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A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS
1333 NEW HAMPSHIRE AVENUE, N.W.
SUITE 400
WASHINGTON, D.C. 20036
(202) 887-4000
FAX (202) 887-4288
www.akingump.com
Rlessy@akingump.com

Roy P. Lessy, Jr.
(202) 887-4500 (direct dial)
(202) 955-7763 (direct fax)

Docket Number IA-01-055

April 3, 2002

U.S. Nuclear Regulatory Commission
Document Control Desk
Washington, D.C. 20555-0001

Subject: "Reply to a Notice of Violation-II-01-055"

Ladies and Gentlemen:

Attached is a bracketed and redacted version of the response in the above-referenced docket filed via FedEx on April 1, 2002. The April 1 response requested that it be withheld from public disclosure pursuant to 10 C.F.R. § 2.790.

Should you have any questions or require additional information, please contact the undersigned at (202) 887-4500, as counsel for the respondent.

Very truly yours,

Roy P. Lessy, Jr.
Jonathan M. Krell

RPLjr:ddc

IE14

cc: James E. Dyer, Regional Administrator, NRC Region III
Frank J. Congel, Director, Office of Enforcement
Stephen P. Sands, DB-1 NRC/NRR Project Manager
C. Scott Thomas, DB-1 Senior NRC Resident Inspector
Bruce A. Berson, Esq., Regional Counsel

Enclosures

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
ATTORNEYS AT LAW

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Docket Number IA-01-055

April 1, 2002

United States Nuclear Regulatory Commission
Document Control Desk
Washington, D.C. 20555-0001

Withholding From Public Release Requested Pursuant to 10 C.F.R. § 2.790

Subject: "Reply to a Notice of Violation–IA–01–055"
[redacted]

Ladies and Gentlemen:

Mr. [redacted] has received the Notice of Violation issued on December 20, 2001. This response is submitted on behalf of Mr. [redacted]. In response to a Freedom of Information Act ("FOIA") request filed on January 4, 2002 [redacted] has received NRC Office of Investigations Report [No. 3-2001-099] (FENOC Log Number 5900) and related documentation. The violation pertains to alleged intentional discrimination of a nuclear security officer by a security supervisor for raising safety concerns at the Davis-Besse Nuclear Power Station ("DBNPS"). By letter dated January 25, 2002 from Brent Clayton, Enforcement Investigations Officer, the request to respond to the Notice of Violation until 30 days after receiving the information requested under the FOIA was granted. The attached response to the subject violation is provided on behalf of Mr. [redacted] It is requested that this reply be withheld from public disclosure under 10 C.F.R. § 2.790, as the information is the type that is normally maintained as confidential and its disclosure would constitute "an unwarranted invasion of personal privacy."

Should you have any questions or require additional information, please contact Roy Lessy at (202) 887-4500.

Very truly yours,

Roy P. Lessy, Jr.
Jonathan M. Krell
Counsel for Mr. [redacted]

ATTEST: [redacted]

RPLjr:ddc

Attachments

cc: James E. Dyer, Regional Administrator, NRC Region III
Frank J. Congel, Director, Office of Enforcement
Stephen P. Sands, DB-1 NRC/NRR Project Manager
C. Scott Thomas, DB-1 Senior NRC Resident Inspector
Bruce A. Berson, Esq., Regional Counsel

[redacted]

Response to a Notice of Violation [redacted], and Notice of Violation No. IA-01-055)

Alleged Violation:

As stated in the Notice of Violation issued to Mr. [redacted] on December 20, 2001, the alleged violation pertains to alleged intentional discrimination of a nuclear security officer by a security supervisor, Mr. [redacted] at the Davis-Besse Nuclear Power Station (DBNPS) which caused the licensee, FENOC, to be in violation of 10 C.F.R. 50.7 "Employee Protection" and Mr. [redacted] in violation of 10 C.F.R. 50.5, "Deliberate Misconduct." The 10 C.F.R. 50.5 violation has been categorized by NRC as a Severity Level IV violation (Supplement VII).

