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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

April 25, 1989

MEMORANDUM FOR: William C. Parler, General Counsel
FROM: Samuel J. Chilk, Secretary
SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION
AND VOTE, 4:30 P.M., MONDAY, APRIL 17,
1989, COMMISSIONERS' CONFERENCE ROOM, ONE
WHITE FLINT NORTH, ROCKVILLE, MARYLAND
(OPEN TO PUBLIC ATTENDANCE)

I. Commission order Responding to a Motion to Quash Subpoena

The Commission, by a 4-0 vote, approved an order responding to a motion of Mr. Stephen B. Comley to quash a subpoena duces tecum issued to him on March 24, 1989, during an internal NRC investigation. The order modified and narrowed the original subpoena and denied the motion to quash. Commissioner Curtiss was on travel and unavailable to participate.

(Subsequently, on April 17, 1989, the Secretary signed the Order.)

Attachment:
Order

cc: Chairman Zech
Commissioner Roberts
Commissioner Carr
Commissioner Rogers
Commissioner Curtiss
EDO
GPA
PDR - Advance
DCS - P1-24

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

In re OIA INVESTIGATION)
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Docket No. OIA-89-02

ORDER

I. Introduction.

This matter is before the Commission on the motion of Mr. Stephen B. Comley to quash a subpoena duces tecum issued to him on March 24, 1989 during an internal NRC investigation. Mr. Comley alleges that (1) the NRC does not have statutory authority to issue the subpoena and that (2) the subpoena violates his First Amendment rights. We reject both arguments and reaffirm the subpoena as modified herein.

II. Factual Background.

In August of 1988, the NRC's Office of Inspector and Auditor ("OIA") received allegations of misconduct involving an employee in the NRC's Office

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of Investigations ("OI").1/ OIA was the NRC office assigned to investigate allegations of employee misconduct and the Director of OIA reports directly to the Commission. See generally 10 C.F.R. • 1.21 (1988).2/ Subsequently,

OIA began an investigation into these allegations. In the late winter of 1988-89, the Commission removed the investigation from OIA and assigned it to a special investigator, Alan S. Rosenthal, an Administrative Judge and former Chairman of the NRC's Atomic Safety and Licensing Appeal Panel.

During the course of this investigation a tape recording of a January 14, 1987 telephone conversation between Mr. Comley and the NRC employee in question was received by the investigators. The recording contains information that at least raises the question of whether the NRC employee (1) provided information of a confidential nature to Mr. Comley and/or (2) received information from Mr. Comley that should have been, but was not, made available to other NRC officials. If such actions in fact occurred, they would constitute a potential violation of several NRC regulations and a breach of certain duties of the employee in question under specific NRC Manual Chapters. See, e.g., 10 C.F.R. • 0.735-49a(b), (c), (d), and (f); 10 C.F.R. • 0.735-30(c) and (x) (10 C.F.R. Part O, Annex A.); 10 C.F.R. • 0.735-3(a)(6).

1/ During the course of this Memorandum Opinion and Order, we will not refer to either the person making the allegations or the NRC employee by name because this investigation is a confidential matter which is still ongoing.

2/ On April 17, 1989, the functions of OIA were transferred to the newly created Office of Inspector General of the NRC. See Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat.-2515, signed October 18, 1988.

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Other information obtained during the course of the investigation indicates that Mr. Comley recorded approximately 40 to 50 telephone

conversations between himself and the NRC employee in question. These tape recordings are clearly relevant to ascertaining whether the NRC employee has engaged in the alleged misconduct, malfeasance, or neglect of duty which is the subject of this investigation. Accordingly, the Commission issued a subpoena to Mr. Comley seeking "any and all tape recordings or transcripts of tape recordings in your custody, control, or possession of any telephone conversations between yourself and any employee of the [NRC], including but not limited to" the NRC employee in question. Mr. Comley responded with the motion to quash which now lies before the Commission.

