CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 30, 2001

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

SUBJECT: Reply to a Notice of Violation (IA-00-038) in Accordance With 10 C.F.R. § 2.201

Dear Sirs:

On September 6, 2000, the Nuclear Regulatory Commission (NRC) issued a Notice of Violation (NOV) concluding that I violated 10 C.F.R. §§ 50.5 and 50.7. The proposed violations were categorized as a single violation at Severity Level III under the NRC's "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600, May 1, 2000 (Enforcement Policy). I am particularly concerned about the allegation that my conduct was deliberate. Attachment 1 contains my request for reconsideration of the alleged Section 50.5 violation as prepared with the assistance of my counsel, Perry D. Robinson (Foley & Lardner). Attachment 2 contains my reply in accordance with 10 C.F.R. § 2.201.

In a letter from Mr. James Luehman, Deputy Director, NRC Office of Enforcement, dated October 2, 2000, the date for responding to the NOV was extended until Numanco and I received information concerning the case pursuant to a Freedom of Information Act (FOIA) request. After receiving this information in late February, my counsel spoke with Mr. Barry C. Westreich, NRC Office of Enforcement, and the date for my reply was extended until April 30, 2001.

I take very seriously the NRC's mission to protect the public health and safety, particularly with regard to allegations of discrimination and deliberate misconduct. While I disagree with the NRC's conclusions in the NOV, I want to assure you that it has served to make me more conscious of and sensitive to situations that might be construed as discriminatory. At the same time, like many other professionals in the nuclear industry, I also believe the NOV sends a conflicting message to supervisory personnel who are trying to properly and in good faith achieve compliance with the NRC's requirements, while at the same time applying sound business judgement in the area of personnel management. As demonstrated in the attachments to this letter, I believe that more guidance is needed to clearly explain how the NRC reaches a conclusion of discrimination, as well as how the NRC distinguishes between discriminatory behavior and deliberate misconduct.

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Public Available
Per: G. Cwalina

I recognize that the agency must exercise its enforcement powers when adequate facts exist to support a violation of regulatory requirements. However, where the facts do not adequately support the proposed violation, as in this case, I believe that the NRC has a responsibility to carefully review its initial position and withdraw the proposed violation. This is particularly appropriate for the violation of Section 50.5 proposed in my case.

The NRC's enforcement action creates the potential for devastating and lasting personal and professional implications for me. Consequently, I request that this matter be addressed in an expeditious manner. If you have any questions concerning this reply, please contact Perry Robinson (Foley & Lardner) at (202) 835-8024.

Very truly yours,

Rob Grant

cc: Director, Office of Enforcement
Regional Administrator, Region III
NRC Resident Inspector (Dresden Station)
NRC Commissioners (under separate cover)

Attachment 1

Request Of Rob Grant, For Withdrawal Of 10 C.F.R. § 50.5 Violation

I. Introduction

This enforcement action concerns Rob Grant, a radiation protection supervisor who, in November 1997, sought to make the best decisions he could under very difficult circumstances. This case is similar to situations that occur every day in the workplace, where supervisors and workers have disagreements and do not do the best job of communicating. However, contrary to the NRC's Notice of Violation (NOV), the facts do not warrant a finding that Mr. Grant deliberately discriminated against a subordinate. As explained below, Mr. Grant acted in good faith and consistent with the directions from his management and with the need to adhere to his client's instructions.

When all of the facts are considered, in the light of the participants' understanding at the time, and the applicable legal and regulatory standards are appropriately applied, the NRC's proposed violation should be withdrawn. At a minimum, the NRC should withdraw its finding of deliberate misconduct.

Mr. Grant respectfully submits his request for withdrawal of the 10 C.F.R. § 50.5 violation. He is acutely aware of the NRC's need to protect the public health and safety, including the need to prevent discrimination. Mr. Grant fully supports the NRC's mission and will continue to strive to support that mission. In this spirit, Mr. Grant respectfully asks that the information presented below be given careful and thorough consideration.

II. Summary Of The Alleged Incident

On Friday, October 31, 1997, around 4:00 p.m., Jack Webb, a radiation protection technician (RPT) for Numanco at Dresden Station, Unit 1, approached Tim Cockream, his immediate supervisor, and said that Dean Berres, another RPT, might be deconning people in the count room. Cockream Tr. at 17; Webb Tr. at 45. [1] According to Mr. Cockream, Mr. Webb's statement was very brief, "like in a passing note." Cockream Tr. at 17. Since most of the RPTs had gone home, Mr. Cockream chose to wait until the next day to investigate the deconning issue.

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[1] Transcript references are to the transcribed interviews conducted by the NRC's Office of Investigations or the pre-decisional enforcement conference conducted on March 15, 2000.

Earlier that same day, a radiation intake event occurred during the cutting of pipe in the radwaste tunnel. Grant Tr. at 32. Mr. Grant stayed at the plant to handle the incident until about 6:00 p.m. Grant Tr. at 33. However, Mr. Cockream did not speak to Mr. Grant regarding Mr. Webb's statement. Cockream Tr. at 17; Cockream Statement (Nov. 5, 1997).

The next day, Saturday, November 1, 1997, Mr. Cockream spoke with Mr. Berres about the issue raised by Mr. Webb. Mr. Berres told him that he was not deconning anyone. Cockream Tr. at 18. Sometime during the day, Mr. Cockream also asked Mr. Grant if he knew about the situation with Mr. Berres and Mr. Grant said he did. Cockream Tr. at 24.