Response to Alleged Violation

The Bases for Disputing the 50.5 Violation

For the reasons discussed below, it is respectfully submitted that Mr. [redacted] did not violate 10 C.F.R. § 50.5. This discussion will contain three sections.

Section II is a discussion of the legal and regulatory standards applicable to consideration of a violation of 10 C.F.R. § 50.5. Section III demonstrates that Mr. [redacted] did not violate 10 C.F.R. § 50.5 and did not act with the requisite "Deliberate Misconduct, or retaliatory intent." Section IV describes corrective actions taken and Mr. [redacted] appreciation of the importance of maintaining a safety conscious work environment.

I. The Legal and Regulatory Standards Under Section 50.5

NRC enforcement action against an employee of a licensee under § 50.5 is appropriate only for acts or omissions that rise to the level of "deliberate misconduct," as that term is defined in NRC regulations and guidance documents. See 10 C.F.R. § 50.5(a) and (c). Section 50.5(a) states, in part, that "any . . ., employee of a licensee . . . may not . . . [e]ngage in deliberate

misconduct that causes or would have caused, if not detected, a licensee . . . to be in violation of any rule, regulation, or order . . . ." 10 C.F.R. § 50.5 (emphasis added) (hereafter, "Deliberate Misconduct Rule"); see also NUREG/BR-0195, Rev. 2, § 7.3 (Aug. 1998) (hereafter "Enforcement Manual") ("Action may be taken directly against individuals either because they are individually licensed or because they violated the rules on deliberate misconduct."); NUREG-1600, General Statement of Policy and Procedure for NRC Enforcement Actions, §VIII (May 1, 2000) ("Enforcement Policy"). The applicable regulation defines "deliberate misconduct" as an "intentional act or omission that the person knows: (1) [w]ould cause a licensee.., to be in violation of any rule, regulation, or order . . .; or (2) [c]onstitutes a violation of a requirement, procedure, instruction . . . or policy of a licensee . . . ." 10 C.F.R. § 50.5(c) (emphasis added).

The express purpose of the Deliberate Misconduct Rule was to amend the NRC's enforcement program to make unlicensed persons individually subject to enforcement action, but only for cases in which individuals engage in "deliberate misconduct." See Final Rule on Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,665 (Aug. 15, 1991) hereafter "Final Rule", amended by 63 Fed. Reg. 1890 (Jan. 13, 1998) ("Although the Commission's concerns extend to all willful misconduct and the proposed rule applied to that conduct, . . . the final rule adopted here addresses only deliberate misconduct.") (emphasis added).

With respect to the enforcement of Section 50.5, the NRC has also made clear that an individual's act or omission does not rise to the level of "deliberate misconduct," if such an act

or omission does not present a "distinct threat to the safety of the public." 56 Fed. Reg. at 40674.[1]

Section VIII of the NRC Enforcement Policy, provides the essential elements of a 50.5 violation:

> An enforcement action involving an individual 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 actions; 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.

Enforcement Policy, § VIII at 39 (emphasis added) see also Enforcement Manual § 7.3 (same).[2]

In addition, as indicated above, the Statements of Consideration for the Deliberate Misconduct Rule make it clear that an individual does not violate Section 50.5 if his act or omission results from "mere negligence," "misjudgment," or "miscalculations." See also Enforcement Policy, § VIII at 39 ("i.e., with more than mere negligence"); 56 Fed. Reg. at 40676-77 (excluding from coverage acts "caused by simple error, misjudgment, miscalculations,

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[1] The Final Rule also provides: ("[T]he number of cases expected to fall under these provisions [of the Deliberate Misconduct Rule] is numerically small. However, they are significant matters, involving serious wrongdoing, and the Commission is concerned that they pose a distinct threat to the safety of the public. . . . [T]he Commission believes it appropriate to address these dangers, even if few in number." (emphasis added); 56 Fed. Reg. at 40675 ("[T]he Commission expects to apply individual sanctions only in a very few significant or egregious cases. . . . The NRC will take action only in those relatively rare instances where the deliberate misconduct . . . raises concerns about the public health and safety. . . . ") Id. (emphasis added).

