



Tennessee Valley Authority, Post Office Box 2000, Spring City, Tennessee 37381-2000

OCT 23 2000

10 CFR 50.4

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

Gentlemen:

In the Matter of) Docket No. 50-390
Tennessee Valley Authority)

WATTS BAR NUCLEAR PLANT (WBN) UNIT 1 - DEPARTMENT OF LABOR (DOL)
CASE NO. 1999-ERA-25 (CURTIS C. OVERALL V. TENNESSEE VALLEY
AUTHORITY)

In letters to J. A. Scalice dated July 17, 1999, and September 4, 1998, NRC requested that TVA provide copies of future filings made to DOL by TVA in connection with Curtis C. Overall's Case No. 97-ERA-53. TVA has provided NRC with copies of each of its filings in that case.

As you are aware, Mr. Overall has filed a second DOL complaint which, although separate, involves issues closely related to his first complaint. For your information, TVA has enclosed its latest filing entitled "Tennessee Valley Authority's Motion to Reconsider and to Compel."

A001

U.S. Nuclear Regulatory Commission
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OCT 23 2000

If you should have any questions concerning this matter, please telephone me at (423) 365-1824.

Sincerely,



P. L. Pace
Manager, Site Licensing
and Industry Affairs

Enclosure

cc (Enclosure):

NRC Resident Inspector
Watts Bar Nuclear Plant
1260 Nuclear Plant Road
Spring City, Tennessee 37381

Mr. Robert E. Martin, Senior Project Manager
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

Mr. Luis A. Reyes
U.S. Nuclear Regulatory Commission
Region II
Sam Nunn Atlanta Federal Center
61 Forsyth St., SW, Suite 23T85
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Mr. R. W. Borchardt, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

ENCLOSURE

ADMINISTRATIVE LAW JUDGES BRIEF
CURTIS C. OVERALL - CASE NO 1999-ERA-25
TENNESSEE VALLEY AUTHORITY'S MOTION
TO RECONSIDER AND TO COMPEL

**BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR**

IN THE MATTER OF)	
)	
CURTIS C. OVERALL)	
)	
Complainant)	
)	
v.)	Case No. 1999-ERA-25
)	
TENNESSEE VALLEY AUTHORITY)	
)	
Respondent)	

**TENNESSEE VALLEY AUTHORITY'S MOTION TO
RECONSIDER AND TO COMPEL**

Pursuant to the September 27, 2000, telephone conference with the Court, and the Court's October 3, 2000, memorandum of telephone conference, respondent Tennessee Valley Authority (TVA) moves for reconsideration of the Court's March 14, 2000, order requiring TVA to return certain correspondence between complainant Curtis C. Overall and his former attorney, Charles W. Van Beke.¹ TVA further moves for the entry of an order compelling complainant to produce to TVA for inspection and copying the originals of that correspondence.² As grounds for its motion, TVA would show, as discussed below, that complainant

¹ For the Court's convenience, we are attaching as exhibit 1 a log prepared by TVA to identify the documents that were responsive to the Court's March 14, 2000, order.

² As explained below, one of the purposes for producing these documents is to determine the font and the model of typewriter with which they were typed. The originals of the documents will more readily facilitate a forensic examination of the documents.

voluntarily and knowingly waived the attorney-client privilege when he intentionally gave the correspondence to a third party.

1. Mr. Van Beke was complainant's attorney in his first ERA case, No. 97-ERA-53. Mr. Van Beke continued to represent complainant until at least April 28, 1999, as shown by the letter he sent on that date requesting that TVA send him a check for all amounts due to complainant. A copy of Mr. Van Beke's April 28 letter is attached hereto as exhibit 2. Complainant's current counsel, Lynne Bernabei, did not enter an appearance in this proceeding until May 24, 1999. A copy of the notice of substitution of counsel is attached hereto as exhibit 3.

2. Complainant began seeing a psychologist, G. Gary Leigh, Ph.D., in August 1995 for a few months. He returned to see Dr. Leigh for a few months beginning in April 1997. He again returned to see Dr. Leigh beginning in May 1998.

3. In this proceeding, complainant alleges that he has incurred "emotional stress" as a result of a hostile work environment. During discovery, complainant indicated that Dr. Leigh had information regarding his emotional state and provided TVA with a signed authorization permitting TVA to inspect and copy all of his medical records. On March 6, 2000, TVA received from Dr. Leigh a copy of his records maintained on complainant.