Mr. Grant found out about the deconning concern on Saturday from Joe Kiman, an outside consultant working at Dresden Station. Grant Tr. at 33. Apparently, Don Johnson, an RPT, told Mr. Kiman that he heard about "somebody deconning people in the count room on Friday or over the last week." Grant Tr. at 33, 70. Mr. Grant continued to be very focused that Saturday on addressing the intake event. Also, Mr. Johnson was not at work that Saturday so Mr. Grant could not speak directly with him. Consequently, Mr. Grant was not able to follow up on the deconning issues at that time. *Id.* Mr. Grant spoke with Tom Nauman, the station manager for Dresden Station, Unit 1 (ComEd), and indicated that he would follow up on the situation on Monday. *Id.*

On Monday, November 3, 1997, Mr. Grant investigated the issue raised by Mr. Kiman. He questioned Dean Berres about whether he was deconning people in the count room. Grant Tr. at 34. Mr. Berres said that he had been frisking for hot particles, but not decontaminating anyone. Berres Tr. at 37. More specifically, Mr. Berres indicated that he had cleaned "off a 1K or 2K - thousand DPM particle from one worker's shoe, but that everyone else he had taken down to the 2, 3 exit point, which is where most of the deconning was performed." Grant Tr. at 34. The general approach used by Mr. Berres apparently was common practice when there was minor contamination. *See* Quealy Tr. at 15-16; *see also* Miller Tr. at 26. At the time, Mr. Grant's understanding was that Mr. Berres' activities would not have been procedural violations. In fact, they were later considered to be good practices. Grant Tr. at 37, 39; *see also* Miller Tr. at 27.

On Tuesday morning, November 4, 1997, Mr. Grant attended a meeting with Larry Aldrich, ComEd Radiation Protection Manager, John Moser, ComEd ALARA supervisor and Deb Miller, ComEd Unit 1 lead supervisor. Grant Tr. a 41, 69-70. The meeting was to follow up on the intake event that happened the previous Friday. *Id.* When the meeting finished, Mr. Moser told Ms. Miller and Mr. Grant that somebody approached him about deconning in the count room. Moser Tr. at 22. Mr. Grant asked who brought the concern to Mr. Moser; however, Mr. Moser stated "I'm not going to tell you . . . but here are a couple of issues that you need to go look at." *Id.* Mr. Moser also mentioned that the concerned individual said that a supervisor had been informed of the matter. Grant Tr. at 48, 70. This conversation occurred sometime between "ten to eleven" that Tuesday morning.

When Mr. Grant left the discussion with Mr. Moser, he thought the deconning issue was a low priority because of his prior investigation into the matter and his understanding of the procedures and practices at the time. Nevertheless, he had been given the responsibility to look into the matter for ComEd. Mr. Grant also believed that the concerned individual referred to by Mr. Moser was Don Johnson and that the supervisor was Tim Cockream. Grant Tr. at 48, 70. At this point in time, Mr. Grant did not know that Jack Webb was involved with the deconning issue.

When Mr. Grant got back to his office he called Mr. Cockream in to ask whether anyone had raised the deconning issue to him. *Id.* Mr. Cockream said that Mr. Webb had briefly mentioned the issue in passing on Friday evening, Cockream Tr. at 25, but that he (Mr. Cockream) had failed to mention it to Mr. Grant before now. Cockream Statement (Nov. 5, 1997); Grant Tr. at 49, 71. Mr. Grant then asked Mr. Cockream to find Mr. Webb and bring him to his office. Cockream Statement (Nov. 5, 1997); Grant Tr. at 72.

Around 10:30 a.m., Mr. Webb arrived at Mr. Grant's office. Cockream Statement (Nov. 5, 1997); Webb Tr. at 58. Mr. Grant asked Mr. Webb what he knew about the deconning issue. Grant Tr. at 72; Cockream Statement (Nov. 5, 1997); Webb Tr. at 58-59. Mr. Grant indicated that he wanted the information so he could write a Problem Identification Form (PIF) to enter the matter into the corrective action program. Pre-decisional Enf. Conf. Tr. at 48, 73. Mr. Webb said that he was advised by his attorney not to have any one-on-one conversations with Mr. Grant. *Id.*[2] This response was totally unexpected and it "flabbergasted" Mr. Grant and "stunned" Mr. Cockream. Grant Tr. at 72; Cockream Tr. at 39. Mr. Cockream was in the room, so Mr. Grant suggested that he be a witness to the conversation. *Id.* Mr. Webb said that he did not trust Mr. Cockream either. *Id.* At this point, Mr. Grant could only think to ask Mr. Webb to go back to his work area until he could determine what to do. Grant Tr. at 72.

After Mr. Webb left, Mr. Grant called his boss, John Ellison, Vice President of Operations for Numanco. Grant Tr. at 72; Cockream Statement (Nov. 5, 1997). According to Mr. Ellison,

> Mr. Grant told me that he and Tim Cockream had just met with one of their subordinates, Jack Webb, to discuss a safety concern that Mr. Webb had previously raised with Mr. Cockream, his first line supervisor. Mr. Grant told me that Mr. Webb refused to discuss the matter with him because his attorney told him not

[2] In a March 14, 2000, memorandum from Charles Weil (NRC) to Brent Clayton, et al. (NRC), Mr. Weil points out that Mr. Webb apparently told Numanco he had three attorneys. When Numanco checked with two of them, each indicated that he did not represent Mr. Webb. Mr. Webb refused to identify the third attorney and Mr. Weil commented that "[t]his may indicate that Webb was not dealing with Numanco in good faith."

> to have any one-on-one discussions with Mr. Grant and because he did not trust Mr. Cockream. . . . .
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> I attempted to give Mr. Grant the best advice that I could at the time. I told Mr. Grant that I considered Mr. Webb's conduct out of line and that he should tell Mr. Webb that he had to discuss the matter with him and Mr. Cockream or he would be suspended pending an investigation into why he would not discuss the matter.

Declaration of John Ellison at 5-6 (submitted prior to the pre-decisional enforcement conference).

Although there is some confusion on this point in the testimony, it appears that during or shortly after the telephone call between Mr. Grant and Mr. Ellison, Pat Quealy, the lead health physicist for Dreseden Station, Unit 1, became informed of the *initial* interaction between Mr. Grant and Mr. Webb. Quealy Tr. 20. Mr. Quealy understood that Mr. Webb was not cooperating with Mr. Grant and that "he's not talking without – on advice of counsel." *Id.* Based on this understanding, Mr. Quealy spoke with his boss, Tom Nauman. *Id.* According to Mr. Quealy, Mr. Nauman told him that Mr. Webb sounded "disgruntled" and because there was nuclear fuel in the spent fuel pool, he did not "want him to be able to get in and do any damage." Quealy Tr. at 20-22. ComEd's solution to this security concern was to restrict Mr. Webb from entering the RPA. Mr. Quealy informed Mr. Grant of Mr. Nauman's decision. Quealy Tr. at 22.