[2] As the context of this NRC guidance makes clear, the term "safety significance" refers to nuclear safety concerns. For instance, as set forth in Section IV of the Enforcement Policy, the "safety consequences" that are considered in assessing the "significance of noncompliance" are nuclear safety issues. See Enforcement Policy, § IV at 9 ("In evaluating actual safety consequences, the NRC considers issues such as actual onsite or offsite releases of radiation, onsite or offsite radiation exposures, accidental criticalities, core damage, loss of significant safety bafflers, loss of control of radioactive material or radiological emergencies."); see also 56 Fed. Reg. at 40680 (listing examples of nuclear safety concerns covered by the Deliberate Misconduct Rule).

ignorance, or confusion on the part of the individual"). The Statement of Considerations for the Final Rule states, in pertinent part:

> 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 not 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 Commission recognizes that enforcement actions involving individuals are significant actions that need to be closely controlled and judiciously applied.

56 Fed. Reg. at 40,681 (emphasis added).

In addition to the criteria set forth above, the NRC's Enforcement Policy has clarified the point that action against the individual will not be taken if the improper action by the individual was caused by, among other things, inadequate procedures. Enforcement Policy, § VIII at 39. To illustrate this concept, the Enforcement Manual provides several examples of such situations where individual action "will not be taken." Those examples include, among others: (a) "[v]iolations resulting from inadequate procedures unless the individual used a faulty procedure knowing it was faulty and had not attempted to get the procedure corrected"; (b) "[i]nadvertent individual mistakes resulting from inadequate training or guidance provided by the facility licensee"; and (c) "[c]ompliance with an express direction of management, such as the Shift Supervisor or Plant Manager, result[ing] in a violation." Id.

In summary, based on a review of the foregoing NRC regulations and guidance, each of the following four essential elements must be met in order for the NRC to find that an employee of a licensee has violated Section 50.5:

(1) the individual fully understood, or should have understood, his or her responsibility;

(2) the individual knew, or should have known, the actions required by the NRC;

(3) the individual knowingly, or with careless disregard (i.e., with more than mere negligence), failed to take those required actions that have actual or potential safety significance; and

(4) in so doing, the individual was not:

(i) simply following, in good faith, inadequate procedures;

(ii) making an inadvertent mistake resulting from inadequate training or guidance provided by the facility licensee; or

(iii) merely complying, in good faith, with an express direction of management.

As demonstrated below, when this regulatory standard is applied to the present case, it is clear that Mr. [redacted] actions clearly do not meet the essential elements constituting "deliberate misconduct," as defined by NRC.

II. Mr. [redacted] Actions Did Not Constitute "Deliberate Misconduct"

Mr. [redacted] did not violate Section 50.5 in the present case, because his actions clearly did not constitute "deliberate misconduct."

First, it is important to note that Mr. [redacted], while having been in the Security Department for over "almost four years" at the time of the Office of Investigations ("OI") interview in July 2001 ([redacted] Tr.6), did not become the Supervisor, Security Operations at DBNPS until October of 2000 ([redacted], TR.6). At the time of Mr. [redacted] assuming the position of [redacted] the Complainant was already "in transition from a supervisor to a security officer." [redacted], TR. 6). Therefore, the reasons that the Complainant left security management at Davis-Besse, as detailed in the Complainant's OI interview [redacted] pp.4-7) relating to job performance, pre-dated [redacted] assuming his present position of [redacted]. Thus, in the Enforcement Panel Worksheet entitled

"Factors for the Sanction In Actions Against Individuals," the evaluation of factor 4, "the benefit to the wrongdoer," is incorrect. That factor indicates that Mr. [redacted] actions "appear to be partial continuation of potentially unfinished personnel action." Rather, as a new supervisor in security, Mr. [redacted] had no involvement or role in the prior personnel and performance issues involving the Complainant. In fact, Mr. [redacted] had not supervised the Complainant previously.

Second, it should also be noted that Mr. [redacted] was relatively new to this position at the time the issue arose concerning the Condition Report ("CR") written by the Complainant. As the CR was written on January 11, 2001 ([redacted] Tr. 7), [redacted] would have been in his position for approximately three months.

