard for the conduct of pre-fit-up inspections, indicates that verification of internal cleanliness is required to be performed as part of a

¹¹⁰ *Id.* at 221.

¹¹¹ *Id.*

¹¹² RX 9.

¹¹³ *Id.*

¹¹⁴ T. at 221 (Speek).

¹¹⁵ RX 5.

¹¹⁶ *Id.* at 2.

pre-fit-up inspection. It is impossible to verify internal cleanliness after the parts to be welded have been tack welded in place.

- Review of the Exelon Nuclear Special Process Procedures Manual-Welding and Brazing indicates that a minimum “pullout” clearance must be verified as part of the fit-up inspection for socket welds. It is not possible to perform this verification after the parts to be welded have been tack welded in place.
- Review of excerpts of the work order shows the initials “RH” written by pre-fit-up for weld numbers 4, 7, 8, and 9 QV hold points and fit-up for weld numbers 7, 8, and 9 QV hold points noting that they were acceptable. The weld number 4 fit-up QV hold point is marked “N/A.” next to the “RH” initials. The intention of this annotation was not clear.
- It is assumed that Hibler entered his initials at these locations. There was no documentation of any hold points being waived.¹¹⁷

There is no indication in the report that Klevorn interviewed Hibler during the course of his investigation. Klevorn concluded that “Rich Hibler falsified those records that document the performance of several safety-related weld inspections contained in Work Order 00494885-01. By placing his initials on the weld record sheets, he created documents that would serve as records of completed weld inspections that he did not perform.”¹¹⁸

On October 16, 2002, Sipek directed Paul F. Schultz, Dresden Station Certifying Authority Level III, to place Hibler’s inspection certifications¹¹⁹ into inactive status, which meant that Hibler could no longer perform inspections at Dresden.¹²⁰ He directed Schultz to take this action based on the results of his interview with Hibler and Klevorn’s inspection report.¹²¹ In particular, the determination that Hibler had falsified the records and the implications such falsification had for Hibler’s “trustworthiness” motivated his decision.¹²²

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.*

¹¹⁹ Inspector certifications permit inspectors to perform various types of inspections (e.g., electrical, welding, civil) at various levels (1-3) at a nuclear facility. If an inspector’s certification is put into inactive status, the inspector may not perform inspections in the facility. T. at 176 (Sipek).

¹²⁰ T. at 176 (Sipek), RX 4.

¹²¹ T. at 177 (Sipek).

¹²² *Id.*

He also discussed Hibler's access to Dresden Station with the Security Organization, advising that it should take appropriate action based on Hibler's falsification of the report and "the resulting problems with trustworthiness of the individual."¹²³ Exelon's Access Authorization Program Procedure, in effect in October 2002 requires that in evaluating criteria for unescorted access an individual's trustworthiness or reliability must be determined.¹²⁴ Susan C. Techau, the Access Authorization/Fitness for Duty Program Manager reviewed the Klevorn report and she concluded that "we could not continue to determine that Mr. Hibler was trustworthy and reliable, based on falsification of documentation."¹²⁵ Accordingly, on October 28, 2002, she sent a letter to Hibler informing him that his unescorted access to Exelon's nuclear power stations was cancelled due to an ongoing investigation at Dresden¹²⁶ and on December 4, 2002, she sent him a letter informing him that his unescorted access to Exelon's nuclear stations had been denied "due to falsification of documentation."¹²⁷

In response to Hibler's falsified report, Sipek ordered a number of corrective actions. He required inspectors to re-review inspections Hibler had conducted because trustworthiness was brought into question.¹²⁸ He disciplined Hibler by revoking his access and then he conducted a stand down of all his QV Inspectors, to discuss the lessons learned, including employer responsibilities and repeating his expectations regarding "documentation of weld inspections in case there was any question."¹²⁹

Sipek also reported the incident to the NRC because it involved a falsification of documents in violation of NRC regulation 10 C.F.R. § 50.9.¹³⁰ The NRC Office of Investigations (OI) investigated the incident.¹³¹ After reviewing the Dresden staff

¹²³ *Id.* at 178-179.

¹²⁴ RX 13 at 5.

¹²⁵ T. at 198, 205 (Susan C. Techau, Access Authorization/Fitness for Duty Program Manager). Techau explained that trustworthiness is the foundation of the security access program because to "protect the health and safety of the public, we need to make an evaluation on an individual's trustworth[iness] and reliability." *Id.* at 198.

