Proposed Rules

Federal Register
Vol. 76, No. 44
Monday, March 7, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM–50–92; NRC–2008–0492]

James Luehman; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is denying a petition for rulemaking (PRM) submitted by James Luehman (the petitioner). The petitioner requests that the NRC amend the NRC's standard for sustaining a whistleblower retaliation violation of the Employee Protection Rule. The NRC is denying PRM–50–92 for the reasons stated in this document.

ADDRESSES: Publicly available documents related to this petition for rulemaking may be accessed using the following methods:

• *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

• *Federal Rulemaking Web Site:* Supporting materials related to this petition for rulemaking can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2008–0492. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; e-mail: *Carol.Gallagher@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Kimberly Sexton, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1151; e-mail: *Kimberly.Sexton@nrc.gov.*

SUPPLEMENTARY INFORMATION:

The Petition

Title 10 of the *Code of Federal Regulations* (10 CFR) § 2.802, "Petition for Rulemaking," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation and on June 26, 2008, the petitioner submitted a PRM requesting that the NRC amend 10 CFR 50.7, "Employee Protection." Section 50.7 prohibits discrimination by an NRC licensee, among others, against an employee for engaging in certain protected activities.[1] This regulation is commonly known as a "whistleblower" protection provision. Similar provisions are found in 10 CFR parts 19, 30, 40, 52, 60, 61, 63, 70, 71, 72, and 76.

The legal standard by which the NRC determines whether a violation of Section 50.7 has occurred was decided by the Commission in the *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI–04–24, 60 NRC 160 (2004) (*TVA*) enforcement proceeding. In *TVA,* the Commission held that in evaluating whether a violation of Section 50.7 has occurred, licensing boards must address two questions:

1. Did the NRC Staff show, by a preponderance of the evidence, that protected activity was a "contributing factor" in an unfavorable personnel action?

2. Did the employer show, by "clear and convincing evidence," that it would have taken the same personnel action regardless of the protected activity?

TVA, CLI–04–24, 60 NRC at 194.

These two questions were adapted by the Commission from Section 211 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. 5851. Section 211 offers protection, through the U.S. Department of Labor (DOL), to employees who have been fired or otherwise discriminated against as a result of engaging in protected activities. S. Rep. No. 95–848, at 29 (1978). Under Section 211, to prove a violation, employees must demonstrate by a preponderance of the evidence that the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." Relief to the employee, however, may not be granted if the employer can demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." Public Law 102–486, Section 2902(d), 106 Stat. 2776, 3123–24 (amending 42 U.S.C. 5851(b)).

The petitioner's proposed new regulatory standard would allow the NRC, in evaluating the evidence, to conclude that a whistleblower retaliation violation has occurred without regard to whether the licensee has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. Thus, the petitioner's proposed approach would apply the clear and convincing evidentiary standard not to the question of whether a violation has occurred but to the determination of the sanction to be imposed for the violation.

The petitioner requests that the NRC amend its standard for sustaining a whistleblower retaliation violation of the Employee Protection Rule based on two asserted changes in circumstance reflecting that a departure from *TVA* is now needed. First, the petitioner states that there is sufficient anecdotal evidence to suggest that the Commission's *TVA* decision may be having an adverse effect on how potential filers of complaints view NRC handling of discrimination cases, as well as how such cases are being evaluated by the NRC staff. The petitioner cites as evidence "a significant recent decline in the number of discrimination allegations submitted

[1] The NRC can take an enforcement action, including orders and civil penalties, against licensees, applicants, or contractors or subcontractors of licensees or applicants who violate Section 50.7 and may do so because the Atomic Energy Act of 1954 authorizes the NRC to prohibit employee discrimination that is based on protected activity, 42 U.S.C. 2201(c) and (o), 2133, 2236(a), and provides broad authority for the NRC to protect workers against retaliation for raising safety concerns. *Union Electric Co.* (Callaway Plant, Units 1&2), ALAB–527, 9 NRC 126 (1979).

as well as a decline in the percentage of discrimination allegations that were determined to meet the threshold for investigation." Second, the petitioner states that because of the probable new construction of power reactors under 10 CFR part 52 and the Department of Energy's application for a high-level waste repository, a clarification of the Employee Protection Rule is necessary.

In support of this request, the petitioner provides eight arguments for changing the Commission ruling in *TVA.* Each of the arguments is described below.