Subsequently, Mr. Grant paged Mr. Webb to have him come back to his office to discuss the deconning issue further. Grant Tr. at 74; Webb Tr. at 62-64. Mr. Webb called in response to the page from John Moser's office. Grant Tr. at 74. When Mr. Webb arrived, Mr. Grant and Mr. Cockream were waiting in the room. Webb Tr. at 64. According to Mr. Webb, Mr. Grant stated to him that he must tell what he knows or be "fired." *Id.* However, Mr. Grant and Mr. Cockream both state that the word "suspended" was used, not the word "fired." Grant Tr. at 78; Cockream Tr. at 29.[3]

During this second meeting between Mr. Grant and Mr. Webb, Mr. Webb indicated that he wanted someone from ComEd present – presumably Mr. Moser. Grant Tr. at 74; Cockream Statement (Nov. 5, 1997). Mr. Grant responded that Mr. Moser was not in their chain of command, and in his opinion, it was not necessary for him to sit in on the discussion.

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[3] As one of only three witnesses to the conversation, Mr. Cockream's testimony on this point is particularly important and credible because, subsequent to this incident, Mr. Grant terminated him for an incident related to the transfer pool. Cockream Tr. at 6. Clearly, if anyone might have an "ax to grind" against Mr. Grant, it would be Mr. Cockream; yet, his testimony is consistent with that of Mr. Grant.

Id. But, "once we're done here, you [Mr. Webb] can go talk to anybody you want." Grant Tr. at 74. The clear implication of Mr. Grant's statement is that they needed to get to the bottom of the issue at that time and, after achieving that end, Mr. Webb could freely discuss the matter, including with the NRC. Mr. Grant's focus was on gathering information about any improper decontamination activities as expeditiously as possible, including getting the matter formally documented in the corrective action program.[4] Moreover, his intention was not to impede Mr. Webb's right to freely discuss the matter.

During this second meeting, Mr. Quealy called Mr. Grant to inform him that Mr. Webb's RPA access should be restricted. Webb Tr. at 65. Mr. Grant told Mr. Webb of the ComEd decision and stepped briefly out of the office to enter Mr. Webb's RPA restriction into the computer, consistent with Mr. Quealy's instructions. Webb Tr. at 66. Based on this, Mr. Webb decided to reveal the information he had withheld before. According to Mr. Webb, he gave Mr. Grant a "very, very brief run down of these events." *Id.* at 66-67.

Believing that Mr. Webb had now been "a little cooperative," Mr. Grant left his office once more to talk with Mr. Quealy. Declaration of Rob Grant at 17 (submitted prior to the pre-decisional enforcement conference); Grant Tr. at 75. Mr. Grant explained to Mr. Quealy what occurred and asked whether ComEd still wanted Mr. Webb's RPA access restricted. Declaration of Rob Grant at 17. Understanding that Mr. Webb was "talking now," Mr. Quealy had a second conversation with Mr. Nauman. Quealy Tr. at 27-28. Mr. Nauman chose to continue the restriction on Mr. Webb's RPA access pending an investigation.[5] Quealy Tr. at 27.

Since ComEd still continued to restrict Mr. Webb's access to the RPA, Mr. Grant sought advice again from Mr. Ellison. During this second telephone call, Mr. Grant explained ComEd's position and that Mr. Webb had been somewhat cooperative, but that he did not feel he was getting all the information from Mr. Webb. Ellison Tr. at 24-26; Grant Tr. at 75. According to Mr. Ellison, he believed that as a radiation protection technician, Mr. Webb was responsible for adhering to procedures and reporting violations and/or noncompliances; in fact, this was "pretty much their primary function." *Id.* Because Mr. Ellison believed that Mr. Webb was not fully cooperating and because of the security concern raised by ComEd, he

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4 Up to this point, even though Mr. Webb had ample opportunity to do so, he had not initiated a PIF. *See* ComEd Root Cause Report No. 010-200-97-00400, Rev. 0. In fact, it was Mr. Quealy who ultimately initiated a PIF on the matter after he first learned of Mr. Webb's allegation. *See* PIF # D1997-07924, dated Nov. 4, 1997.

5 Apparently, there were two reasons for ComEd's decision, Mr. Webb was "disgruntled" and "because of the investigation ongoing." Quealy Tr. at 27. Importantly, in direct answer to questions from an NRC/OI investigator, Mr. Quealy stated that it was *never* his impression that Numanco wanted Mr. Webb's RPA access restricted or that such an action had ever been suggested by Numanco. *Id.* at 33.

directed Mr. Grant to temporarily suspend Mr. Webb with pay pending an investigation. Mr. Ellison also indicated that he would fly to the site in the morning to talk with Mr. Webb. *Id.*

When Mr. Grant got back to his office, he informed Mr. Webb of the situation and proceeded to escort him to the gate. Declaration of Rob Grant at 18; Cockream Statement (Nov. 5, 1997). On the way to the gate, Mr. Webb cursed Mr. Grant. Declaration of Rob Grant at 18. Mr. Grant told Mr. Webb to contact John Ellison for further information and Mr. Webb left his badge at the guardhouse. Declaration of Rob Grant at 18; Webb Tr. at 68.

From the point in time that Mr. Grant became aware of Mr. Webb's concern until Mr. Webb left the site, the entire set of interactions described above took only about two or two and one half hours. The interactions started about 10:30 a.m. on Tuesday, Webb Tr. at 58, Moser Tr. at 22, and were clearly over by at least 1:00 p.m. that same day when Mr. Webb left the station. *See* Miller Tr. at 41.