4. *The records which Dr. Leigh maintained and which he produced to TVA included copies of correspondence between complainant and Mr. Van Beke.* Copies of that correspondence were previously submitted to the Court as collective ex. B to the March 16, 2000, affidavit of Brent R. Marquand. *Dr. Leigh's clinical notes of his interview sessions with Mr. Overall show that the correspondence was voluntarily and intentionally given to Dr. Leigh and discussed with him by complainant.* For example, Dr. Leigh's notes for January 29, 1999, state that "*Curtis brought a letter from Mr. Van Beke (in ___) dated January 25, 1999*"

(No. BB 533).³ Dr. Leigh's notes for February 15, 1999, also state that "Curtis has talked with Charles Van Beke. They worked out a financial arrangement. . . . *Went over a series of letters from Mr. Van Beke*" (No. BB 534). Copies of these notes are Marquand aff. collective ex. C.

5. Dr. Leigh's notes emphasize that complainant's disclosure of the correspondence with Mr. Van Beke was no mistake. Complainant often complained to him about his disagreements with Mr. Van Beke over the handling of complainant's litigation and his attorney's fee arrangements. His notes show that complainant complained about his "renewed conflict with lawyer" (May 28, 1998, No. BB 486), "continues to be upset with attorney wonders if he has his best interest in mind" (July 6, 1998, No. BB 491), "feels some pressure from attorney for \$" (Aug. 7, 1998, No. BB 492), "Curtis is having trouble trusting others - esp[ecially] his lawyer" (September 22, 1998, No. BB 511), "Mr. Van Beke is preparing a proposal to judge to revise order to return to TVA" (Oct. 2, 1998, No. BB 517), "He [complainant] plans to issue his own proposal/settlement. . . . Anger at attorney - who makes him ___ and frustrated" (Oct. 15, 1998, No. BB 517), "Wife is angry at their attorney - she expresses their anger - for both!" (Oct. 22, 1998, No. BB 518; emphasis in original), "He [complainant] has a reasonable proposal put forth for a settlement" (Oct. 29, 1998, No. BB 518), "He has negative feelings about his attorney's handling of his case. He wonders if he is being told 'everything'" (Jan. 20, 1999, No. BB 530). Copies of these notes are Marquand aff. collective ex. A.

6. Any attorney-client privilege that applied to the correspondence between complainant and Mr. Van Beke was waived when complainant knowingly and voluntarily provided copies of the correspondence to Dr. Leigh, a third party to the

³ Emphasis added throughout.

attorney-client relationship.⁴ According to Dr. Leigh's clinical notes, complainant provided those documents to him before the complaint in this case was filed, before his current counsel had entered an appearance, and at a time when he was still represented by Mr. Van Beke.

7. Cases holding that "inadvertent disclosure" is not a waiver of the privilege apply to instances in which documents are mistakenly disclosed by counsel during a large-scale document production. Those cases do not apply to a client's deliberate disclosure of the attorney-client communication to a third party. See, for example, *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187, 1188 (N.D. Ohio 1996), and *Van Hull v. Marriott Courtyard*, 63 F. Supp.2d 840, 841 (N.D. Ohio 1999), which dealt with the accidental disclosure by counsel of privileged documents during pretrial discovery. In contrast, complainant here deliberately disclosed the privileged communications to a third party while complaining to that third party about the issues set forth in the communications.

8. The law is clear that there has been a waiver of the attorney-client privilege in this case. The attorney-client privilege is personal to the client and may, in general, be waived only by the client. *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991); *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *American Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734 (7th Cir. 1987). "Regardless of the client's intention not to waive the privilege, the privilege will generally be deemed waived where confidential

⁴ In addition to the records sent to TVA by Dr. Leigh, complainant's counsel also sent TVA a complete copy of Dr. Leigh's records, including the correspondence between complainant and Mr. Van Beke (Marquand aff. ¶ 6). The fact that complainant's counsel may not have intended to give TVA copies of the correspondence does not resurrect the privilege. The privilege was waived by complainant much earlier--when he gave the correspondence to Dr. Leigh and before complainant's current counsel had even entered an appearance.