III. The Commission's Statutory Authority To Issue Subpoenas.

A. Subpoenas In Internal Investigations.

In his motion to quash the subpoena, Mr. Comley argues that "the Commission has not issued the instant subpoena in connection with any of its powers under the Atomic Energy Act." Motion to Quash at 3. Mr. Comley argues that "[t]he Commission's authority to hire and, ultimately [to] discipline agency employees does not derive from the Atomic Energy Act . . . Rather, it derives from the Civil Service Reform Act of 1978" Motion to Quash at 5. He argues further that "[n]o agency, including the NRC, is given subpoena authority under the provisions of 5 U.S.C. Chapter 75 in the context of administrative disciplinary proceedings." He asserts that subpoena authority in disciplinary cases "is granted only to the Merit System

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Protection Board -- a quasi-judicial federal agency that has jurisdiction to review actions [against certain employees.]" Id.

Under Section 161 (C) of the Atomic Energy Act ("AEA"), as amended, th

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Commission is authorized to

make such Studies or investigations, obtain such information, and hold such meetings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes, the Commission is authorized ... by subpoena to require any person to appear and testify or appear and produce documents, or both, at any designated place.

42 U.S.C. • 2201(c). In sum, Congress authorized the Commission to gather information "to assist it in exercising any authority provided in" the AEA and "[f]or such purposes ... authorized" the Commission to issue any necessary subpoenas.

Section 161(d) of the AEA provides that the Commission is authorized to
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"appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission." 42 U.S.C. • 2201(d). Furthermore, Section 161(d) requires the Commission to "make adequate provision for administrative review of any determination to dismiss any employee." Id. Thus, the Commission's express authority to "appoint" or hire employees and to make determinations to dismiss" employees is found in the Atomic Energy Act, not the Civil Service Reform Act of 1978, as argued by Mr. Comley. True, the Commission's "employees shall be appointed in accordance with the civil-service laws," Id. (emphasis added), including the Civil Service Reform Act. See, e.g., 5 U.S.C. • 7541 et seq. However, that reference to the generic "civil-service laws" indicates that the appropriate civil service laws which are in effect at the time of appointment or discharge (or by implication some lesser disciplinary action)

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Supply the appropriate standards and procedures for effecting and processing the Commission's personnel action decisions, not the actual authority to make such decisions in the first place. Thus, the Commission's authority to make appropriate personnel decisions is an authority provided in the AEA.

In this instance, the agency has received allegations that one of its senior officials is guilty of misconduct. Obviously, the agency cannot make a determination of the truth of the allegations or propose to take any action against the employee in question without making an investigation. Moreover, the employee himself is entitled to a full and fair investigation. Therefore, the agency is obligated to make an investigation to determine whether the allegations have any substance. 42 U.S.C. • 2201(c). When it is necessary for the Commission to conduct an investigation in order to obtain information to make a personnel decision, the Commission is authorized to issue subpoenas under Section 161(c).

B. Subpoenas In Public Health And Safety Investigations.

A separate and additional basis under the AEA also supports the Commission's subpoena. Mr. Comley concedes (as he must) that the Commission clearly has the authority to issue subpoenas in investigations affecting public health and safety. Motion to Quash at 3. As we noted above, the NRC employee is an employee in the NRC's Office of Investigations ("OI").

This office is responsible for investigating allegations of "wrongdoing" or deliberate violations of NRC regulations by holders of Commission licenses. As such, these investigations frequently have serious implications for public health and safety. If an OI investigation uncovers information relating to violations of NRC regulations governing the technical aspects of licenses

activity, OI must refer those matters to the NRC's technical offices, such as the Office of Nuclear Reactor Regulation ("NRR"). See, e.g., 10 C.F.R. • 1.27(f) (1988).

In this case, the evidence developed during this investigation provides sufficient reason for the NRC to inquire further into the possibility that the NRC employee in question received information relating to potential violations of NRC regulations and did not pass that information to the appropriate officials of NRR. Thus, the allegations being investigated also raise questions involving public health and safety which, as Mr. Comley concedes, clearly fall within proper NRC subpoena jurisdiction.