After returning from the guardhouse, Mr. Grant set up a meeting with every Numanco technician assigned to Dresden Station, Unit 1, (in person or via telephone) to question them about the alleged deconning incident. *See* Pre-decisional Enf. Conf. Tr. at 114. While none of the technicians said they saw Dean Berres actually performing decontamination in the count room, there were comments suggesting that he was doing something he should not be doing. *Id.* at 115. After conferring with Mr. Ellison, Mr. Grant followed the same approach as with Mr. Webb and suspended Mr. Berres with pay pending further investigation. *Id.* Mr. Grant escorted him to the guardhouse and, like Mr. Webb, he too was asked to drop off his badge. *Id.*

Mr. Grant proceeded to Mr. Nauman's office to update him on the situation. Grant Tr. at 115; Declaration of Rob Grant at 19. While talking with Mr. Nauman, Mr. Grant was informed that Mr. Webb had contacted the NRC after leaving the site, indicating that he had been terminated. Declaration of Rob Grant at 19. Around 5:00 p.m. on November 4, 1997, Mr. Grant, along with Mr. Aldrich, Ms. Miller and John Hill of ComEd, called both Mr. Webb and Mr. Berres to make sure they clearly understood that they were not terminated and to advise them to report to the site the next morning "to be interviewed as part of the ComEd investigation." Declaration of Rob Grant at 19; Pre-decisional Enf. Conf. Tr. at 116.

III. Legal And Regulatory Bases Required To Support A Section 50.5 Violation

The NRC's regulations define deliberate misconduct as "an intentional act or omission that the person knows . . . [w]ould cause a licensee or applicant to be in violation of any rule, regulation, or order." (Emphasis supplied) 10 C.F.R. § 50.5 (c)(1); *see also* 56 Fed. Reg.

40644, 40677 (Aug. 15, 1991). In addition, the NRC's enforcement guidance states that the *basic elements* of a deliberate violation are:

- a requirement exists (a regulation, license condition or technical specification, order or statute);
- a violation of a requirement has occurred;
- the person's actions were voluntary, as opposed to inadvertent;
- the person committing the violation knew a requirement existed, understood the requirement, and knew the requirement was applicable at the time; and
- the person knew that his or her actions were contrary to the requirement [in this case, 10 C.F.R. § 50.7].

(Emphasis supplied.) NRC Enforcement Manual, NUREG/BR-0195, Rev. 3, Chapter 7.2. An enforcement action under Section 50.5 should only be taken against an individual that fully understood, or should have understood, his or her responsibility; knew, or should have known, the required actions; and knowingly failed to take required actions which have actual or potential safety significance. (Emphasis supplied) *Id.* at Chapter 7.3.[6]

NRC enforcement precedent has consistently applied the meaning of the terms stated above. For example, in a recent enforcement case involving FirstEnergy Nuclear Operating Company (FENOC), EA 99-012 (May 20, 1999), the NRC concluded that a radiation protection manager did not engage in deliberate misconduct regarding discrimination because he "did not understand what activities were protected under the regulations." (Emphasis supplied.) In a letter to the Union of Concerned Scientists, dated June 23, 1999, Mr. James Lieberman, Director, Office of Enforcement, discussed the case. Specifically, Mr. Lieberman stated:

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6 Several key words are prominent in the NRC's rule and guidance concerning Section 50.5: deliberate, intentional and knowingly. The meaning of these words is important to the analysis of any alleged Section 50.5 violation. Since the NRC's case law is limited in its discussion of these terms, reference to Black's Law Dictionary (6th ed. 1990) may be instructive. First, the term *deliberate* includes the following definitions: well advised, carefully considered, not sudden or rash; circumspect; formed, arrived at, or determined upon as a result of careful thought and weighing of considerations, as a deliberate judgement or plan. Second, the words *intentional* or *intentionally* define a person's act(s) if he desires to cause consequences of his act or he believes consequences are substantially certain to result. Finally, the term *knowingly* describes an individual's actions where he acts with awareness of the nature his conduct.

> The NRC agrees that knowledge and understanding of the law are not necessary elements in determining whether a violation of 10 CFR 50.7 occurred. These elements are relevant, however, in determining whether enforcement action can be taken against the individual based on a violation of 10 CFR 50.5, the rule on deliberate misconduct.

(Emphasis supplied.) Mr. Lieberman's statement demonstrates that the state of mind necessary to sustain a Section 50.5 violation is more than careless disregard. In fact, in recent comments by Mr. Dennis Dambly, NRC's Office of General Counsel, he states that "specific intent" must be established in order to sustain a Section 50.5 violation.[7] In addition, Mr. Lieberman's statement demonstrates that Section 50.5 is distinct from the underlying violation of Section 50.7 and, as such, must be separately and fully proven in order to uphold a violation.[8]

Other more recent enforcement actions involving deliberate misconduct reinforce Mr. Lieberman's position. For example, in IA-00-034 (December 15, 2000), the NRC determined that an individual supervising radiographic operations specifically "authorized" radiography to be performed with only one qualified person present when he "knew" that two qualified individuals were required under the regulations. Another case, IA-00-009 (January 3, 2001), involved a security manager who apparently took steps to "deter" the reporting of a security event which he "knew" was required to be reported. The NRC's Office of Investigations considered the manager's actions a deliberate "cover-up." Both of these cases reinforce that, in order to sustain a deliberate misconduct violation, the NRC must show that the accused individual possessed a certain state of mind - one where the individual *knew* and *understood* that his or her act would violate the underlying regulation or requirement.

In addition to the above, the Deliberate Misconduct Rule was crafted narrowly, and the "range of actions that would subject an individual to action by the Commission does not differ significantly from the range of actions that might subject the individual to criminal prosecution." 56 Fed. Reg. 40644, 40675 (Aug. 15, 1991). Since liability for deliberate misconduct does not stop at the NRC rule, but may also constitute a violation of the Atomic Energy Act's criminal provision in 42 U.S.C. § 2273, *Thermal Science, Inc. v. N.R.C.*, 29 F. Supp. 2d 1068, 1072 (E.D. Mo. 1998), a careful and reasoned analysis of a person's state of mind is necessary to establish a violation of Section 50.5.

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7 Reference Slide No. 7 from Mr. Dambly's presentation concerning employment discrimination during Session W5 of the March 14, 2001 NRC Regulatory Information Conference (RIC).

8 This position was recently reiterated in comments made at the NRC's March 14, 2001 RIC, Session W5, by Mr. Dennis C. Dambly, Assistant General Counsel for Materials Litigation and Enforcement. Specifically, on a slide discussing the differences between Section 50.5 and Section 50.7, Mr. Dambly stated that "DIFFERENT RESULTS ARE THE RESULT OF DIFFERENT STANDARDS."