The petitioner first argues that the addition of the clear and convincing test in effect raises the standard for concluding a violation exists from a preponderance of the evidence (meaning that it is more likely than not that a violation occurred) to a higher standard of "somewhere between preponderance [of the evidence] and clear and convincing [evidence]." Accordingly, the petitioner views *TVA* as making it more difficult to prove a violation of the Employee Protection Rule. The petitioner argues that the legal requirements of Section 50.7 of the Employee Protection Rule and Section 211 of the ERA are satisfied by the lesser standard of evidence, *i.e.* when it is shown by a preponderance of the evidence that discrimination was "a contributing factor" in the adverse action against the employee. The petitioner states that the licensee may raise the defense that clear and convincing evidence demonstrates it would have taken the same unfavorable personnel action in the absence of protected activity only as a defense in the sanction determination process, not as a defense to the question of whether a violation has occurred.

Second, the petitioner states that the additional clear and convincing test identified in *TVA* directly conflicts with the present language of Section 50.7(d). That provision provides that adverse actions taken by an employer, or others, against an employee may be predicated upon nondiscriminatory grounds and that an employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations. The petitioner argues that *TVA* changed the application of Section 50.7(d) such that "the prohibition against discrimination now applies, if and only if, the employer is unable to show by clear and convincing evidence that the adverse action would have been taken in absence of the protected activity." The petitioner believes this "will cause and in fact may now be causing some number of people to not enter the process given the reduced chances of success."

The petitioner's third, fourth, and fifth arguments essentially state that the clear and convincing test does not exist in Section 211 of the ERA for the determination of a violation and thus should not be used by the NRC for that purpose. The petitioner cites the decision of an NRC Atomic Safety and Licensing Board (Licensing Board) in *Tennessee Valley Authority,* LBP–03–10, 57 NRC 553 (2003) as support for modifying the Section 50.7 Employee Protection Rule so that the "clear and convincing" question is considered in the sanction determination process, not in determining whether a violation has occurred .

Sixth, the petitioner states that there is a possibility of an inconsistent regulatory message if the DOL finds a violation of Section 211 of the ERA but the NRC does not find a violation of the Employee Protection Rule of Section 50.7 for the same set of underlying facts.

Seventh, the petitioner states that the Commission's decision in *TVA* could cause employees to fear retaliation because *TVA* demonstrates "that some amount of retaliation is in fact acceptable."

Finally, the petitioner states that the test established in *TVA* is not necessary to ensure that the staff appropriately applies the Section 50.7 Employee Protection Rule.

The NRC reviewed the request for rulemaking and determined that the request met the minimum sufficiency requirements of 10 CFR 2.802 and therefore was considered as a petition for rulemaking. Accordingly, the NRC docketed the request as PRM–50–92 on July 9, 2008. The NRC notified the petitioner of this decision by letter dated July 15, 2008. Due to this PRM's primary focus on the continued viability of a Commission adjudicatory decision, it was deemed a legal matter and thus, the NRC did not prepare a notice of receipt and request for comment, and instead began consideration of the request.

Background

In *TVA,* the NRC staff issued an $110,000.00 Order Imposing Civil Monetary Penalty to the Tennessee Valley Authority for its non-selection of an employee to a competitive position due, in part, to that employee's having engaged in protected whistleblowing activities. *Tennessee Valley Authority,* LBP–03–10, 57 NRC 553. The Tennessee Valley Authority did not deny that the employee had engaged in protected activities; however, it stated that the employee's non-selection was made solely for legitimate business reasons and requested a hearing on the imposition of the penalty. After a 25-day evidentiary hearing, the Licensing Board determined that the Tennessee Valley Authority violated Section 50.7 based solely on a standard of "whether the Staff can prove by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an adverse action." Having found a violation, the Licensing Board then reduced the civil penalty to $44,000.00 because of "the small role that protected activities may have played in leading to the adverse action."

The Tennessee Valley Authority appealed the Licensing Board's ruling to the Commission. The Commission agreed to review the decision, and also raised its own question of whether the Licensing Board applied the correct legal evidentiary standard when determining whether to mitigate a civil penalty arising from a violation of the Employee Protection Rule. *TVA,* CLI–03–09, 58 NRC 39. On appeal, the Tennessee Valley Authority argued that the Licensing Board erred by not following the evidentiary framework established in discrimination cases like *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973) and *Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989). *Id.* at 190. The NRC staff, on the other hand, provided essentially the same argument as the petitioner does now, that it need only prove by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an unfavorable personnel action without looking to whether the employer would have taken the same action in the absence of the complainant's protected activity.[2]

