

BALCH & BINGHAM LLP

ATTORNEYS AND COUNSELORS

POST OFFICE BOX 306

BIRMINGHAM, ALABAMA 35201-0306

(205) 251-8100

WRITER'S OFFICE:

1710 SIXTH AVENUE NORTH

BIRMINGHAM, ALABAMA 35203-2015

FACSIMILE (205) 226-8798

M. Stanford Blanton

DIRECT DIAL TELEPHONE:

(205) 226-3417

June 29, 2000

Cynthia D. Pederson, Director
Division of Nuclear Materials Safety
United States Nuclear Regulatory Commission
Region III
801 Warrenton Road
Lisle, IL 60532-4351

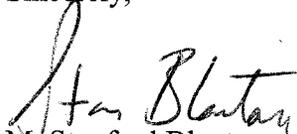
Re: NRC OI Reports 3-1999-012; 3-1999-033; and 3-1999-034
IA 00-009

Dear Ms. Pederson:

Pursuant to your request at the June 26, 2000 predecisional enforcement conference, I am enclosing a redacted copy of our Reply to Notice of Apparent Violations which was submitted to you on June 22, 2000.

Please call me if you need anything further.

Sincerely,


M. Stanford Blanton

MSB:dc

Encl.

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The NRC's initial findings, as compared to its latest position reversing those findings, clearly indicates that reasonable minds could differ on the classification and reportability issues. This dichotomy of opinion not only demonstrates the reasonableness of []'s conclusions, it also demonstrates the apparent lack of adequate guidance concerning the procedures for making such determinations. In addition, []'s actions, specifically his directives to conduct a classification review and to safeguard the document (including all notes, copies, etc.) as potentially classified pending Mr. []'s classification determination, are demonstrative of the judiciousness with which [] handled the matter. Therefore, notwithstanding the final determination on the classification and reportability issues, [] could not reasonably be charged with deliberate misconduct on these facts.

Moreover, the above-referenced deficiencies in guidance appear to satisfy the NUREG-1600 criteria mitigating against taking enforcement action against an individual. The alleged failure to report an incident involving the creation of the document, albeit potentially classified, on an unclassified computer lacks "actual or potential safety significance," and was the result of "inadequate procedural or technical guidance." The NRC Enforcement Policy states that such circumstances mitigate against individual enforcement actions for alleged intentional violations of the Commission's requirements. For these and the foregoing reasons, [] should not be subject to individual enforcement action. Even though [] may have been incorrect in his analysis, he acted in a good faith belief, based upon the information available to him at the time, in arriving at his opinion. In fact, [] implemented NRC and [] security and reporting policy and guidelines in accordance with his experience and understanding thereof. [] asserts that he exercised reasonable judgment, relying on his experience and expertise in security operations and management.

Second, the evidence shows that [] did not direct those present in the August 1998 meeting to not report the creation of the document nor did he threaten them in any way. []'s testimony in this regard is corroborated by half of the meeting participants. In other words, no statements made during the August 1998 meeting were intended by [] to prevent event reporting. This evidence supports a finding that [] did not make any statements with the intent of violating, or causing another to violate, company or NRC requirements. Conversely, []'s performance record demonstrates that he is a proponent of the prompt reporting of security infractions or violations. Any misunderstanding of []'s comments would not support individual enforcement action against him.

Third, [] did not discriminate against any employee for engaging in protected activity. The factual circumstances surrounding the alleged discrimination discredit the charge. That is, legitimate factors, wholly unrelated to the event in question, were the basis for []'s initial refusal of Mr. []'s travel request. [] asserts that he exercised reasonable judgment and standard procedure in evaluating and

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dispositioning the travel request, and was not motivated in any way by []'s assertions or actions in connection with the August incident. The objective facts support []'s position in this regard. Conversely, given the apparent lack of support for OI's findings in this regard, [] should not be made the subject of an individual enforcement action.

In sum, the evidence presented in the OI Reports, to the extent made available to [] and/or counsel, is at best inconclusive to support a finding of deliberate misconduct on the part of [] with respect to any of the foregoing apparent violations. Notwithstanding his lack of culpability, this incident has underscored []'s appreciation for the need to avoid statements or actions that could, even inadvertently, be considered chilling by others. He understands that this is especially true when discussing contentious issues with subordinates. Although he disagrees with the disciplinary action taken against him by the company, he has accepted the discipline without complaint and has assumed his new position within [] with a renewed commitment to regulatory compliance. Additional punitive action is not warranted, would not be productive, and would not serve the purpose of NRC enforcement policy and regulation.