The additional issue reviewed by OI, the raising of the Fitness For Duty ("FFD") testing issue, which was not cited in the Notice of Violation occurred at a shift meeting a few weeks later on February 6, 2001 ([redacted], Tr. 303). Again, Mr. [redacted] was still only a few months into his current position at the time.

Third, Mr. [redacted] should not be held liable for a Section 50.5 violation, because his actions were taken pursuant to Security Department expectation at the time regarding the preparation and supervisory review of Condition Reports for safeguards information, which policy has since been modified. See **Exhibit A** hereto, Memorandum to "All Nuclear Security Personnel" from [redacted], Manager of Severity (January 21, 2002). As noted above, individuals are not liable under Section 50.5 for actions in following procedures that may be "inadequate procedures." Enforcement Policy, § VIII, at 39. The primary purpose for the fact-finding meeting directed by Mr. [redacted] was to address the management's expectation that security officers discuss CR's with supervisors in order to protect safeguards information. See OI Report at 12; id. at 15 ("Security management had placed an expectation on the NSOs to notify them of any CR issue prior to entering the concern into the computerized reporting system."); OI

Interview of Mr. [redacted] at 11, lines 18-21 (July 12, 2001) ("Expectation was then, prior to that, and even now today, that when ever there is a potential problem or concern it be brought to supervisor's attention.") ("[redacted] Interview"); [redacted] Interview, at 12, lines 10-14 ("It was our expectation that security personnel would tell their supervisors prior to writing a CR to ensure no safeguards information was potentially shared . . . ."). However, as noted above, this expectation was eliminated by FENOC on January 21, 2002 since Davis-Besse Nuclear Power Station (DBNPS) security officers are trained on the control of safeguards information.

Fourth, Mr. [redacted] reasonably relied on his training regarding the well-known M.A.R.C.[3] principles, in his consideration that fact finding meetings are intended to be separate entities from the disciplinary process:

> SPECIAL AGENT KALKMAN: Well, the fact finding is a, as I understand it, is part of this MARC management.
> MR. [redacted]: Comes from the MARC principles.
> SPECIAL AGENT KALKMAN: MARC principle. And that's the process you were expecting Mr. [redacted] to use?
> MR. [redacted]: Yes. . . . .

See [redacted] Interview, at 15, lines 12-20; id. at 23 lines 16-24 (Q: "When you directed the fact finding meeting to take place, did you anticipate that there may be some disciplinary action resulting from what you perceived to be procedure violations with the way [Complainant] prepared this Condition Report?" A: "At the time, no. . . . You know fact finding and discipline are two separate entities in themselves." Id. at 23. See also discussion below.

Fifth, as the interviews and documents recognize, neither the underlying Condition Report involved the security system in the owner controlled area and were, therefore, not "Safety related," which is a necessary element in a Section 50.5 violation. See, e.g., AMS No. RIII-01-A-0010 ("After review of the OI transcripts, DRS staff determined that the OI investigations should

[3] "Management Action Response Checklists," Management Associated Results Company, Inc.,

be terminated since... "[t]he CI indicated that s/he realized that the issue s/he raised regarding the new security monitoring system was not safety related. . . .") (emphasis added); Enforcement Panel Worksheet, at 3 ("In the current case, the alarm is in the 'owner controlled area,' which is outside the 'protected area' (PA) of the Davis-Besse Plant. The equipment is not regulated by the NRC and it is not considered "balance of plant" equipment.") (emphasis added).

`In fact, during his OI interview, the Complainant explained that, because his concern over the security system was *not safety-related*, he felt it was appropriate not to notify his supervisor about the Condition Report until several hours after initiating the report. See OI Interview of Complainant, at 10, lines 11-16 (April 3, 2001) (Q: "Did you think of it as a safety issue?" A: "No, not as a safety issue, a concern basically.") (emphasis added); see also OI Report at 8 ("[Complainant] did not consider the concern as nuclear safety related. . . .") (emphasis added); id. at 15 ("[Complainant] stated that he was unaware of any requirement to report his lack of training concern, 'not nuclear safety,' immediately to management, but he clarified that he understood and would have reported a nuclear safety related concern expeditiously to management."). (Emphasis added).