In sum, specific intent is required to sustain a 10 C.F.R. § 50.5 violation. An individual accused of such a violation must not only be shown to know, but understand and/or comprehend the implications of his or her actions. Moreover, the Deliberate Misconduct Rule on its face, as well as through the NRC's guidance, indicates that it is not enough to simply intend an act, the accused individual must be shown to know that his or her act will cause or result in a violation of NRC requirements (*i.e.*, an illegal act).[9] This analysis or standard is the same one applied by other federal agencies when dealing with knowing violations of agency regulations. *See, e.g., Liparota v. United States*, 471 U.S. 419, 425 (1985) (involving a knowing violation of Food Stamp Fraud Act implementing regulations). Accordingly, for a violation of 10 C.F.R. § 50.5 to exist, the NRC must show that the accused possessed the requisite intent or state of mind to cause a violation of NRC regulatory requirements (in this case, Section 50.7).

While the NRC acknowledges that terms such as "willful misconduct" (and, thus, deliberate misconduct) are "difficult to precisely define," 56 Fed. Reg. at 40676, given the potential devastating personal and professional impacts that NRC sanctions can bring, it is imperative that the agency be as clear and precise as possible concerning what constitutes an act of deliberate misconduct. *See, e.g., ABBS v. Sullivan*, 756 F. Supp. 1172, 1189 (W.D. Wis. 1990) (vacated on other grounds) (where an agency's imposition of permanent sanctions on individuals for misconduct can cause damage to reputations or other liberty interests, the court indicated that considerations of fairness and informed decision making are appropriate). Moreover, the NRC considers enforcement actions against individuals to be "significant personnel actions" that must be "closely controlled and judiciously applied." NRC Enforcement Policy (NUREG 1600), Section VIII.

IV. Analysis Of The Facts Under The Applicable Legal And Regulatory Standards

Consistent with the legal and policy standards discussed above, there are two principal reasons why Mr. Grant's decision on November 4, 1997, should not be considered deliberate misconduct:

- Mr. Grant did not possess the requisite intent to deliberately violate the provisions of Section 50.7. Mr. Grant did not know or understand that a temporary suspension with pay would be considered adverse employment action. Consistent with prior

[9] In terms of the requisite knowledge to violate a rule, the Commission has indicated it has adopted a reasonable man standard. 56 Fed. Reg. 40681. Thus, the relevant facts must be viewed from the vantage of what a reasonable man knew, in the place of the accused, at the time the events took place. Deliberate conduct cannot be assigned through a retrospective review of the facts, for that would not reflect the understanding of a reasonable man at the time the relevant actions were taken. Moreover, absent the requisite knowledge at the time of the act, there would be no causal nexus between the act and the underlying violation.

NRC precedent, such unfamiliarity and lack of understanding precludes a finding of a Section 50.5 violation.

- The NRC announced for the first time in Mr. Grant's enforcement action that temporary suspension with pay was considered an adverse employment action. This is not only a breach of due process but, under the circumstances, it was impossible for Mr. Grant to have known or understood that he was intentionally violating the provisions of Section 50.7

The basis for each of these reasons is discussed separately below.

A. Mr. Grant Did Not Possess The Requisite Intent

To substantiate that Mr. Grant deliberately violated the prohibition against discrimination under 10 C.F.R. § 50.7 and thus violated 10 C.F.R. § 50.5, the NRC must show by a preponderance of the evidence that he possessed the requisite intent (*i.e.*, specific intent) to do so. Based on the above discussion, this showing must demonstrate that Mr. Grant knew and understood that his actions would violate the law. In fact, the showing must demonstrate that he was aware of the nature of his conduct, desired to cause the consequences, and sought to do so in a careful or circumspect manner. A number of facts demonstrate that Mr. Grant's state of mind on November 4, 1997, did not measure up to these standards.

1. Mr. Grant simply had no intention to discriminate against Mr. Webb. As stated in his March 10, 2000, submittal prior to the pre-decisional enforcement conference, "I did not do anything related to Mr. Webb that was deliberately wrong. I did not retaliate against him because he raised a safety concern." Declaration of Rob Grant at p. 24.

2. Mr. Grant's actions to temporarily suspend Mr. Webb with pay pending an investigation were directed by his management. Mr. Grant did not act alone; the record shows that Mr. Ellison specifically told Mr. Grant to take this action. Mr. Grant understood that his actions were consistent with company policy. These facts alone demonstrate that Mr. Grant did not intend to violate the NRC's prohibition against discrimination.

3. Mr. Grant's actions show that he did not posses any retaliatory animus toward Mr. Webb. As the record indicates, when Mr. Webb became even "a little cooperative," Mr. Grant went back to see if ComEd still wanted to restrict Mr. Webb's RPA access. If Mr. Grant truly had wanted to act in a discriminatory manner, he certainly would not have made the effort to seek reinstatement of Mr. Webb's RPA access. Moreover, as Mr. Quealy's testimony indicates, there was *never* any indication or even a suggestion that Numanco wanted Mr. Webb's RPA access restricted.

4. Mr. Grant's client, ComEd, directed him to restrict Mr. Webb's RPA access. In his mind, it appeared that ComEd had a security concern related to Mr. Webb's behavior. Security concerns at nuclear power plants need to be treated very seriously. Since ComEd was the licensee, Mr. Grant was in no position to second-guess their decision.[10] Moreover, even with his RPA access restricted, Mr. Webb still had access to the Protected Area (PA) and, thus, safety significant systems and equipment (*e.g.*, the fuel handling building, which only required a key card to gain entry). To Mr. Grant, it seemed that temporary suspension with pay would be an appropriate measure until ComEd's security concern could be resolved. Again, Mr. Grant's intention was not directed at discrimination, but rather toward ensuring the security of the site consistent with the understanding of his client's wishes.