Respectfully submitted,

[]
[] LLP

Attorneys for []

June 22, 2000

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of [])
[]) IA 00-009

**Reply to Notice of Apparent Violations Cited
in Office of Investigations Reports Nos.
3-1999-012, 3-1999-033, and 3-1999-034**

I. Introduction and Summary of Apparent Violations

This Reply to Notice of Apparent Violations is submitted on behalf of [] in response to a letter received by him from NRC Region III, dated April 12, 2000, which "refers to investigations conducted between March 22, 1999, and February 11, 2000, by the NRC Office of Investigations ("OI") into allegations that [he] may have deliberately violated NRC requirements."¹ The purpose of this Reply is to address the allegations against [] in the context of the legal prerequisites for a finding of deliberate misconduct under [] and the prerequisites for enforcement action against individuals under the NRC Enforcement Policy. Additional evidence supporting the factual arguments in this Reply will be submitted at the Predecisional Enforcement Conference scheduled for [].

The April 12 letter to [] enclosed an earlier letter to the [], dated [], which summarizes the OI reports.²

In the March 14 letter to [], the NRC provided the following summary of OI Report Nos. 3-1999-012 and 3-1999-033, respectively, in regard to the allegations against []:

After the document was created, several individuals recognized that the document included classified information, and recognized that the development of the document on an unclassified computer constituted a security infraction, an NRC reportable event. A manager made certain statements that those present understood to mean that the event should not be reported to either []

¹ Letter to [] from [], NRC Region III, Subject: Request for Predecisional Enforcement Conference (Apr. 12, 2000).

² See *id.* (enclosing Letter to [], VP-Production, [], from [], NRC Region III, Subject: NRC Office of Investigations Reports 3-1999-012, 3-1999-033 and 3-1999-034 (Mar. 14, 2000)).

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management or the NRC. . . . The OI investigation concluded that the event was reportable per NRC requirements in effect at that time, and that the event was not reported by the manager or anyone else aware of the event because of the 'chilling' statements made by the manager.

In this case, the manager involved with the security infraction refused to authorize a previously-arranged, out-of-state training trip for one of the individuals who notified [] management of the security incident. . . . The OI investigation concluded that the initial refusal by the manager to approve the training constituted a discriminatory act in violation of 10 CFR 76.7.³

This Response is directed to these allegations of deliberate misconduct, which are more specifically enumerated in the April 12 letter to [], as follows:

- 1) you apparently failed to notify the NRC immediately that a security infraction occurred;
- 2) you apparently failed to initiate or have initiated an Assessment and Tracking Report (ATR) for a non-conforming condition (security infraction);
- 3) you apparently intimidated security personnel into not making a report to NRC or initiating an ATR for the above security infraction; and
- 4) you apparently discriminated against a security staff member at the [] Plant by disapproving travel to previously-scheduled training because the individual raised safety concerns regarding the above security infraction.⁴

[] denies that he is guilty of the acts of deliberate misconduct alleged in the NRC's correspondence. In particular, [] asserts: (1) that the failure to notify the NRC and/or generate an ATR in connection with the preparation of the document on an unclassified computer was not a deliberate violation of either NRC or [] reporting requirements because of []'s reasonable belief that the document did not contain classified information; (2) that he did not order or direct others not to notify the NRC or generate an ATR regarding the incident, and did not make statements intending to chill the reporting environment; and (3) that his refusal to approve the travel request was based on legitimate business considerations, not because the requesting individual had engaged in protected activity. Nevertheless, as a result of the investigative process and discipline already

³ Enclosure to March 14 letter to [] (summarizing OI Report Nos. 3-1999-012, 3-1999-033, and 3-1999-034).

⁴ April 12 letter to [].

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imposed, [] has developed a heightened appreciation for the need to affirmatively promote a questioning attitude among subordinates. The following discussion responds to each of the foregoing allegations for the purpose of refuting the factual bases for OI's conclusions, and demonstrating that the evidence does not warrant individual enforcement action against [].

II. Factual Background

[] has been employed in various positions within the NRC-regulated nuclear industry for over twenty (20) years, during which time he has held numerous [] positions. He has been employed in [] positions for several nuclear plants and/or facilities, including for [], [], [], and [].⁵ From October 1997 until the date of his reassignment, effective July 19, 1999, [] held the position of [] at []'s [] Plant ("[]").⁶ While acting as the [] [], [] reported directly to [], [] [].

In the months preceding the August 1998 meeting, significant organizational changes within the [] Department at [] had created friction between and among [] Department staffs, as well as between the [] Department management and the [] which represents [] security guards. [] caused significant changes in the [] security requirements, and impacted physical security personnel in substantial ways. In addition, resources for security were reduced and this further increased the level of tension and stress among security personnel. []'s involvement in these organizational changes were a source of tension between he and other individuals in the [] Department, including two of the participants in the meeting which is the focus of the OI Report, Messrs. [] and [].

In addition, [] had been involved in an ongoing dispute between [] Management and the [] representing security guards. The company had received several requests from the [] that represents [] security guards regarding access to [] information. [] had denied the []'s requests for access to the company's "contingency plans"

⁵ See Transcript, In the Matter of: Interview of [], Docket No. 3-1999-012, pp. 5-6 (July 22, 1999).

⁶ See Tr. at 6-7.