communications are disclosed, or allowed to be disclosed, to persons outside the professional attorney-client relationship” (SCOTT STONE & RONALD S. LIEBMAN, TESTIMONIAL PRIVILEGES, § 1.45, at 78 (McGraw Hill, 1983). The attorney-client privilege is waived by voluntary disclosure of the privileged communication to a third party. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3rd Cir. 1991); *United States v. Plache*, 913 F.2d 1375 (9th Cir. 1990); *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982); *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989). Once the privilege is waived with regard to a particular communication, it is lost forever and may not be asserted later in the same or different proceeding. *United v. Suarez*, 820 F.2d 1158, 1160 (11th Cir.), *cert. denied*, 484 U.S. 987 (1987); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984); *United States v. Krasnov*, 143 F. Supp. 184, 190-91 (E.D. Pa. 1956), *aff’d*, 355 U.S. 5 (1957); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464 (E.D. Mich. 1954). Here, Dr. Leigh’s contemporaneous notes of his clinical sessions show that complainant deliberately provided copies of attorney-client correspondence to a third party, Dr. Leigh. That disclosure constitutes a waiver of the privilege.⁵

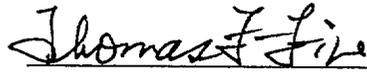
For the foregoing reasons, TVA’s motion to reconsider should be granted, and the Court’s March 14, 2000, order should be vacated and complainant’s

⁵ The correspondence between complainant and Mr. Van Beke are relevant to two issues in this proceeding. First, the letters from complainant may have been typed using the same model of typewriter and the same font as the harassing note that complainant purportedly received. Although complainant admits owning that model of typewriter, he claims he did not purchase it until February 1999, some six months after receiving the note. Obviously, complainant has some explaining to do if the October 1998 and January 1999 letters to Mr. Van Beke were typed using the same font and the same model of typewriter. Second, the Van Beke-Overall correspondence dovetails with Dr. Leigh’s notes which indicate that complainant complained to Dr. Leigh about a number of stresses on him besides the matters which he has alleged in his complaint.

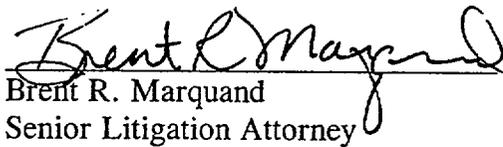
counsel should be ordered to produce the original of the documents returned by TVA and reflected in exhibit 1.

Respectfully submitted,

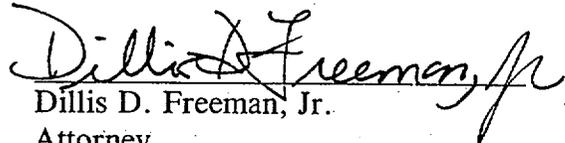
Edward S. Christenbury
General Counsel



Thomas F. Fine
Assistant General Counsel



Brent R. Marquand
Senior Litigation Attorney



Dillis D. Freeman, Jr.
Attorney

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone No. 865-632-2061

Attorneys for Respondent

003680375

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion has been served on complainant by mailing a copy thereof to:

Lynne Bernabei, Esq.
Bernabei & Katz, PLLC
1773 T Street, NW
Washington, D.C. 20009-7139

This 6th day of October, 2000.



Attorney for Respondent

EXHIBIT 1

CURTIS C. OVERALL v. TENNESSEE VALLEY AUTHORITY
CASE NO. 1999-ERA-25

DOCUMENTS RETURNED TO LYNNE BERNABEI IN ACCORDANCE WITH
THE COURT'S MARCH 14, 2000, ORDER

INDEX

TO	FROM	DATE	BATES NO.
Curtis C. Overall	Charles W. Van Beke	March 10, 1997	BB000470-71 CCO 00420-21
Charles W. Van Beke	Curtis C. Overall	January 18, 1999	BB000507 CCO 00481
Proposed settlement to TVA		October 11, 1998	BB000519 CCO 00471
Charles W. Van Beke	Curtis C. Overall	October 23, 1998	BB000520 CCO 00467
Settlement Proposal	Curtis C. Overall		BB000521 CCO 00468
Curtis C. Overall	Charles W. Van Beke	January 25, 1999	BB000531-32 CCO 00482-83
Curtis C. Overall	Charles W. Van Beke	February 19, 1999	BB000535-36 CCO 00486-87
Charles W. Van Beke	Curtis C. Overall	February 27, 1999	BB000537-38 CCO 00488-89
Curtis C. Overall	Charles W. Van Beke	March 3, 1999	BB000540 CCO 00491