¹²⁶ RX 2.

¹²⁷ RX 3.

¹²⁸ T. at 182 (Sipek).

¹²⁹ *Id.* at 182-183.

¹³⁰ T. at 178.

¹³¹ RX 8, p.1.

investigation reports and interviewing Hibler, Barnes, Porter, Meyer, Sipek and Walker, the OI investigator found:

[O]n October 15, 2002, a non-supervisory QV inspector did not perform the preliminary fit-up and fit-up inspection associated with four welds on a flow sensing line for the #A recirculation loop. The inspections were required by the Dresden Station QA Program and its implementing procedures. Subsequently, the QV inspector [Hibler] falsified the “ASME Weld Records,” also required by the Dresden Station QA Program, to show the required inspections had been performed. The actions of the QV inspector placed Exelon Nuclear in violation of 10 CFR Part 50, Appendix B, Criterion V, “Instructions, Procedures, and Drawings,” the Dresden Station QA Program and 10 CFR 50.9, “Completeness and Accuracy of Information,” and were categorized in accordance with the “General Statement of Policy and Procedure for NRC Enforcement Actions” (Enforcement Policy), NUREG-1600, at Severity Level IV.^{132]}

The OI investigator concluded that Hibler’s falsification of the weld reports was deliberate.¹³³

In a report to John L. Skolds, President of Exelon Nuclear, detailing the results of the NRC investigation, Cynthia D. Pederson, NRC Director of the Division of Reactor Safety, noted:

The matter was identified and immediately investigated by Exelon Nuclear. Corrective actions taken by Exelon Nuclear in this matter included, but were not limited to: (1) reviewing previous inspections performed by the QV inspector [Hibler] and reworking an unacceptable weld previously accepted by the QV inspector; (2) taking disciplinary action against the inspector; and (3) conducting a stand-down with all QV inspectors to discuss the lessons

¹³² *Id.* See also Report of Investigation – Dresden Nuclear Power Station: Deliberate Falsification of Quality Record by QV Inspector and Discrimination Against a Contract QV Inspector for Raising QC Concerns, RX 16.

¹³³ RX 16, p.p. 3, 17. The OI investigator also investigated Hibler’s complaint that Dresden discriminated against him for raising quality control inspection concerns and he determined that Dresden did not discriminate against Hibler for raising such concerns. RX - 16 at 18.

learned, including employee responsibilities and management expectations of employees. Therefore after considering the circumstances of this case and after consulting with the Director, Office of Enforcement this violation is being treated as a Non-Cited Violation (NCV) consistent with Section V1.A.1 of the Enforcement Policy.[¹³⁴]

Because Exelon cancelled Hibler's certifications and security access, he could no longer work for Venture at the Dresden Power Station or at any other Exelon plant. On December 20, 2002, Hibler filed an ERA whistleblower complaint.¹³⁵ The Department of Labor's Occupational Safety and Health Administration (OSHA) investigated the complaint and on February 10, 2003, informed Hibler of its findings.¹³⁶ OSHA concluded that the complaint lacked merit.¹³⁷ The findings included instructions for filing an appeal.¹³⁸ These instructions provided in pertinent part:

Unless [a] request for appeal is received by the Chief Administrative Law Judge within the five day period, this notification of determination will become the final order of the Secretary of Labor. Exelon Nuclear Generating is being advised of the determination and the right to a hearing. A copy of this letter and complaint have been sent to the Chief Administrative Law Judge. If you decide to request a hearing, it will be necessary for you to send copies of the request to Exelon Nuclear Generating, and to this office at the address noted in the above letterhead.[¹³⁹]

Hibler served the ALJ with a request for a hearing within five business days of the receipt of OSHA's determination that the complaint "must be dismissed for lack of merit." But contrary to the pertinent regulations, Hibler failed to serve Exelon with a copy of his hearing request.¹⁴⁰

¹³⁴ RX-8, p. 1.

¹³⁵ Secretary's Findings (S. F.) at 1.

¹³⁶ *Id.*

¹³⁷ *Id.* at 4.

¹³⁸ *Id.*

¹³⁹ OSHA Findings at 4 (Feb. 10, 2003).