The Notice of Violation sent by NRC to Mr. [redacted] provides that Mr. [redacted] "also directed that a copy of the questions and answers from the 'fact finding' meeting be placed in the security officer's personnel file." However, Mr. [redacted] did not direct that a copy of the notes be placed in the Complainant's official personnel file. See [redacted] Interview, at 29, lines 5-6 ("Personnel file, when you say that to it (sic), it's one owned and contained by the Human Resources Department. No, I did not direct it to go there.") (emphasis added). Mr. [redacted] did note that he expected such notes to be maintained in the supervisor working file. See id. at lines

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1992.

9-11.[4] Furthermore, Mr. [redacted] explained his understanding that retention of such a document is consistent with the M.A.R.C. training provided to him. See also [redacted] Interview, at 30, lines 11-12 ("We were taught in the MARC principle to document, contain and retain all that information.") (emphasis added). As noted above, Mr. [redacted] should not be held liable under Section 50.5 for his understanding and use of the M.A.R.C. principles. While, as discussed below, counseling sessions and the documentation of counseling session have been construed by many courts under Title VII as not rising to the level of actionable discrimination or retaliation, the purpose of reference of this issue here is simply to focus upon Mr. [redacted]'s intent as to the fact finding and the subsequent documentation of the fact finding, which were not intended by him to be disciplinary. In that regard, it should also be noted that at the time Mr. [redacted] requested the fact-finding, he was about to leave for vacation for a week ([redacted], TR. 46); he was a relatively new security supervisor as previously noted; the expectation within the Davis-Besse Security department at the time, was that information would be shared with a security supervisor before a CR was written to screen the CR for safeguards information ([redacted], TR 16); and a door in the owner-controlled area of the facility had, in fact, been accessed (Id.). Thus, Mr. [redacted] focus and intent was to address these issues, not personnel issues. Mr. [redacted] recognizes and is now more sensitive to the fact that placement of the documented results of the January 12, 2001 fact finding meeting into the supervisor working file of the nuclear security officer could be construed by the individual as a potential form of disciplinary action and raised unintended issues under FENOC's Safety Conscious Work Environment policy.

[4] "Mr. [redacted] who conducted the approximately ten-minute fact-finding [redacted], TR. 13] which was not confrontational ([redacted] p.12) recalls being directed to put the fact-finding results in the Complainant's file by Mr. [redacted], but that interview did not differentiate between "the supervisor working file and personnel file" and "a personnel file," as did Mr. [redacted].

Sixth, Mr. [redacted] response to the Complainant's raising the recall of a [redacted] for FFD testing during a periodic team building shift meeting [redacted] TR.3) clearly does not rise to the level of "deliberate misconduct" or contribute to a finding of a 50.5 violation.[5] As Mr. [redacted] explained during his OI Interview, the purpose of the coaching session following the Complainant's behavior in the February 6 shift meeting was to communicate to the Complainant that his behavior in the meeting had appeared to Mr. [redacted] as unprofessional. One essential element of the periodic shift meeting, conducted by Mr. [redacted], was to talk about professional conduct, and the respectful treating of each other. [redacted] TR. 33]. The Shift meetings were "mostly team building sessions" with the purpose focused at trying to build trust, respect, accountability and teamwork among security force personnel...." Id. See [redacted] Interview, at 38, lines 18-23 (Q: "You had the meeting to address professional conduct, professional courtesy, as documented by Mr. [redacted]. Was this just to reinforce with [Complainant] your expectations with regard to professionalism?" A: "Correct."). Specifically, it appeared to Mr. [redacted] that the Complainant had "pump[ed]" Mr. [redacted] with questions in an unprofessional manner, in front of numerous other employees, despite the fact that [redacted] did not have answers to the Complainant's questions at the time. See id. at 34; id. at 41 (Q: "[H]ow should [Complainant] have handled the situation [in the February 6 meeting]"? A: "Probably after the first time I said I didn't know, drop it, and not keep probing, because I really didn't know. . . ."). Moreover, the Complainant's behavior in question immediately followed Mr. [redacted] statement at the meeting regarding team-building and professionalism between the different shifts of security officers. See id. at 3 3-34. Mr. [redacted] did not have a problem with the

[5] The February 6 shift meeting issue is not included in the Notice of Violation issued to Mr. [redacted] However, the December 20, 2001 letter to Mr. [redacted] stated that the Office of Investigations had concluded that the Complainant was discriminated against for raising "safety concerns" relating to the lack of training on the new security system and for "a potential fitness-for-duty procedure violation."