The Commission disagreed with the NRC staff and decided that it was appropriate for Licensing Boards in

[2] Before the Licensing Board, the staff argued that "[t]he appropriate standard to apply in a section 50.7 violation case is whether the Staff has proven by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an unfavorable personnel action. The Board should not consider whether the employer can demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the complainant's protected activity. A section 50.7 violation is based on the employer's actual motives; if one of the employer's motives for taking the adverse action was the complainant's protected activity, the employer has violated section 50.7." "NRC Staff Pretrial Legal Brief" (Mar. 1, 2002) (ADAMS Accession No. ML020660033). The staff maintained its position before the Commission on appeal. "NRC Staff's Brief in Response to CLI–03–10 Regarding Standards by Which a Licensing Board Should Mitigate a Civil Penalty in a Discrimination Case" (Oct. 2, 2003) (ADAMS Accession No. ML032820036).

whistleblower discrimination cases to ask two questions, adapted from Section 211 of the ERA, to determine whether a violation of 10 CFR 50.7 exists:

> 1. Did the NRC Staff show, by a preponderance of the evidence, that protected activity was a "contributing factor" in an unfavorable personnel action?
>
> 2. Did the employer show, by "clear and convincing evidence," that it would have taken the same personnel action regardless of the protected activity?

TVA, CLI–04–24, 60 NRC at 194. The Commission attempted to "make[] clear that engaging in protected activities does not immunize employees 'from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations.' " *Id.* at 192–93. In establishing this test, the Commission believed that employers should be offered "the same right of defense in an NRC enforcement proceeding as Section 211 gives them in a Department of Labor compensation proceeding—*i.e.,* the right to defend against a whistleblower discrimination charge on the ground that they would have taken the same personnel action regardless of the employee's protected activities." *Id.* at 192–193. The clear and convincing test dovetails with Section 50.7(d) to provide that protection and while the Commission looked to, and tracked, Section 211's evidentiary framework, it emphasized that Section 50.7 does not adopt it. *Id.* at 194.

The Commission also defined what constitutes a "contributing factor" in an adverse employment action. Although both parties in *TVA* agreed that Section 211's "contributing factor" causation standard should apply, the parties could not agree on what that standard entails. *TVA,* CLI–04–24, 60 NRC at 195. First, the Commission looked to Congressional intent. "Congress did not enact Section 211's 'contributing factor' test in a vacuum," but instead patterned it after similar whistleblower protection statutes in other industries. *Id.* at 196. Congressional intent in using the "contributing factor" test in other industries evidenced a desire to lessen the burden on plaintiffs in making their case, and in turn to make it more difficult for defendants to avoid liability. *Id.* Thus, after looking to case law involving whistleblower statutes similar to Section 211, the Commission held that the correct questions to ask in determining whether the protected activity was a "contributing factor" in the adverse action was: whether the "protected activity contributed 'in any degree' or played 'at least some role' in [the employer's] personnel decisions" as opposed to whether it was a "significant" or "motivating" factor. *Id.* at 196–97. The Commission, however, was quick to point out that this is not a "toothless" test:

> An employee may not simply engage in protected activities and expect immunity from future unfavorable personnel actions. Mere employer (or supervisor) knowledge of the protected activity does not suffice as a "contributing factor;" nor does "the equivalent of adding 'a drop of water into the ocean.' " The evidence, direct or indirect, must allow a reasonable person to infer that protected activities influenced the unfavorable personnel action to some degree. In cases where the evidence is weak, employers should be able to avoid liability by providing "clear and convincing evidence" that they would have taken the same personnel action anyway, based on non-discriminatory grounds.

Id. at 197. Therefore, finding a contributing factor does not necessarily end the analysis; "under section 211 (and under analogous whistleblower laws) employers still may avoid liability if they show, by 'clear and convincing evidence,' that they would have taken the same unfavorable personnel action even in the absence of whistleblowing."[3] *Id.* at 198.

NRC Evaluation

Within the context of the Commission's *TVA* decision, the NRC has reviewed the petition and has decided to deny PRM–50–92. As stated above, in deciding *TVA,* the Commission had before it the NRC staff's position as to the appropriate evidentiary standard under the Employee Protection Rule. The standard advocated by the staff in 2002 is fundamentally the same position now advocated by the petitioner. In 2004, when the Commission ruled in *TVA,* it explicitly elected an approach that is different from that proposed by the petitioner. In overturning the Licensing Board's decision, and the standard advocated by the staff in *TVA,* the Commission fully considered the option of using the clear and convincing question solely in the sanction determination process, and chose not to elect this approach. Further, the Commission also considered, and dismissed, the possibility of an inconsistent regulatory message in *TVA.*[4] Thus, the Commission's approach in *TVA* was adopted with full knowledge of the position and arguments currently advocated by the petitioner.