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and similar documents on the grounds that such documents did not exist and in any event would not have been releasable to [] officials because they did not have the requisite "need to know." Under the circumstances, [] was concerned about leaks to the [] during the time period encompassing the August 1998 meeting.⁷

On August 28, 1998, [] convened a meeting to brainstorm additional plant security measures that might be implemented in response to an NRC advisory regarding potential terrorist activity.⁸ During a break in the meeting, Mr. [], on his own initiative, typed up his notes from the brainstorming session on an unclassified computer.⁹ ([]' typed notes are hereinafter referred to as the "document.") Sometime after the meeting re-convened, the issue was raised regarding the classification status of the document.¹⁰ At that time at least one individual, believed to be Mr. [], stated that he thought the document contained classified material. Some discussion among the meeting participants ensued with regard to this issue.¹¹ [] shared his opinion with the other attendees that he did not believe the document contained classified information.¹² [] specifically asserted that he did not believe the document to be a "contingency plan," as defined in [].¹³

Given the difference of opinion regarding the classification of the document, as evidenced by statements made during the meeting, [] ordered a classification review to be performed by Mr. [], the [].¹⁴ No classification determination was made during the August meeting, rather Mr. [] left the meeting with marching orders to review and classify the document, as appropriate.¹⁵ At the close of the meeting, notwithstanding the lack of any determination on the classification status of the

⁷ See Tr. at 36-40.

⁸ See Tr. at 12.

⁹ See Tr. at 13.

¹⁰ See Tr. at 13.

¹¹ See Tr. at 14-15, 24-26, 35-36.

¹² See Tr. at 20.

¹³ See Tr. at 20-22.

¹⁴ See Tr. at 15-17.

¹⁵ See Tr. at 15-17.

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document, [] directed that the document be treated as potentially classified and ordered precautionary measures to control the potentially classified material, i.e., collection and protection of both paper and disk copies of the document.¹⁶ The unclassified computer used to create the document was also sanitized.¹⁷ This was the extent of []'s involvement with the document. After the close of the meeting, [] was not consulted further regarding the document.¹⁸

The event involving the creation of the document was not documented in an ATR or reported to the NRC at that time. Rather, the event was not brought to the attention of plant senior management until October 1998.¹⁹ Thereupon, the company initiated an investigation, which was conducted by personnel from []'s [] facility. The company concluded that the document was classified, and that the creation of the document on an unclassified computer was an infraction of the [] []²⁰. Based on these findings, the company considered the event reportable under [] . The company reported the event to the NRC on November 4, 1998.²¹

On November 6, 1998, the company's investigator, Mr. [], prepared an internal report entitled []

[] (" [] Report"). The [] Report acknowledges that two of the four eyewitness reports of the meeting do not support the allegation that [] made threatening comments relative to the reporting of the potential security infraction,²² but nevertheless concludes that such statements were made based solely on the fact that the event was not reported. Alternative explanations for the failure to report were apparently not considered. Moreover, the company's investigation consisted primarily of oral statements from meeting participants, including [], who was not fully informed of the substance of the allegations against him.²³

¹⁶ See Tr. at 16, 27-28.

¹⁷ See Tr. at 16.

¹⁸ See Tr. at 51.

¹⁹ See [] prepared by Mr. [] ([] ([] Report).

²⁰ See [] Report.

²¹ See Event Report No. [] .

²² See also Attachments 1 and 2 to the Reply.

²³ See Tr. at 42-48, 64-65.

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Nevertheless, based on the conclusions in the [] Report, the company disciplined [] by issuing him a Letter of Reprimand, which included certain corrective action to be taken by [].²⁴ Specifically, [] was assigned to develop a plan to improve knowledge and understanding of NRC reporting requirements among plant staff, and to coordinate the implementation of that plan at both the Paducah and Portsmouth facilities.²⁵ [] had initiated this process when he was re-assigned to []'s [].

Since the event was reported, the NRC has completed at least two rounds of inspection into the issues surrounding the document. The NRC's initial report, NRC Inspection Report [], dated January 28, 1999, found that:

[NRC] inspectors concluded that the detail provided in the document did not appear to meet the []. In fact, the detail of the security measures included in the document appear to be similar to that currently provided in the unclassified []. Thus, the inspectors concluded that the original document creation was not an infraction of the [] and would not have been required to have been reported pursuant to [].²⁶

Several months later, the NRC issued NRC Inspection Report 70-7001/99007(DNMS) (July 1, 1999), reversing its earlier position. In the latter report, the NRC referred to the document as a draft "contingency plan," and concluded that its preparation on an unclassified computer was a reportable event pursuant to []. Characterizing Inspection Report [] as a "preliminary finding," the latter report did not explain the basis for the NRC's reversal of its position.

In addition, a Section 211 investigation was initiated by OSHA in response to a related discrimination complaint. In the complaint, Mr. [] alleged that [] discriminated against him for reporting the event by refusing to authorize a travel request later submitted by Mr. []. To summarize, on or about November 20, 1998, Mr. [] submitted a travel request to [] for approval of a [] training seminar/conference. The request submitted by Mr. [] did not indicate the source of funding for the trip. Moreover, the purpose of the training did not appear to support [] [] Department goals. Finally, the travel appeared to conflict with the due date for a priority project for which Mr. [] was responsible. [] reviewed the request, taking into consideration the

²⁴ See Tr. at 59-64.