*3/21/00 - Doc. Nos. BB000507, 520-21 received back from Grant Sperry

3/22/00 - Forwarded to Lynne Bernabei

003680409

EXHIBIT 2

WAGNER, MYERS & SANGER

(A PROFESSIONAL CORPORATION)

ATTORNEYS AT LAW

1801 FIRST TENNESSEE PLAZA
KNOXVILLE, TENNESSEE 37909

HERBERT S. SANGER, JR.*
 CHARLES W. VAN BEKE
 CHARLES A. WAGNER III
 WILLIAM C. MYERS, JR.
 H. DOUGLAS CAMPBELL, JR.
 NICHOLAS A. DELLA VOLPE
 BARBARA C. BOULTON
 RONALD D. GARLAND
 ROBERT G. CRANE
 JOHN E. BROCK
 KATHLEEN M. FLYNN**
 J. ANDREW LEMONS***
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 (423) 525-4600

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April 28, 1999

Thomas A. Fine, Esq.
 Assistant General Counsel
 Tennessee Valley Authority
 400 West Summit Hill Drive
 Knoxville, TN 37902-1499

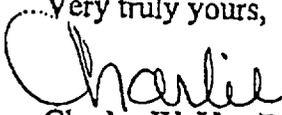
Via Facsimile

Re: *Curtis C. Overall v. Tennessee Valley Authority*

Dear Tom:

Please cut a check payable to Mr. Overall only for all amounts due to him. Acceptance of the check by Mr. Overall does not, however, preclude his right to challenge the amount and TVA's calculations at a later date. Such reservation is particularly valid since we have not had access to the backup data on which TVA bases the overtime calculations, that is, Gary Jordan's time sheets. While you were on vacation, Brent suggested that this reservation of rights was acceptable to TVA.

Very truly yours,


 Charles W. Van Beke
 For the Firm

CVB/sal

cc: Mr. Curtis C. Overall

Exhibit 2

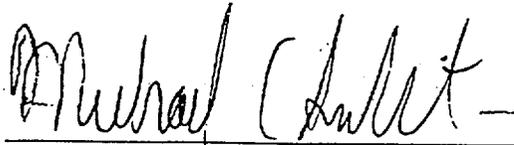
EXHIBIT 3

BEFORE THE UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

_____)	
CURTIS OVERALL,)	
)	
Complainant,)	
)	
v.)	ARB Case No. 98-128
)	ALJ Case Nos. 97-ERA-53
TENNESSEE VALLEY AUTHORITY,)	
)	
Respondent.)	
_____)	

NOTICE OF SUBSTITUTION OF COUNSEL

Please note the appearance of Lynne Bernabei, Debra S. WKatz, Michael C. Subit, and the firm of Bernabei & Katz as substitute counsel for complainant Curtis Overall in place of Charles W. Van Beke and the firm of Wagner, Myers & Sanger. Please transmit all future correspondence related to this matter to the address below, and do not send future correspondence to Mr. Van Beke, or to Wagner, Myers & Sanger. Mr. Overall has already advised the Board, through prior counsel, not to send correspondence directly to him. See Letter from C.W. Van Beke (Nov. 4. 1998).



Lynne Bernabei
Debra S. Katz
Michael C. Subit
Bernabei & Katz
1773 T Street, N.W.
Washington, D.C. 20009
(202) 745-1942

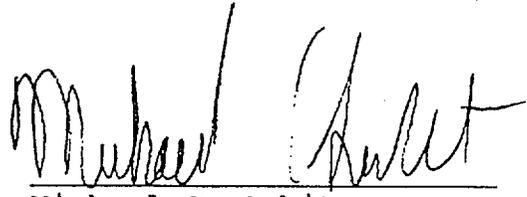
Attorneys for Complainant
Curtis Overall

DATED: May 24, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Substitution of Counsel was served on Respondent by mailing a copy, first-class postage prepaid, this 24th day of May 1998, to:

Thomas Fine, Esquire
Office of General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37901-1499


Michael C. Subit