Contrary to the petitioner's understanding, *TVA* did not raise the NRC staff's burden of proving a violation to "somewhere between preponderance and clear and convincing." The staff's burden for proving retaliation is always preponderance of the evidence. Once the NRC staff meets its burden, the employer may proffer an affirmative defense by clear and convincing evidence, a higher standard for the employer to meet, that it would have taken the same personnel action anyway, regardless of the whistleblowing activity. The petitioner mistakenly treats the second part of the *TVA* test as a standard the NRC staff must refute to take enforcement action, rather than recognizing it as, in essence, an affirmative defense that the licensee may, but is not required to, address.

Further, *TVA* does not establish that "some amount of retaliation is in fact acceptable." Instead, *TVA* states that if the protected activity affected or contributed to the adverse action "in any way," "in any degree," or "played 'at least some role'," the staff will satisfy the Commission's "contributing factor" test. *TVA,* CLI–04–24, 60 NRC at 197. The staff does not have to show that the protected activity played a "significant," "motivating," "substantial," or "predominant" factor in the adverse action. *Id.* But, the staff must show more than mere employer knowledge of the protected activity or the equivalent of adding a "drop of water into the ocean." *Id.*

The Commission recognized in establishing the two-part test that although the NRC staff may demonstrate by a preponderance of evidence that the contributing factor test is met "where the evidence is weak," *id.* at 197, the Commission did not expect for the NRC staff to prevail in weak cases—only in those where the employer does not prove by a high standard of proof that it would have taken the same action absent protected activity. *See id.* at 192 ("In cases where the evidence is weak, employers should be able to avoid

[3] Ultimately, the Commission affirmed in part, and reversed in part, the Licensing Board's Order, and remanded the case to the Licensing Board for further action. On November 10, 2004, the Licensing Board approved a settlement agreement between Tennessee Valley Authority and the NRC and terminated the proceedings. *TVA,* LBP–04–26, 60 NRC 532 (2004).

[4] In fact, the staff argued this very same point to the Commission in the "NRC Staff Reply to Initial Briefs of the Tennessee Valley Authority and the Nuclear Energy Institute" (Nov. 3, 2003) (ADAMS Accession No. ML033240178), which the Commission directly rejected: "In practical terms, because we see few whistleblower enforcement adjudications at the NRC, because varying evidentiary frameworks are not necessarily outcome-determinative, and because the NRC's general enforcement policy is to give deference to DOL's whistleblower determinations, our disagreement with DOL on how to apply section 211 in adjudications is unlikely to lead to inconsistent results between the agencies very often, if at all." *TVA,* CLI–04–24, 60 NRC at 192.

liability by providing 'clear and convincing evidence' that they would have taken the same personnel action * * *"). By contrast, in cases where the staff has stronger evidence that protected activity was a contributing factor, such as when a document or employer's statements confirm an allegation of whistleblower discrimination, it would be unlikely that the employer could make its case by clear and convincing evidence that it would have taken the adverse action regardless. Thus, the Commission in *TVA* did not condone "some amount of retaliation"; rather, it established the standards for determining the existence of whistleblower discrimination if a violation is challenged by an employer.

In deciding *TVA,* the Commission looked to Section 211 for procedural guidance in applying Section 50.7 and generally adopted Section 211's overall framework. *Id.* at 194. The Commission, however, is not required to follow Section 211's evidentiary standard. *Id.* at 193–194.[5] Section 211 establishes DOL's authority to take action in cases involving whistleblower discrimination, *id.* at 194, but the NRC's authority to regulate against employee discrimination is derived from the Atomic Energy Act of 1954. Therefore, Section 211 should not be construed as directing the NRC's evidentiary approach.

Further, contrary to the petitioner's assertion, the discrimination data from 1999–2009 do not appear to evidence any meaningful trends because the data fluctuates up and down during the years prior to and following *TVA* (2004); in some years since *TVA,* the number of discrimination claims filed is higher than in the years directly preceding *TVA* and in others that number is lower. Also, because the data does not differentiate claims failing to meet the threshold *prima facie* determination from those that were withdrawn by the alleger or came to the NRC as third-party claims,[6] it is unknown whether there is any change in the percentage of discrimination allegations that were dismissed or withdrawn because they failed to meet the threshold for investigation, as the petitioner asserts.