²⁵ See Tr. at 63-64.

²⁶ NRC Inspection Report [] (emphasis added).

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purpose and cost of the training, the section budget/funding concerns, and the timing of the training given an impending project deadline. Based on these considerations, [] initially denied the travel request.

Having been made aware of these concerns by [], Mr. [] managed to secure DOE funding for the trip, and submitted the project for which he was responsible on November 25, 1998, five days after the initial review and refusal of the travel request. That same day, after resolution of the considerations identified by [], Mr. [] re-submitted the travel request. As both [] and Mr. [] were out of the office at the time, the request was approved at the direction of Mr. [], [] Manager.²⁷ Mr. [] later informed [] that he approved the request because he had been presented with evidence of funding availability and project completion.²⁸ There was no further discussion with or by [] on this matter. When he initially refused the travel request, [] was unaware that Mr. [] was the initiator of the allegation that led to his discipline.

III. NRC Regulation and Enforcement Policy Regarding Individual Enforcement Actions

Pursuant to NRC guidance, the NRC should take enforcement action directly against an unlicensed individual (e.g., an employee of a licensee or certificate holder) only for acts or omissions amounting to “deliberate misconduct.”²⁹ The NRC Enforcement Manual specifically states: “Actions may be taken directly against individuals either because they are individually licensed or because they violated the rules on deliberate misconduct.”³⁰ The NRC’s own guidance makes clear that actions by unlicensed employees that violate, or cause the licensee to violate NRC requirements must be “taken deliberately” in order to warrant individual enforcement action, and that in the absence of “deliberate misconduct” an enforcement action may be pursued against the licensee, but not the individual employee.³¹

²⁷ See Tr. at 90-91.

²⁸ See Tr. at 93.

²⁹ See NUREG-1600, *General Statement of Policy and Procedure for NRC Enforcement Actions*, § VIII *Enforcement Actions Involving Individuals* (May 1, 2000) (Enforcement Policy); NUREG/BR-0195, Rev. 2, § 7.3 *Enforcement and Administrative Actions Involving Individuals* (Aug. 1998) (Enforcement Manual).

³⁰ Enforcement Manual § 7.3. See generally Enforcement Policy § VIII.

³¹ See Enforcement Policy § VIII. See also Enforcement Manual § 7.3.3 *Action Against the Licensee or Action Against the Licensee and the Individual* (same).

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The stated purpose of the NRC's Final Rule on Deliberate Misconduct by Unlicensed Persons ("Deliberate Misconduct Rule") was to amend the enforcement program to make unlicensed persons individually subject to enforcement action, but only where the individual engaged in "deliberate misconduct."³² The Statement of Considerations ("SOC") for the Final Rule explains:

Until now, enforcement actions concerning persons who have willfully caused violations of Commission requirements or otherwise have engaged in willful misconduct in connection with licensed activities consisted of actions against licensees. . . . [T]he Commission believes that additional enforcement options are needed to address directly persons who are not themselves licensees, but are or have been engaged in licensed activities and whose deliberate misconduct, directly or indirectly, causes a licensee to be in violation of a Commission requirement.³³

The Deliberate Misconduct Rule, as codified in [] [], provides:

- (a) The Corporation or any employee of the Corporation and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor . . . may not:
 - (1) Engage in deliberate misconduct that causes or, but for detection, would have caused, the Corporation to be in violation of any rule, regulation, or order, or any term, condition, or limitation of a certificate or approval issued by the Commission; or
 - (2) Deliberately submit to the NRC, the Corporation, or its contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

The NRC defines "deliberate misconduct" as used in [], as follows:

- (c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

³² See Final Rule on Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664 (Aug. 15, 1991), amended by 63 Fed. Reg. 1890 (Jan. 13, 1998) (extending Deliberate Misconduct Rule to additional categories of persons).

³³ *Id.* at 40,665.

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- (1) Would cause the Corporation to be in violation of any rule, regulation, or order, or any term, condition, or limitation of a certificate or approved compliance plan issued by the Director; or
- (2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of the Corporation, contractor, or subcontractor.

Based on the foregoing definition, a finding of deliberate misconduct appears to require proof of the following elements:

1. Intentional act or omission,
2. Knowledge and understanding of the regulation or requirement, and
3. Intentional or knowing violation of the regulation or requirement.