5. Mr. Webb's assigned responsibilities involved working under a radiation work permit (RWP). Restricting an individual's RPA access also prevents that person from signing in on a RWP. Pre-decisional Enf. Conf. Tr. at 91. Since Mr. Webb's access to the RPA was restricted, Mr. Grant did not believe there was other (non-RWP) work for him to do. *Id.* at 92, 96. Thus, temporarily suspending Mr. Webb with pay was not intended as a discriminatory action, but rather was considered a prudent business decision since Mr. Grant believed that other work was not available.

6. One of Mr. Grant's main purposes for seeking information from Mr. Webb was to gather the facts about the alleged deconning incident so that it could be appropriately documented and promptly addressed. As the record shows, Mr. Grant told Mr. Webb that he was free to discuss the matter with *anyone* once the crucial information about the allegation was obtained. Mr. Grant clearly did not intend to discourage Mr. Webb from raising the matter to anyone, including the NRC.

7. When Mr. Moser raised the deconning issue, Mr. Grant considered it a low priority. He had already been informed of the issue and had already looked into it on the previous day. He had talked with the radiation protection technician believed to have conducted the deconning, Dean Berres, and had been informed that only frisking was performed. Mr. Grant also understood at the time that what Mr. Berres had done would generally have been acceptable under existing

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10 As Mr. Chris Crane of ComEd pointed out at the March 15, 2000, pre-decisional enforcement conference, Mr. Webb appeared to be a "disgruntled individual" and, as such, "it is our responsibility no matter what level, what position, what function, what action if you do have an individual that is disconnected, not aligned, showing somewhat disgruntled focus," that a "cooling-off" period is "truly appropriate." Pre-decisional Enf. Conf. Tr. at 15-16.

practices and procedures. So, at most, Mr. Moser raising the issue to Mr. Grant was of minor significance - it was something he simply needed to get more information on. Therefore, there was no motivation for Mr. Webb to discriminate against Mr. Webb.

8. The entire incident concerning Mr. Webb's temporary suspension with pay took place in rapid succession over a very short time frame, a matter of about two hours, and it involved considering a variety of competing factors. Mr. Grant had never faced such a situation before in his career. As the facts demonstrate, Mr. Grant did not even know Jack Webb was involved until late in the morning on Tuesday, November 4, 1997. When he approached the matter initially with Mr. Webb, he expected to routinely obtain the needed information on a safety issue from someone who had knowledge, properly document it and then proceed to address the matter further as needed. Instead, he was faced with a completely unexpected response from Mr. Webb. Rather than act alone, he sought direction from his management. He conferred with and took into consideration the concerns of his client, ComEd. He also attempted to properly address these concerns in light of the immediate work opportunities available for Mr. Webb. Mr. Grant did all of this in about two hours. Such a situation would be challenging for anyone under the same circumstances. With a variety of new and difficult issues and decisions being thrust at him, Mr. Grant made the best judgement he could. When all the facts are viewed together, from the real-time perspective of those involved, it simply does not make sense that Mr. Grant intended to discriminate against Mr. Webb.

9. Contrary to Mr. Webb's allegation, Mr. Grant did not threaten to or tell him that he was "fired." Mr. Cockream is the only third party witness and he testified that the word "suspended" was used, not the word "fired." Cockream Tr. at 29. Moreover, given his subsequent termination by Numanco, the fact that he continued to support Mr. Grant makes his testimony extremely credible.

10. Asking Mr. Webb to drop off his badge at the guardhouse had no other significance to Mr. Grant than that it seemed like an appropriate protocol under the circumstances. The same process was used with regard to Mr. Berres later the same day. Mr. Webb and Mr. Berres were expected back the next day to participate in the ComEd investigation. Clearly, Mr. Grant would not have expected a terminated employee to cooperate in such a manner. Moreover, even if the communication between Mr. Grant and Mr. Webb was poor and led to a misunderstanding about Mr. Webb's employment status, this was cleared up within several hours after Mr. Webb left the site.

When all of the facts are viewed together and in light of what Mr. Grant knew and understood <u>at the time of the incident</u> (or reasonably could have known or understood at the

time), it is clear that he did no more than make a good faith effort to handle a frustrating and difficult situation. In the span of only about two hours and having never faced such a situation before, Mr. Grant followed the direction of his management, addressed the legitimate concerns of his client (*i.e.*, ComEd), and applied the best judgement that he could under the circumstances. The facts simply do not support that Mr. Grant specifically intended to (*i.e.*, deliberately intended to) discriminate against Mr. Webb. Instead, Mr. Grant's actions show that, while there may have been a better way to balance all of the factors which rapidly arose, his mind was on being responsive to the immediate demands of the situation, not on retaliating against Mr. Webb. As the NRC has recognized before,

> 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.

56 Fed. Reg. 40664, 40681 (1991).

B. Mr. Grant Could Not Reasonably Have Known Or Understood That Temporary Suspension With Pay Was An Adverse Employment Action Because NRC First Announced This Position In His Case

On the face of the Deliberate Misconduct Rule and consistent with the NRC's guidance and precedent, anyone accused of violating 10 C.F.R. § 50.5 must be shown to have known and understood that their actions would violate a NRC requirement (in this case, 10 C.F.R. § 50.7). This necessarily means that the accused individual must be accorded a reasonable opportunity to become informed about the requirements of Section 50.7.

It is well established that an agency's interpretation of its regulations must coincide with adequate notice. *See generally General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). Where an interpretation of a regulation is made for the first time, fair notice must be given *before* subjecting a party to enforcement. Under such circumstances, fair notice means that "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *General Electric Co.* at 1329 (*citing Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

A review of NRC precedent shows that, prior to this enforcement action, the agency had not announced any position that temporary suspension with pay would be regarded as

adverse action for the purposes of Section 50.7. In fact, a recent search of the NRC's website (*i.e.*, www.nrc.gov) identifies only two enforcement actions that deal directly with the issue of temporary suspension with pay, and these are the ones against Numanco and ComEd for this very matter.[11] Seven other enforcement actions were identified that involved some form of suspension.[12] In all cases, these enforcement actions referred to suspension as a positive corrective action by the licensee. Enforcement Actions 97-391 and 98-131 specifically indicated that suspension without pay was an action worthy of credit toward reduction of the proposed civil penalty amount. While these cases did not involve alleged Section 50.7 violations, they suggest that temporary suspension with pay could be an appropriate response by management to address certain employee actions. Beyond this information, no further guidance is available. The publicly available information from the NRC, at the time of the alleged incident, would not have articulated a prohibition under Section 50.7 against temporary suspension with pay. Consequently, the NRC failed to provide Mr. Grant and other regulated parties fair notice of this interpretation. Moreover, given the available precedent, Mr. Grant reasonably could have believed that temporary suspension with pay was an appropriate management tool under the circumstances he faced.