¹⁴⁰ 29 C.F.R. § 24.4(d)(2), (3) provides in pertinent part:

On March 27, 2003, Exelon filed a Motion to Dismiss with the ALJ alleging that Hibler's failure to serve Exelon with his hearing request deprived the ALJ of jurisdiction to adjudicate his case. The ALJ denied Exelon's motion.¹⁴¹ The ALJ acknowledged that 29 C.F.R. § 24.4(d)(2) specifically provides that if a party fails to timely serve the ALJ with a hearing request, the notice of determination shall become the final order of the Secretary. However, the ALJ concluded that 29 C.F.R. § 24.4(d)(4), providing for service of the request on the respondent, does not specify any consequence, much less dismissal of the complaint, for failure to perfect service on the respondent. Similarly, the ALJ noted that while the "Appeal Notification" provided to Hibler in the notice of determination informed him of the necessity of serving the ALJ and the consequences of his failure to do so and that it was necessary to send copies of the hearing request to Exelon, the notification did not specify how the copies should be sent to Exelon or advise Hibler of the consequences of his failure to serve Exelon. Consequently, the ALJ denied Exelon's motion, "as too harsh a result for this pro se Complainant."¹⁴²

In response, Exelon filed a motion requesting the ALJ to certify the case to the Administrative Review Board to consider an interlocutory appeal of the order denying the

(2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. . . . If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.

(3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the . . . respondent (employer) . . . on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

¹⁴¹ Order Denying Respondent's Motion to Dismiss at 2.

¹⁴² *Id.*

motion to dismiss. The ALJ granted this motion,¹⁴³ and Exelon filed a petition for interlocutory review and brief in support of the petition with the Board. On February 26, 2004, the Board issued its Order Dismissing Petition for Interlocutory Review. The Board determined that Exelon has not presented the Board with any reason to depart from the Board's Order Denying Interlocutory Appeal and Amending Briefing Schedule (ARB June 22, 1998) and Final Decision and Order (ARB Mar. 30, 2001) in *Shelton v. Oak Ridge Nat'l Lab.*,¹⁴⁴ a case directly on point.¹⁴⁵ Accordingly, the Board refused to consider Exelon's interlocutory appeal.

On December 15, 2004, the ALJ issued a Recommended Decision and Order – Dismissing Claim (R. D. & O.). Hibler timely petitioned the Board to review the ALJ's R. D. & O.¹⁴⁶

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review an ALJ's recommended decision in cases arising under the ERA's whistleblower protection provision and to issue the final agency decision.¹⁴⁷

Under the Administrative Procedure Act, this Board, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board reviews the ALJ's recommended decision de novo.¹⁴⁸

¹⁴³ Order Granting Respondent's Request for Certification and Staying Hearing.

¹⁴⁴ ARB No. 98-100, ALJ No. 95-CAA-19.

¹⁴⁵ In *Shelton*, the Board initially denied the petition for interlocutory review, noting that the complainant could raise any arguments concerning the timeliness of the respondent's request for a hearing in her brief challenging the ALJ's recommended decision. Slip op. at 2. Thus the challenge to the ALJ's finding that the request for a hearing was timely did not fall within the collateral order exception because the finding was not effectively unreviewable on appeal from the final judgment. In the Final Decision and Order, the Board reiterated that the time limit for filing a request of a hearing is not a jurisdictional prerequisite and that the ALJ properly determined that the limitations period was subject to equitable tolling. Slip op. at 6.

¹⁴⁶ See 29 C.F.R. § 24.8(a).

¹⁴⁷ See 29 C.F.R. § 24.8 (2005). See also Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

¹⁴⁸ See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States*

It is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature.¹⁴⁹ But an ALJ's findings, including those based upon determinations of witness credibility, constitute a part of the record and, as such, are subject to review and receipt of appropriate weight.¹⁵⁰ In weighing a witness's testimony, the fact-finder considers the relationship of the witness to the parties, the witness's interest in the outcome of the proceedings, the witness's demeanor while testifying, the witness's opportunity to observe or acquire knowledge about the subject matter of the witness's testimony, and the extent to which other credible evidence supported or contradicted the testimony.¹⁵¹

DISCUSSION

Under the ERA whistleblower provision, it is unlawful for an employer to “discharge . . . or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” participated in a proceeding or in any other action to carry out the purposes of the ERA or the Atomic Energy Act of 1954.¹⁵² An employee establishes a violation of § 5851 by proving by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer subjected him to an adverse employment action, (3) the employer was aware of the protected activity, and (4) the protected activity was a contributing factor in the employer's decision to take adverse action.¹⁵³ Nevertheless, even if the employee

Coast Guard Acad., ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

¹⁴⁹ See Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) (“the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself”). See generally *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision).