Complainant raising the FFD issue at the meeting ([redacted], TR 39) and encouraged the [redacted] Complainant to write a CR ([redacted], TR. 40).

Certainly, Section 50.5 does not prohibit supervisors from coaching employees on what the supervisor perceives as unprofessional or disrespectful behavior. Moreover, NRC regulations do not give an employee the right to behave in an unprofessional or disrespectful manner. By engaging in a coaching session with the Complainant, Mr. [redacted] was not discriminating against the Complainant for raising a safety concern. See, e.g., [redacted] Interview, at 47, lines 17-21 ("But again, I don't think I've treated [Complainant] any differently than I have any other security officers on this issue or others pertaining to the same types of things, it's reacting to their behaviors."). Indeed, coaching sessions are not considered to be part of the discipline process. See id. at 44, lines 13-16. In addition, Mr. [redacted] decision to conduct a coaching session with the Complainant is consistent with Mr. [redacted] raining in the Leadership in Action principles, which encourage managers to focus on the situation, issue, or behavior, not on the person. See **Exhibit B** attached.

Finally, Mr. [redacted] should not be held liable under Section 50.5 because his actions certainly cannot be considered "egregious."[6] As noted above, the NRC has stated that it expected

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[6] Even under broad anti-retaliation provisions like the one found in Title VII, 42 U.S.C. § 2000e-3(a), many courts have found that counseling sessions, in addition to warnings and reprimands, do not rise to the level of retaliation. See, e.g., Johnson v. Danzig, 213 F.3d 631, 2000 WL 458887 (4th Cir. April 24, 2000) (holding that a letter of reprimand, a letter of admonishment, and the denial of training do not rise to the level of "adverse employment actions") ("Adverse employment actions include decisions such as hiring, firing, granting leave, promoting, and compensating. . . . Johnson offers no evidence that he was denied promotion, bonus or any other similar employment opportunity as a result of the reprimands or denial of training."); Reid v. Madison County, Tennessee, 173 F.3d 856, 1999 WL 195650, at *1 (6th Cir. April 1, 1999) ("Plaintiff received no time off from her regular duty, no suspension, no loss of pay or benefits, and no change in duties"); Allen v. Michigan Dep't of Corrections, 165 F.3d 405, 409-10 (6th Cir. 1999) (holding that disciplinary actions in the form of counseling memoranda did not result in a "materially adverse" change in plaintiffs employment status or in the terms and conditions of

Section 50.5 to apply individual sanctions "only in a very few significant or egregious cases." 56 Fed. Reg. at 40675. As discussed above, the present case involves the actions of a relatively new supervisor in that position that are: (a) unrelated to nuclear safety; and (b) consistent with accepted procedures and training in place at the time the actions were taken.

In light of the foregoing, Mr. [redacted] should not be held liable for a violation of Section 50.5. Section 50.5 was intended to outlaw deliberate acts or omissions by individuals that result in distinct and significant nuclear safety concerns, or deliberate acts taken with retaliatory animus. Section 50.5 was not intended to outlaw attempted compliance with existing licensee/employer procedures and training in place at the time, or even, which is not present here, negligence. Simply put, the requisite standard for a 50.5 violation has not been met.