Applying this definition, NRC guidance emphasizes that individual enforcement action “will normally be taken only when the NRC is satisfied that the individual fully understood, or should have understood, his or her responsibility; knew, or should have known, the required action; and knowingly, or with careless disregard (i.e., with more than mere negligence), failed to take required actions which have actual or potential safety significance.”³⁴ This policy statement makes clear that individual enforcement action is not appropriate for mere negligence or mistake, nor for violations which lack actual or potential safety significance. This is consistent with the SOC for the Deliberate Misconduct Rule, which states:

It would be an erroneous reading of the final rule on deliberate misconduct to conclude that conscientious people may be subject to personal liability for mistakes. The Commission realizes that people may make mistakes while acting in good faith. Enforcement actions directly against individuals are not to be used for activities caused by merely negligent conduct. These persons should have no fear of individual liability under this regulation, as the rule requires that there be deliberate misconduct before the rule’s sanctions may be imposed. The

³⁴ Enforcement Policy § VIII; Enforcement Manual § 7.3.

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Commission recognizes . . . that enforcement actions involving individuals are significant actions that need to be closely controlled and judiciously applied.³⁵

In addition, applicable NRC guidance makes clear that mitigating factors should also be considered in individual enforcement actions. Such guidance cites several examples of situations which might work to cause a violation or other improper action on the part of an individual, but which militate against individual enforcement action. Pursuant thereto, individual enforcement action appears to be foreclosed where the improper action or violation committed by the individual was caused by such things as “inadequate training or guidance” or “inadequate procedures.”³⁶ Therefore, according to the NRC’s own policy and procedure, enforcement action should not be taken against an individual when the improper conduct or violation was the result of inadequate procedural or technical guidance.

IV. The Evidence Does Not Support Individual Enforcement Action Against [_____]

A. OI Report No. 3-1999-012: Failure to Generate an ATR and/or Notify the NRC Regarding the Creation of the Document on an Unclassified Computer

It is alleged that [_____] apparently failed to generate an ATR and/or failed to notify the NRC pursuant to [_____] regarding [_____]’ creation of the document on an unclassified computer. Contrary to this allegation, however, the evidence is irreconcilable with a finding that the failure to report the event in question was a result of deliberate misconduct. The evidence shows that [_____] did not deliberately violate either NRC or [_____] reporting requirements. From the time the document was brought to his attention during the August 1998 meeting up until he was informed otherwise during the investigation that ensued after the event was reported, [_____] did not believe the document to contain classified information, and thus its creation on an unclassified computer would not have been reportable. The initial NRC Inspection Reports substantiated [_____]’s belief. Importantly, [_____] never received any notification that the document being reviewed for classification was finally determined to be classified, a determination that would make the event reportable. Rather, [_____] was informed by investigators that the document had been classified.³⁷

The applicable NRC reporting regulations at [_____] , in effect during the time-period in issue, provided:

³⁵ 56 Fed. Reg. at 40,681 (*quoted in* 63 Fed. Reg. at 1892) (emphasis added).

³⁶ See Enforcement Policy § VIII; Enforcement Manual § 7.3.3.

³⁷ See Tr. at 73.

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Each licensee or other person having a facility clearance shall immediately report to the CSA and the [NRC Regional Administrator]:

- (a) Any alleged or suspected violation of the Atomic Energy Act, Espionage Act, or other Federal statutes related to classified information.
- (b) Any infractions, losses, compromises or possible compromises of classified information or classified documents not falling within paragraph (a).³⁸

Applying these criteria, the critical question concerning reportability is dependent, first and foremost, on a determination as to whether or not the subject document or information is "classified." In this case, in order to conclude that the event involving the creation of the document was reportable, there must first be a determination as to the classification status of the document. As stated above, [] did not believe the document to be classified.³⁹ More specifically, [] did not believe that the document met the requirements of a classified contingency plan.⁴⁰ Nevertheless, in accordance with procedure, [] directed Mr. [], the [], to conduct a classification review of the document for the purpose of resolving the issue.⁴¹

The bottom line here is that [] honestly believed that the document was not classified and thus that its creation on an unclassified computer was not a security infraction. If, as [] believed, the document was not classified and its creation was not an infraction, then there would be nothing to report. That []'s opinion on this issue was reasonable was established by the NRC's own initial assessment, which

³⁸ 62 Fed. Reg. 17,683, 17,698 (Apr. 11, 1997).

³⁹ See Tr. at 20-21.

⁴⁰ See Tr. at 20-21.

⁴¹ See Tr. at 15-17; 20-22.

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concluded that the document was not classified and not reportable under []⁴².
The NRC inspectors specifically concluded:

[T]he detail provided in the document did not appear to meet the [].
In fact, the detail of the security measures included in the document appear
to be similar to that currently provided in the unclassified []
]. Thus, the inspectors concluded that the original document
creation was not an infraction of the [] and would not have to
be reported pursuant to [].⁴³

Although the NRC later reversed its original determination as to the classification status
and reportability of the subject document,⁴⁴ this about-face leads to the obvious conclusion that
reasonable minds could and did in fact differ on this issue. The NRC's original determination
supported []'s position and should relieve him of culpability with regard to
his own failure to report the incident. At the very least, however, the NRC's vacillation supports
the conclusion that []'s opinion that the document was neither classified nor
reportable precludes a finding of deliberate misconduct sanctionable under []

Finally, []'s conduct must be viewed in light of the totality of
circumstances surrounding the event. []
]. The company was still in transition and []
] personnel were still in the process of learning and becoming comfortable with the NRC's
reporting requirements. In short, during the time period in issue, there was wide-spread
confusion within the [] security organization regarding both the company and NRC
reporting requirements and procedures. There was so much confusion, in fact, that the company
had started issuing employee bulletins to help answer some of the many questions that had been
raised regarding event reporting. Even more significant, the company's own investigation into
the above-described event concluded: "Disagreement of the hierarchy of authority between []
] and the [] has led to confusion throughout the company on
what is an NRC reportable event."⁴⁵ Therefore, even if the reportability issue had later been
raised with or by [], there would have been no easy answer.