IV. Petitioner's First Amendment Concerns.

In the pleading before us, Mr. Comley alleges that enforcement of the subpoena will somehow "chill" his rights of freedom of association under the First Amendment to the United States Constitution, citing *United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987), appeal dismissed, 848 F.2d 1307 (D.C. Cir. 1988). We reject this argument as a basis for quashing this subpoena. By this subpoena the Commission is simply trying to obtain records of conversations that are relevant to a lawful investigation being conducted by the Commission. Nothing in the First Amendment immunizes such information from discovery. If the case were otherwise, no party to any lawsuit or any investigator seeking to learn facts could discover the contents of any conversation.

The First Amendment burdens at issue in the *Garde* case are clearly distinguishable from any that might be involved in the present case. The subpoena in *Garde* was directed at records and documents of an attorney

employed by an organization whose primary purpose, indeed whose very existence, was asserted to depend upon protecting the confidentiality and identity of individuals who filed complaints regarding safety in the nuclear industry. The allegations in that case suggested that these individuals had requested confidentiality and had spoken to the individual involved solely because of an understanding that their identities would be protected.

Here, Mr. Comley has not made similar assertions regarding the organization he calls "We The People" or claimed a dependence on confidentiality and nondisclosure of the identity of persons who have spoken to him. Such assertions would in any case not appear plausible.

As we understand Mr. Comley's argument, he believes that if he is required to surrender his tape recordings, NRC employees will be afraid to communicate with him, reducing the effectiveness of his political activities.

Mr. Comley also appears to suggest that the Commission is engaged in a "witch hunt" to discover the names of presently unknown Commission employees who may have been in contact with him. This is emphatically not the purpose of the subpoena. All the subpoena seeks is information relevant to the ongoing investigation described above. To remove all question about this point, the Commission by this order hereby modifies and narrows the subpoena to seek only "tape recordings or transcripts of tape recordings between [Mr. Comley and] the NRC employee in question. Thus, there can be no concern that compliance with the subpoena will disclose previously unknown identities of persons in contact with Mr. Comley.

Finally, we note that even were some Garde First Amendment interests implicated by this case, the Garde Court expressly acknowledged that the Commission can obtain information necessary to conduct its investigations, even if obtaining that information would burden a First Amendment right. As

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the Garde Court explicitly noted, "it is clear that under the appropriate circumstances [the asserted] First Amendment rights would give way to the compelling government interest in nuclear safety," 673 F. Supp. at 606, if the Commission has demonstrated a "lack of alternative means" to avoid an unnecessary infringement on any First Amendment associational rights. 673 F. Supp. at 607.

The Garde Court declined to enforce the Commission's subpoena because in the Court's view the Commission had not considered other ways, perhaps less burdensome, to obtain the information it sought. However, in the present case, the information of interest to the Commission is the precise content of certain conversations. It is evident that by issuing a subpoena for the tape recordings of the conversations at issue the Commission is pursuing the least burdensome, indeed, the only possible means to obtain this relevant information. Simply put, the Commission has no other means to retrieve this material which is relevant and material evidence regarding the questions at issue.

The motion to quash is denied. The subpoena is modified as set forth herein. The new return date is 1:00 E.D.T., April 24, 1989, at the Office of the United States Attorney for the District of Massachusetts.

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It is so ORDERED.3/

For the Commission 4/

SAMUEL J. CHILK

Secretary of the Commission

Dated at Rockville, Maryland
this 17 day of April, 1989.

3/ In his Motion to Quash, Mr. Comley "neither confirms or denies that any taperecordings [sic] or transcripts exist at the current time, or ever existed." Motion to Quash at 1, n.1. The Commission has drafted this order under the assumption that Mr. Comley would not waste our time and effort and the taxpayers' resources unless he possessed material he wished to shield. Otherwise, a simple response that he possessed no such items would have sufficed to conclude this matter.

4/ Commissioner Curtiss was unavailable to participate in this decision.

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NUCLEAR REGULATORY COMMISSION

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Certificate of Service

I hereby certify that a copy of the foregoing Commission Order has been served upon the following person by Express Mail and in accordance with the requirement of 10 CFR Sec. 2.712.

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Ernest C. Hadley, Esquire
Counsel for Stephen B. Comley
175 Main Street
Wareham, Massachusetts 02571

Dated at Rockville, Maryland
this 17 day of April 1989

Office of the Secretary of the Commission