Subsequent to the alleged discrimination incident, the NRC published Enforcement Guidance Memorandum (EGM) 99-007, dated September 20, 1999. This guidance document, which precedes the NOVs issued to Mr. Grant, Numanco, and ComEd by almost one year, directly addresses what constitutes an "adverse action" under 10 C.F.R. § 50.7. Again, the NRC EGM does not state a position on temporary suspension with pay. Attachment 2 of the EGM provides the following example of "adverse action:"

> On January 10, 1999, the Manager of Safety and Quality Assurance notified the Supervisor that he was being reassigned to a non-managerial position in the Licensee's training division, which is outside the Licensee's compliance monitoring organization. This action took place approximately one month after the Supervisor had raised the safety concerns described above. The evidence indicates that the position to which the Supervisor was transferred had no supervisory responsibilities, and was generally considered a less desirable position than Supervisor of Quality Systems.

This example suggests that adverse employment actions involve some level of permanency – *i.e.*, the individual was "reassigned," not temporarily suspended pending an investigation. The

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11 The search function provided on the website was used and the search terms were "suspension with and without pay."

12 The enforcement actions include: EA 98-404; EA 98-224; IA 98-015; EA 98-131; EA 97-207; EA 97-391; and IA 97-071.

example also suggests that the impact was to reduce the individual's role or duties – *i.e.*, to one where "no supervisory responsibilities" existed any longer. Neither of these factors were present as part of the incident involving Mr. Webb. Thus, even as Mr. Grant, Numanco and ComEd prepared for the pre-decisional enforcement conference on March 15, 2000, the NRC still had not articulated a position on temporary suspension with pay.[13]

The NRC's position concerning temporary suspension with pay was never articulated before this case. Clearly, given the information publicly available to Mr. Grant at the time, "ascertainable certainty" as to the NRC's position concerning temporary suspension with pay was not possible.[14] To subject Mr. Grant to enforcement based on this first time interpretation would be a breach of due process and would constitute arbitrary and capricious action on the part of the agency. While the NRC certainly may seek to prospectively interpret temporary suspension with pay as an adverse employment action, it may not do so at Mr. Grant's expense.

In addition, the NRC cannot rely on DOL case law for the fair notice required under the *General Electric* case. DOL has taken the position on numerous occasions that not all impacts on the terms and conditions of employment are considered adverse. For example, the court in *Smart v. Ball State Univ.*, 89 F.3rd 437, 441 (7th Cir. 1996), points out that "[w]hile adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action." Citing *Crady v. Liberty National Bank & Trust Co. of Indiana*, 993 F.2d 132 (7th Cir. 1993), the court gives an example where an individual had his title changed from assistant vice-president to loan officer and was transferred from one bank branch to another as a situation that did not constitute adverse employment action. *Id.* The court in *Smart* also indicated that such actions are too "minor and even trivial" to form the basis of a discrimination suit. *Id.*

Other contemporaneous court cases indicated, for example, that "[c]hanges in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish . . . adverse conduct." *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). From the court's perspective, the phrase "'terms, conditions, or privileges of employment'" is focused on '"ultimate employment decisions such as hiring, granting leave,

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13 The action taken by Mr. Grant with respect to Mr. Webb was neither permanent nor a diminishing of his role or duties. Mr. Webb was placed in status that was for the best under the circumstances so that a prompt and thorough investigation could be completed without any unnecessary distractions. Again, as previously mentioned above, Mr. Webb was expected back to the site the next day to participate in the investigation by providing information to the ComEd investigators. On the day of the incident, there was no reason for Mr. Grant to believe that the temporary suspension with pay would not be lifted in the very near term.

14 Since Mr. Grant did not know that temporary suspension with pay was adverse employment action, he could not have intended its use with Mr. Webb as a deliberate violation of Section 50.7.

discharging, promoting, and compensating . . . [and not] interlocutory or mediate decisions having no immediate effects upon employment conditions.'" *Taylor v. F.D.I.C.*, 132 F.3rd 753, 764 (D.C. Cir. 1997) (*citing Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981)).

The DOL has maintained this position current. All of these cases were cited in *Griffith v. Wackenhut Corp.*, ARB No. 98-067 (ARB Feb. 29, 2000), where a situation involving suspension without pay was deemed not to be adverse employment action.

Based on the above discussion, it is clear that Mr. Grant did not know or understand, nor could he have known or understood, that temporary suspension with pay was an adverse employment action for purposes of Section 50.7. Since such knowledge or understanding is an essential element to violating Section 50.5, this means that Mr. Grant could not have intended to deliberately violate this requirement. Moreover, his lack of knowledge and understanding clearly falls within the precedent established by the NRC in the FENOC enforcement matter (*i.e.*, EA 99-012) and, thus, Mr. Grant should be treated in a similar manner as the radiation protection manager in that case as to the alleged Section 50.5 violation. As to the alleged Section 50.7 violation, unless the NRC can demonstrate that temporary suspension with pay could be discerned as an adverse action with "certainty," the alleged violation also should be withdrawn.

V. Conclusion

The facts demonstrate that Mr. Grant did not *deliberately* violate the requirements of 10 C.F.R. § 50.7 and, therefore, did not violate 10 C.F.R. § 50.5. At a minimum, the proposed violation of Section 50.5 should be withdrawn. However, the circumstances strongly support that the violation concerning Section 50.7 should likewise be withdrawn because Mr. Grant did not take adverse action as retaliation for Webb having raised a safety concern. If the Section 50.7 violation is not withdrawn, it should be reduced to Severity Level IV.