The widespread confusion within the industry as a whole regarding reporting of security
infractions has led the NRC to amend these very regulations. In fact, a proposed amendment to
the reporting requirements had been issued not long before the event in question, and industry

⁴² See NRC Inspection Report [] .

⁴³ *Id.* at 14-15 (emphasis added).

⁴⁴ See NRC Inspection Report 70-7001/99007(DNMS).

⁴⁵ See [] Report.

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comments were due not long after. The final, amended rule took effect within one year after the event. By revising the regulations at [], the NRC officially manifested its intent that events of this type not be reported. The new revision, which became effective on May 3, 1999, provides the following examples of the types of events that require a report under paragraph (a): “deliberate disclosure of classified information to persons not authorized to receive it,” and “theft of classified information.”⁴⁶ The SOC makes it absolutely clear that the NRC intended to “significantly reduce the number of events that will qualify for the one-hour reporting” and that “only truly serious events will now qualify.”⁴⁷ Prior to the adoption of the rule, NRC officials had admonished [], and [] in particular, regarding []’s overly-conservative reporting of events. Certainly, the NRC’s amendment of the reporting requirement to exclude events such as the one alleged from its scope indicates that such events do not have significant safety consequences, an additional mitigating factor against individual enforcement action against [].

The NRC should give considerable weight to the level of confusion surrounding these issues at the time of the event, which confusion was so prevalent as to warrant amending the regulations. It is imminently clear that the available training and guidance and/or the procedures were inadequate during the time period in issue. Therefore, in accordance with NRC enforcement policy, such mitigating factors should forestall any enforcement action against [] for the failure to report the event in question.

B. OI Report No. 3-1999-012 - Chilling Effect of Statements Made During Meeting

It is alleged that [] intimidated some security personnel into not initiating an ATR or a report to the NRC regarding the event involving the creation of the document. More specifically, it has been suggested that during the August 1998 meeting [] said something to the effect of “This did not happen. If this gets out of this room, I know who was in here,” referring to the creation of the document on an unclassified computer.⁴⁸

⁴⁶ 64 Fed. Reg. 15,636, 15,653 (Apr. 1, 1999).

⁴⁷ *Id.* at 15,639.

⁴⁸ *See* Tr. at 47.

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[] denies that he made that statement or any statement to that effect in the context alleged.⁴⁹ Credible evidence establishes that [] did not deliberately intimidate or chill others, by word or manner, for the purpose of preventing the reporting of the event in question.

Independent witness testimony on this issue corroborates []'s recollection.⁵⁰ Besides [], the following four individuals were in attendance at the August 1998 meeting: [], [], [], and []. Of the four witnesses present at the meeting, half refute the allegation against [].⁵¹ Both Mr. [] and Mr. [] refuted the allegations against [] when they were interviewed by [].⁵² Sworn statements from Mr. [] and Mr. [] are attached to this Reply.⁵³

Here again, []'s actions, and the basis for the allegations against him, should be viewed in the context in which they occurred. As the [], [] had refused numerous requests by the labor [] representing the security officers to gain access to contingency plans and related documents. The [] had repeatedly insisted that [] should have a "contingency plan," and [] was concerned that sensitive information discussed during the August 1998 meeting regarding potential enhancements to physical security at [] in response to an NRC potential terrorist advisory might be leaked to [] personnel.⁵⁴ [] acknowledges that he may have admonished the attendees not to discuss or disseminate sensitive information discussed during the meeting to unauthorized personnel. []'s testimony is that any such remarks were made out of his concern over possible leaks of contingency plan information to the [] and that he never intended his remarks to inhibit event reporting.⁵⁵

⁴⁹ See Tr. at 47-50.

⁵⁰ See [] Report.

⁵¹ See [] Report.

⁵² See [] Report.

⁵³ See Attachments 1 and 2.

⁵⁴ See Tr. at 39-40.

⁵⁵ See Tr. at 36-40.

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This is borne out by the testimony of [] and Messrs. [] and [], which demonstrates that [] neither directed anyone not to report this or any other incident to the NRC nor made statements intending to effect such a result. [] never intended, by his speech or conduct, to create or contribute to a “chilled environment.” []’s own track record with respect to event reporting refutes any suggestion that he aimed or intended to chill the reporting environment. In fact, during []’s tenure as [], the [] organization had actually erred on the side of “over-reporting.” For the period October - December 1997, over sixty (60) [] notifications were filed from within the [] organization, and for the period January - October 1998, another thirty (30) such notifications were filed. In an effort to curb the flood of reporting, NRC officials had suggested that plant staff be more judicious in making reportability determinations.