¹⁵⁰ *Universal Camera*, 340 U.S. at 492-497; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

¹⁵¹ *Jenkins v. United States Env'tl. Pro. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted).

¹⁵² 42 U.S.C.A. § 5851(a).

¹⁵³ *Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-7, slip op. at 3 (ARB July 30, 2004).

establishes a violation, the Secretary may not grant relief if the employer demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence” of protected activity.¹⁵⁴ Furthermore, an 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” forfeits his or her whistleblower protection.¹⁵⁵ This forfeiture provision provides the employer with an affirmative defense on which it bears the burden of proof by a preponderance of the evidence.¹⁵⁶

In this case, the ALJ did not find it necessary to determine whether Hibler had carried his burden of establishing a violation of the ERA whistleblower protection provision because he found that Exelon established by a preponderance of the evidence that when Hibler signed an ASME Weld Record Continuation Sheet and falsely certified that he had completed four pre-fit-up and fit-up weld inspections, he, without Exelon’s direction, deliberately violated regulations promulgated pursuant to the ERA and the Atomic Energy Act.¹⁵⁷ We agree.

Exelon, to prevail in its affirmative defense must established three elements: 1) Hibler violated the ERA or Atomic Energy Act, 2) the violation was deliberate, and 3) Exelon did not direct Hibler to violate the ERA or Atomic Energy Act. We address each element in turn.

1. Whether Hibler Violated the ERA or Atomic Energy Act

Hibler has conceded that he signed an ASME Weld Record Continuation Sheet, indicating that he had conducted the pre-fit-up and fit-up inspections on four welds that he did not in fact complete.¹⁵⁸ Hibler’s action “placed Exelon Nuclear in violation of 10 CFR Part 50, Appendix B, Criterion V, ‘Instructions, Procedures, and Drawings,’ the Dresden Station QA Program and 10 CFR 50.9, ‘Completeness and Accuracy of

¹⁵⁴ 42 U.S.C.A. § 5851 (b)(3)(D). *See also Kester v. Carolina Power & Light Co.*, ARB No. 02-07, ALJ No. 2003-ERA-33 (ARB Sept. 30, 2003).

¹⁵⁵ 42 U.S.C.A. § 5851(g).

¹⁵⁶ *Fields v. Florida Power Corp.*, ARB No. 97-070, 96-ERA-22, slip op. at 2 n.3 (ARB Mar. 13, 1998), *aff’d sub nom.*, *Fields v. United States Dep’t of Labor*, 173 F.3d 811 (11th Cir. 1999).

¹⁵⁷ R. D. & O. at 21-25.

¹⁵⁸ T. at 77, 82, 111, 122-126 (Hibler).

Information.”¹⁵⁹ The NRC promulgated these regulations pursuant to the Atomic Energy Act and the ERA.¹⁶⁰ Accordingly, “we deem a violation of these regulations to constitute a violation of the Atomic Energy Act and the ERA.”¹⁶¹

2. Whether Hibler’s Violation was Deliberate

The deliberate nature of the violation was the most strongly contested of the three elements. Hibler, in his brief to the Board, contended:

I admit to signing the inspection in error under duress because I made an issue of there being no work instruction package present at the time I made my inspection. . . . They vehemently ordered me to go in and do the inspection without reviewing the work package because this job was critical path work. . . . Exelon’s lead inspector Jim Myers, [sic] who was the person who ordered me to go in and do the inspection, stated implicitly [sic] “No” in court when I asked him if he believed I falsified the inspection.^[162]

Hibler’s contention that he unintentionally signed for four pre-fit-up and fit-up weld inspections that he did not complete is severely compromised by his failure to explain the connection between the alleged missing work package, the alleged duress he experienced because Meyer vehemently urged him to conduct the inspections and the fact that he signed for the four inspections that he did not conduct. If, as Hibler contends there was no work package, its absence might explain why Hibler did not know what inspections he was to perform, but it would not explain why Hibler signed for inspections that he knew he had not performed. Furthermore, Hibler never contended that he was under duress to sign the work package, only to enter the containment vessel to perform the inspections. To the contrary, Hibler complained that he had to sit and wait for 15 to 20 minutes before the package arrived after he exited the containment vessel.¹⁶³ Therefore this was not a situation in which Hibler exited the containment vessel and was rushed to sign the report without the opportunity to reflect on what he was signing.