If the NRC is not inclined to dismiss the Section 50.5 violation against Mr. Grant, he respectfully requests a hearing before an impartial administrative law judge. It is acknowledged that a NOV issued under 10 C.F.R. § 2.201 does not on its face contemplate the opportunity for a hearing. Generally, the NRC has taken the position that consideration of written correspondence is adequate to resolve any differences between the parties. *In re Tennessee Valley Authority*, EA 88-253, 1998 WL 383380 (Oct. 21, 1998). However, in the present case, several factors warrant the NRC exercising discretion to grant the hearing request.

First, fundamental fairness should allow Mr. Grant an opportunity to clear his name through an impartial and structured review process, such as an adjudicatory hearing.

Second, the NRC has recognized that the "Due Process Clause" of the Fifth Amendment prohibits a federal agency from depriving a person of "liberty" or "property"

interests. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 N.R.C. 282, 316 (Feb. 25, 1985). Specifically, the NRC stated:

> [a] person's liberty interest is implicated "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him," or where the government's action "imposed . . . a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities.

Id. (*quoting Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)). In today's nuclear industry, licensees are very aware of individual enforcement actions. Mr. Grant believes that unless this matter is resolved favorably to him, a stigma may attach that will keep him from advancing in his career.

Finally, as discussed above, the facts support that Mr. Grant is being subjected to a first time interpretation of 10 C.F.R. § 50.7 through this enforcement action. Consistent with legal precedent, such a situation violates due process and would be considered arbitrary and capricious on the part of the NRC.

Attachment 2

Submittal by Rob Grant in Reply to a Notice of Violation (IA-00-038) in Accordance With 10 C.F.R. § 2.201

I. RESTATEMENT OF THE VIOLATION

During a NRC investigation completed on November 10, 1999, a violation of NRC Requirements was identified. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600, the violation is listed below.

10 CFR 50.5(a)(1) provides, in part, that an employee of a contractor of any licensee may not engage in deliberate misconduct that causes or would have caused, but for detection, a licensee to be in violation of any rule, regulation, or order by the Commission.

10 CFR 50.5(c) provides, in part, that for the purposes of 10 CFR 50.5(a)(1), deliberate misconduct means an intentional act or omission that the person knows would cause a licensee to be in violation of any rule, regulation, or order issued by the Commission.

10 CFR 50.7(a) prohibits discrimination by a Commission licensee or licensee contractor against an employee for engaging in certain protected activities. Discrimination includes discharge and other action that relate to compensation, terms, conditions or privileges of employment. The protected activities were established in Section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act. Protected activities include providing a Commission licensee or contractor with information about nuclear safety at an NRC licensed facility.

Contrary to the above, on November 4, 1997, you engaged in deliberate misconduct that caused the Commonwealth Edison Company (ComEd) and its contractor, Numanco, L.L.C., to be in violation of 10 CFR 50.7, in that you discriminated against a radiation protection technician, employed by Numanco, as a result of his engaging in protected activities. Specifically, the radiation protection technician engaged in protected activities when he expressed a nuclear safety concern to you, the Numanco site coordinator at the ComEd Dresden Nuclear Station, Unit 1, about the improper use

of the Unit 1 "counting room" for the decontamination of personnel. You suspended the employment of the radiation protection technician on November 4, 1997, immediately following the conversation with you about the improper use of the "counting room."

II. THE REASON FOR THE VIOLATION, OR, IF CONTESTED, THE BASIS FOR DISPUTING THE VIOLATION OR SEVERITY LEVEL

Two regulatory requirements are cited in the restated violation above: 10 CFR § 50.5 and 10 CFR § 50.7. As demonstrated in Attachment 1, these requirements are distinct standards and, thus, each one must be separately supported by sufficient evidence in order to sustain a violation.

As to the allegation of deliberate misconduct under 10 C.F.R. § 50.5, I respectfully deny this violation. The detailed basis for my position is set forth in Attachment 1. In summary, consistent with NRC requirements and guidance, I did not posses the requisite knowledge or understanding at the time of the alleged discrimination incident to deliberately violate 10 C.F.R. § 50.7. My intentions were focused on following the explicit direction of my management, addressing a legitimate security concern raised by my client utility, and obtaining and documenting information about a potential safety issue. In a rapidly evolving situation, which lasted only about two hours, I considered these factors and others to make the best judgement I could under the circumstances. The facts simply do not support that I acted deliberately in violation of NRC requirements.

As to the allegation of discrimination under 10 C.F.R. § 50.7, I respectfully deny the violation. The basis for my position is set forth in Attachment 1. In summary, I was not aware, nor could I reasonably have been aware, that the NRC considered temporary suspension with pay an adverse employment action. The NRC is establishing this position for the first time through the enforcement actions against Numanco, ComEd and me. As Attachment 1 indicates, this would be an arbitrary and capricious action by the agency and would be a breach of due process.

In addition, when all of the facts are considered in light of what I knew and understood, or reasonably could have known or understood at the time of the alleged discrimination incident, they do not support that I possessed retaliatory animus against Mr. Webb. If my judgement was flawed or I made a mistake, consistent with NRC policy, this does not warrant a violation.

III. THE CORRECTIVE STEPS THAT HAVE BEEN TAKEN AND THE RESULTS ACHIEVED

Because the violations are respectfully denied, I have taken no specific corrective steps. As a result of this experience, I am clearly more sensitive to situations that could be construed as discriminatory and will be vigilant in my efforts to ensure that both myself and my subordinates remain in compliance with Section 50.7. I would like to reiterate that I continue to fully support the NRC's prohibition against discrimination.

IV. THE CORRECTIVE STEPS THAT WILL BE TAKEN TO AVOID FURTHER VIOLATIONS

Reference my response in Section III above.

V. THE DATE WHEN FULL COMPLIANCE WILL BE ACHIEVED

Reference my response in Section III above.

VI. REQUESTED DISPOSITION OF THIS MATTER

As supported by Attachment 1, I respectfully request that the violations, cited against 10 C.F.R. §§ 50.5 and 50.7 be withdrawn.

In the alternative, as set forth in Attachment 1, if the NRC does not withdraw the violations, at least the one cited against Section 50.5, I respectfully request that I be granted a hearing before an impartial administrative law judge.