	Calendar year										
	1999	2000	2001	2002	2003	2004[7]	2005	2006	2007	2008	2009
TOTAL DISCRIMINATION CLAIMS	139	144	108	97	96	97	118	88	84	94	116
Total Claims Resolved/[8]% of Total Claims	91/65.5	91/63.2	75/69.4	55/56.7	70/72.9	75/77.3	73/61.9	37/42.0	52/61.9	34/36.2	10/8.6
NRC Substantiated/% of Total Claims	6/4.3	6/4.2	8/7.4	0/0	4/4.2	3/3.1	1/0.9	2/2.3	0/0	1/1.1	0/0
NRC Not Substantiated/% of Total Claims	83/59.7	84/58.3	66/61.1	55/56.7	64/66.7	66/68.0	63/53.4	23/26.1	42/50.0	16/17.0	7/6.0
Settlements/[9]% of Total Claims	2/1.4	1/0.7	1/0.9	0/0	0/0	6/6.2	9/7.6	9/10.2	10/11.9	17/18.1	3/2.6
Claims Still Open/% of Total Claims	0/0	0/0	0/0	1/1.0	2/2.1	1/1.0	3/2.5	1/1.1	2/2.3	13/13.8	58/50.0
Claims Not Warranting NRC Review/[10]% of Total Claims	48/34.5	53/36.8	33/30.6	41/42.3	24/25.0	21/21.6	42/35.6	50/56.2	30/35.7	47/50.0	48/41.3

*The data contained in this table was obtained from the Allegation Management System.

Finally, the *TVA* decision has had no effect on the way the NRC staff approaches or evaluates whistleblower discrimination claims. That is, the NRC staff continues to issue notices of violations of the Employee Protection Rule to licensees, applicants, and contractors or subcontractors of licensees and applicants based on its assessment as to whether the evidence shows that protected activity was a contributing factor in the adverse action, while also taking into consideration credible evidence that the employer would have taken the same personnel action regardless of the protected activity.

Public Comments on the Petition

Due to this PRM's primary focus on the continued viability of a Commission adjudicatory decision, it was deemed a legal matter and thus, the NRC did not prepare a notice of receipt and request for comment, and instead began consideration of the request. Accordingly, there are no public comments on this petition.

Determination of Petition

For reasons cited above, the NRC is denying PRM–50–92.

Dated at Rockville, Maryland, this 28th day of February 2011.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2011–5053 Filed 3–4–11; 8:45 am]

BILLING CODE 7590–01–P

[5] "It is true that our whistleblower regulation, section 50.7, does not adopt the Section 211 evidentiary paradigm as such, but neither does it adopt the *McDonnell Douglas or Price Waterhouse* paradigms. Our regulation is prohibitory, not procedural. It renders discriminatory conduct unlawful, but does not purport to prescribe evidentiary standards and approaches for use in NRC enforcement litigation."

[6] Third party claims are those discrimination claims that come to the NRC from an individual other than the employee who was allegedly discriminated against.

[7] 2004 represents both: (1) The year when the Commission decided *TVA* and (2) the year that the interim program regarding the voluntary use of Alternative Dispute Resolution (ADR) in addressing discrimination complaints and other allegations of wrongdoing was adopted in the NRC's Enforcement Policy.

[8] Refers to the number of discrimination claims for which either: (1) The NRC's Office of Investigations (OI) reached a conclusion and (2) those that did not involve an OI investigation and were settled via early-ADR (or licensee-sponsored internal mediation) or in the DOL.

[9] These numbers represent the number of cases settled either through early-ADR or in the DOL. However, the table does not reflect cases that involved DOL settlements between 1/1999 and 9/2004 that also involved an OI case. For information only, those numbers are: 1999—10; 2000—7; 2001—7; 2002—3; 2003—9; and 2004—3.

[10] These numbers represent the number of claims that did not meet the threshold *prima facie* determination, were withdrawn by the alleger, or came to the NRC as third-party claims. These numbers do not take into account that some of the open claims might eventually be found to not meet the *prima facie* determination or could be withdrawn by the alleger.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1325; Airspace Docket No. 10–ASO–40]

Proposed Amendment of Class E Airspace; Orangeburg, SC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E Airspace at Orangeburg, SC, to accommodate the additional airspace needed for the Standard Instrument Approach Procedures (SIAPs) developed for Orangeburg Municipal Airport. This action shall