The disparity in the accounts of [] and [] of the August 28, 1998 meeting with the OI Report findings suggests that the other participants, Messrs. [] and [], either misunderstood []’s comments regarding his opinion of the document, his comments regarding potential leaks of information from the meeting, or both. Certainly, the tension and friction within the department at the time could have led to mistrust, which could foster such misunderstandings. Regardless of any other conclusion that may be drawn regarding the conflict between Messrs. []’ and []’s accounts of the meeting and the conclusions in the OI Reports, however, it is evident that neither Mr. [] nor Mr. [] were intimidated by [] from reporting the event.

[] himself had no reason not to report the event if he believed it to be reportable. Further, [] had no motive or incentive to chill reporting in this instance or in any other. [] neither created the document in question nor ordered its creation. Reporting the incident would not have had a significant impact on [] or his job performance record. As indicated above, during []’s relatively short tenure as the [] [], his department had already made over ninety (90) such reports. One more or less, especially in connection with such a relatively minor incident, would not have been significant. It strains logic to suggest that [] would have intentionally prevented the reporting of such an issue; [] would have had nothing to gain – but plenty to lose, as evidenced by this proceeding.

C. OI Report No. 3-1999-033 - Refusal of Training Trip Request

It is also alleged that [] apparently violated NRC regulations at 10 CFR [] by refusing to authorize a travel request for an individual that had engaged in protected activity by reporting the event to [] management. [] denies that he discriminated against Mr. [], the complainant, in violation of []. Conversely, [] reviewed []’s travel request, exercising the same business judgment he has always exercised in reviewing such

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requests. [] initially refused []'s request solely on nondiscriminatory grounds. Moreover, []'s actions in this regard did not constitute deliberate misconduct.⁵⁶ The evidence shows that [] did not deliberately discriminate against Mr. [] for engaging in protected activity.

NRC regulations at [] expressly prohibit discrimination against an employee for engaging in "protected activities," as defined in Section 211 of the Energy Reorganization Act.⁵⁷ According to NRC guidance, four essential elements must be affirmatively proven to sustain a charge that an employer discriminated against an employee for having engaged in protected activity:

1. Employee engaged in protected activity,
2. Employer was aware of the protected activity,
3. Adverse action was taken against the employee, and
4. Adverse action was taken because of the protected activity.⁵⁸

The second element is strictly a question of fact, i.e., whether [] knew that the employee had engaged in the protected activity when [] refused the travel request submitted by the employee. The facts of this case are such that, as of the time of the initial review and refusal of Mr. []'s travel request, [] was not aware that Mr. [] had reported the event or raised allegations against him. [] became aware that the event involving the creation of the document had been reported during the [] investigation in late October 1998. However, the complainants were not identified in the investigation or in the report thereof. [] did not become aware of Mr. []'s allegations against him until after the DOL complaint was filed the following year, months after his refusal of []'s travel request.

The third element requires that the adverse action taken against the employee have some detrimental effect on the employee's "compensation, terms, conditions, or privileges of employment."⁵⁹ It is noteworthy that [] did not suffer any actual harm or

⁵⁶ See Tr. at 81-83.

⁵⁷ [] (a) ("Discrimination by the Corporation, a contractor, or a subcontractor of the Corporation against an employee for engaging in certain protected activities is prohibited.").

⁵⁸ See Enforcement Guidance Memorandum (EGM) 99-007, Atch 1 *Documented Analytical Process in Discrimination Matters* (Sep. 20, 1999). See generally []; Enforcement Manual § 7.7 *Discrimination for Engaging in Protected Activities*.

⁵⁹ [] ("Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment."). See also Enforcement Manual § 7.7.

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adverse employment action, as his request was approved after resolution of the identified business considerations.

Finally, the fourth element is clearly not present given the facts of this case. The fourth element requires proof that the adverse action was taken against the employee because of the protected activity. NRC regulation at [] specifically provides:

Actions taken by an employer or others which adversely affect an employee may be predicated upon nondiscrimination grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. 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.⁶⁰

As explained by [], his determination regarding Mr. []'s travel request was completely unrelated to the event involving the document, and his decision to deny the request was based on legitimate business considerations, including office budgetary and operations constraints.⁶¹ First, the subject training covered DOE-specific issues, which were of questionable relevance to security operations at [] given the transition to NRC oversight. Moreover, Mr. []'s travel request did not identify a source of funds, and as such would have consumed almost all of the [] Department travel budget for the year. Exercising reasonable business judgment, [] considered this to be an imprudent use of departmental travel funds.⁶²

A primary consideration was an impending deadline on a high priority project in the Business Priority System that had been assigned to Mr. [].⁶³ As of the date of the request, November 20, 1998, the project had not been completed and would have come due after []'s departure. The travel request indicated that the training program ran from November 30 to December 4, 1998.⁶⁴ Mr. []'s project was due December 1, 1998.