¹⁵⁹ RX 8, p.1. *See also* Report of Investigation – Dresden Nuclear Power Station: Deliberate Falsification of Quality Record by QV Inspector and Discrimination Against a Contract QV Inspector for Raising QC Concerns, RX 16.

¹⁶⁰ 10 C.F.R. § 50.1 (2006).

¹⁶¹ *Fields*, slip op. at 5-6 n.9.

¹⁶² Opening brief at 1.

¹⁶³ T. at 80 (Hibler).

In addition, while Hibler claims that he told Porter and Sipek that he signed in error, Porter testified that Hibler never stated that he mistakenly signed and should be permitted to correct his mistake.¹⁶⁴ Furthermore, Sipek testified that when he pressed Hibler for an explanation of how he signed for four welds he had not inspected, Hibler gave no rational reason for his actions and instead attempted to justify his action by stating that the welders had failed to do their work properly.¹⁶⁵ Hibler did not maintain at that time that he was under the influence of medication or that he was too pressured to do his job properly.¹⁶⁶ Likewise, when Speek interviewed him, Hibler again did not take responsibility or claim that he had made a mistake; he attempted to shift the responsibility to WSI because the welders were not following procedures.¹⁶⁷ Given Hibler's inability or unwillingness to offer a rational explanation for his actions or to take any responsibility for signing for the welds that he did not inspect, it was reasonable to conclude that Hibler had intentionally falsified the weld report.

In any event, the ALJ, who had the opportunity to observe the witnesses testify, found that Meyer credibly testified that Hibler knew before he entered the containment area that the pipes had already been tacked, that a copy of the work package was available and that Hibler reviewed the work package.¹⁶⁸ After an examination of the record, we find no basis for disturbing the ALJ's finding that Meyer's testimony was credible. Therefore, given that Hibler reviewed the work package before he entered the containment area and he knew that he was supposed to conduct the pre-fit and fit-up inspections but that the welders had already passed the hold points, these facts further support the ALJ's ultimate finding that Hibler deliberately signed the weld report. Correspondingly the fact that Hibler did not credibly testify concerning these facts casts strong doubt on his ultimate testimony that he unintentionally signed for the four welds.

Furthermore, while Hibler contends that Porter's determination that he deliberately falsified the weld record was influenced by personal animosity, in separate investigations, Speek, the Employee Concerns Representative, and Klevorn, a Nuclear Oversight, Braidwood Station Operations Assessor, also concluded that Hibler's falsification was intentional. Even if it could be argued that these investigators were subject to influence because they were Exelon employees, the same could not be argued in reference to the NRC investigator, who also concluded that Hibler deliberately

¹⁶⁴ T. at 294 (Porter).

¹⁶⁵ T. at 161 (Sipek).

¹⁶⁶ *Id.* at 163.

¹⁶⁷ T. at 217 (Speek).

¹⁶⁸ R. D. & O. at 22-23.

falsified the report.¹⁶⁹ Hibler does not allege that the NRC inspector had any personal animosity towards him; the investigator considered both Hibler's testimony and that of Meyer, Porter and Sipek and concluded that Hibler intentionally falsified the weld record in violation of NRC regulations.¹⁷⁰

In Hibler's defense, Meyer did testify that he did not believe Hibler would intentionally falsify a report and it is certainly not clear what would have motivated him to do so. But while Hibler claims that Meyer and Porter may have taken his comments about the waiver of hold points in the wrong context, he does not explain in what context or for what purpose he raised the waiver or potential waiver of hold points with them when they initially questioned him concerning the false weld record. Accordingly, the ALJ concluded that Hibler had entered into an informal and improper agreement to bypass the hold points so that the WSI welders could finish the job more quickly and then signed for the weld inspections to cover up the fact that he had violated proper procedure. In any event, if Exelon believed that it could attribute Hibler's actions to a simple mistake rather than a deliberate falsification of a weld report, surely it would have been to the company's advantage to do so. It is simply too great a stretch to conclude that Exelon would have expended substantial resources and work hours in investigations and corrective actions and exposed itself to possibly serious NRC sanctions, just to rid itself of Hibler because one its managers was angry that he changed his schedule or because he complained that a work package was incomplete or missing.

Finally, Hibler argues that Exelon failed to substantially respond to his discovery request by producing condition reports for the three years preceding the cancellation of his security clearance in which QV inspectors had made mistakes but their security clearances were not cancelled. Exelon contends that it conducted an extensive search and that it provided all of the reports that its search produced.¹⁷¹ Hibler ultimately introduced 17 condition reports into evidence.¹⁷² The ALJ considered Hibler's objection in a telephone conference on June 24, 2004. In response to Hibler's claim that it had not produced all documents responsive to his request, Exelon explained how it conducted its search.¹⁷³ Exelon also argued that Hibler's request for reports of CV inspector mistakes was not relevant, in any event, because Exelon did not cancel Hibler's clearance because he made a mistake; it cancelled his clearance because he deliberately falsified an

¹⁶⁹ RX 8, p.1. *See also* Report of Investigation – Dresden Nuclear Power Station: Deliberate Falsification of Quality Record by QV Inspector and Discrimination Against a Contract QV Inspector for Raising QC Concerns, RX 16.

¹⁷⁰ *Id.*

¹⁷¹ Telephonic hearing transcript –June 24, 2004 (THT) at 7.

¹⁷² R. D. & O. at 16-17.

¹⁷³ THT at 7-8.

inspection report.¹⁷⁴ Upon questioning from the ALJ, Hibler admitted that he had no evidence establishing that Exelon had failed to comply; he was simply relying on his experience working at Exelon plants.¹⁷⁵ Hibler also conceded that he knew of no QV inspectors who had falsified documents and whose employment was not terminated.¹⁷⁶ Ultimately, Hibler stated that he had sufficient condition reports to go to trial and he did not accept the ALJ's offer to allow him to depose QV inspectors who had worked at Exelon during the relevant period about such reports.¹⁷⁷ Accordingly, the ALJ declined to find that Exelon had not complied with the discovery order.

The Board has held that ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion.¹⁷⁸ Hibler was unable to prove that Exelon had failed to produce any relevant condition reports and ultimately stated that he was ready to go to trial with the reports that he had. Furthermore, even if there had been additional reports concerning CV-inspector mistakes, Hibler has not demonstrated how these reports would have bolstered his case since Exelon contended that it cancelled his security clearance because he deliberately falsified the weld report, not because he made a mistake, and Hibler conceded that he knew of no CV inspectors who falsified a report and whose security clearance was not cancelled. Thus the ALJ did not abuse his discretion in concluding that Exelon had sufficiently complied with Hibler's discovery request and we agree with the ALJ that the preponderance of the evidence supports a finding that Hibler deliberately falsified the weld report.

3. Whether Exelon Directed Hibler to Violate the ERA or Atomic Energy Act

Although Hibler contended that Meyer angrily ordered him into the containment area to perform the inspections, he conceded that he was not pressured into falsely signing for the welds.¹⁷⁹ Accordingly Exelon has demonstrated by a preponderance of the evidence that it did not direct Hibler to violate the ERA or Atomic Energy Act.

¹⁷⁴ *Id.* at 11.

¹⁷⁵ *Id.* at 10.

¹⁷⁶ *Id.* at 14.

¹⁷⁷ *Id.* at 11, 12 13, 15.

¹⁷⁸ *Friday v. Northwest Airlines Inc.*, ARB No. 03-132, ALJ No. 03-AIR-19, 20, slip op. at 4 (ARB July 29, 2005).

¹⁷⁹ T. at 80 (Hibler).

CONCLUSION

Because we conclude that Exelon has established by a preponderance of the evidence that Hibler, without Exelon's direction, deliberately violated the ERA and Atomic Energy Act, Hibler has forfeited the protection of the ERA's whistleblower provision. Accordingly we **DENY** Hibler's whistleblower complaint.¹⁸⁰

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

¹⁸⁰ Because we have denied Hibler's complaint, it is not necessary for us to reach the alternative grounds for dismissal urged by Exelon – that the ALJ should not have considered Hibler's appeal because Hibler failed to serve it with his hearing request within five days as provided in 29 C.F.R. § 24.4(d)(2).