Having been made aware of these concerns by [], Mr. [] managed to secure DOE funding for the trip, and submitted the project as completed on

⁶⁰ [] (emphasis added).

⁶¹ See Tr. at 81-82.

⁶² See Tr. at 83.

⁶³ See Tr. at 82.

⁶⁴ See Tr. at 81, 84-89.

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November 25, 1998, five days after [] initially refused the travel request. On November 25, after resolution of the considerations identified by [],⁶⁵ Mr. [] re-submitted the travel request. As both [] and Mr. [] were absent at the time, the request was approved at the direction of Mr. [], Plant Manager.⁶⁶ Mr. [] later informed [] that he approved the request because he had been presented with evidence of funding availability and project completion.⁶⁷ The fact that the request was approved only after the foregoing considerations were resolved is itself evidence that []'s actions regarding the travel request were taken for legitimate, non-prohibited business reasons, and were not in response to or retaliation for any protected activity. [] did not intend to discriminate against Mr. [] for any reason, much less for raising a safety concern. []'s actions were reasonable under the circumstances, and therefore do not warrant individual enforcement action under the Deliberate Misconduct Rule.⁶⁸

V. Corrective Actions Implemented and Effective

The afore stated apparent violations have been made the subject of a [] internal investigation.⁶⁹ As a result of these investigations into []'s conduct during the August 1998 meeting, [] was disciplined by the company. Notwithstanding that [] denies the allegation that he deliberately intimidated anyone from reporting the event in question, the company issued a written reprimand to [] for "preventing, by words or conduct, the reporting" of the event. The reprimand prescribed certain corrective actions to be taken by [], which he instituted before being reassigned to a position outside of the [] Department. [] is now assigned to [] Regulatory Affairs.

The company's corrective action was effective. As a result of the company's investigations, [] now understands and appreciates that his comments, although intended to convey his understanding as to the classification status of the document and

⁶⁵ Note, however, that although the closure paperwork was submitted by Mr. [] and approved by Mr. [], the Regulatory Engineer assigned to manage the action item referred to as Regulatory Commitment Priority 1, it is evident from entries in Mr. []'s action item tracking log that the project was not completed to the desired level.

⁶⁶ See Tr. at 91.

⁶⁷ See Tr. at 93.

⁶⁸ See Enforcement Manual § 7.7.8.2 *Enforcement Actions Against Contractors and Individuals* (application of the Deliberate Misconduct Rule to warrant enforcement action against an individual for discrimination.).

⁶⁹ See Special Investigation, prepared by [] (Nov. 6, 1998).

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to protect the confidentiality of the meeting's discussions, apparently were misconstrued by some of those in attendance. In the future, [] intends to better clarify his comments to fellow employees and/or subordinates to avoid such confusion and misunderstanding. Moreover, [] recognizes the possibility that his expression of opinion regarding the classification of the document could have been misinterpreted by a meeting participant as the final word on the issue. To avoid such misunderstandings in the future, [] acknowledges that any expressions of opinion regarding regulatory issues should be qualified or conditioned by a statement that anyone who disagrees with his opinion should feel free to act in accordance with his/her own views.

Based on the facts of this case, as outlined above, and the discipline and corrective action already taken, the NRC should, in the exercise of discretion, refrain from instituting an individual enforcement action or otherwise sanctioning []. Even in extreme and clearly established violations of 10 CFR 50.7, NRC has refrained from taking individual enforcement action where the licensee has taken prompt effective disciplinary action. If anything, the disciplinary action in this case has been more severe than warranted. Nevertheless, [] has accepted the action as proactive effort on the part of the company to clearly demonstrate its commitment to a Safety Conscious Work Environment. Further action by NRC is clearly not warranted.

VI. Individual Enforcement Action Is Not Warranted

There is no basis for individual enforcement action against [] in this case. First, [] sincerely believed, based on knowledge and experience, that he was correct in his opinion that the document was not classified and thus its creation was not an NRC reportable event subject to the one-hour reporting requirement. []'s conclusion was shared by his manager and by the NRC inspectors who initially reviewed the issue. If the NRC had not reversed its initial determination, then []'s conduct would not constitute a violation of [] at all, much less deliberate misconduct under [].

Even given the NRC's final determination, reversing its initial position on both the classification and reportability issues, []'s failure to report the incident did not rise to the level of deliberate misconduct for the simple fact that he did not commit a knowing or intentional violation of [] or any other rule, regulation, order, etc. of the Commission. The record sufficiently demonstrates the lack of any consensus on the applicability of the regulations and guidance in effect at the time. In particular, the NRC's own initial findings regarding the classification and reportability issues undercut a finding of a deliberate or willful failure to report the event in question. The NRC initially determined that the document was not classified nor reportable, stating that "the original document creation was not an infraction of the [] and would not have been required to have been reported pursuant to []."