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his employment); Ribando v. United Airlines, Inc., 200 F.3d 507, 511 (7th Cir. 1999) ("Standing alone, a letter of concern or counseling . . . does not rise to the level of an adverse employment action."); Sweeney v. West, 149 F.3d 550, 556-5 7 (7th Cir. 1998) (holding that two counseling statements were not "adverse employment actions") ("If we interpreted these simple personnel actions as materially adverse, we would be sending a message to employers that even the slightest nudge or admonition (however well-intentioned) given to an employee can be the subject of a federal lawsuit. . . .") (parenthetical in original); Ritzert-Smith v. Siemens Nuclear Power Corp., 76 F.3d 388, 1995 WL 792068 (9th Cir. December 11, 1995) (holding that oral reprimand was not an adverse employment action); Wyse v. Summers, 100 F. Supp.2d 69, 77 (D. Mass. 2000) ("Here, because there were no tangible job consequences attributable to the counseling statement, the counseling was not an adverse employment action. . . . This is the kind of de minimis employment hand-slap which falls beneath the radar screen of Title VII.") (citations omitted); Slinkosky v. Buffalo Sewer Authority, No. 97-CV-0677E (SR), 2000 WL 914118, at *8 (W.D.N.Y. June 29, 2000) ("[T]he failure of Buffalo Sewer to remove the letter of reprimand from her file was not, by itself and as a matter of law, adverse inasmuch as Dawn has failed to show that the reprimand affected the compensation, promotion opportunities, or any other term, privilege or condition of her employment."); Irvine v. Video Monitoring Servs. of American, No. 98 CIV. 8725 (NRB), 2000 WL 502863 (S.D.N.Y. April 27, 2000) ("The one reprimand . . . which resulted in no suspension or further action, was not a sufficiently adverse employment action to make out a prima facie case of retaliation."); Hunter v. Ark Restaurants Corp., 3 F. Supp.2d 9, 20 (D.D.C. 1998) ("[T]hough plaintiff contends that every time a supervisor informally reprimanded him for a work-related issue, it was in retaliation for his complaints of discrimination, he does not allege these informal reprimands adversely affected his employment position. . . .").

III. Corrective Steps that Have Been Taken and Results Achieved

This response incorporates by references the "corrective steps that have been taken" "the corrective steps that will be taken" and "the date that full Compliance will be achieved" in FENOC's "Response to Notice of Violation" dated January 22, 2002, Serial Number 2758, with the following additions or updates.

The additional training on maintaining a Safety Conscious Work Environment that had been scheduled in preparation for the current refueling outage at DBNPS has been conducted for personnel temporarily fulfilling a supervisory role during the outage.

As to the investigation conducted by an external industry expert on Root Cause evaluations and a DBNPS Compliance Senior Engineer, that investigation, as reported in the January 22nd FENOC response, identified an undesired and unintended overlap of the Condition Report program and the disciplinary process. On February 13, 2002, additional guidance was disseminated to Supervisors and above by the Vice-President – Nuclear Davis-Besse, to ensure that implementation of the Condition Report program is separated from any personnel performance management activity that may be necessary. A copy of that memorandum is attached hereto as **Exhibit C**.

As to the expectation in the Security Department that all issues identified by nuclear security officers were to be discussed with the Security Shift Supervisor prior to initiation of a Condition Report, this expectation has now been removed by a memorandum from the Manager – DBNPS Security to all nuclear security personnel dated January 21, 2002. See **Exhibit A** hereto.

In addition, on September 6, 2001, Mr. [redacted] received additional supervisory training on Safety Conscious Work Environment Issues and compliance with 10 C.F.R. § 50.7. As noted

above, Mr. [redacted] was also the recipient of a memorandum from the Vice-President DBNPS, dated February 13, 2002, addressed to "Supervisors and Above" which emphasized both the importance of maintaining a Safety Conscious Work Environment and the separation between Condition Reports and performance management. See **Exhibit C**.

As a result of this additional training on maintaining a Safety Conscious Work Environment, the **Exhibit C** memorandum from the Vice-President DBNPS that ""[e]mployee performance management activities such as coaching, counseling on disciplinary processes shall never include or refer to Condition Reports," as well as the immediate response of the site Ombudsman and site management to the events at hand, Mr. [redacted] has greater sensitivity, awareness, and commitment to the importance of maintaining a Safety Conscious Work Environment and how the documented fact finding that he requested (as well as the coaching session) could be construed by the individual as leading to potential disciplinary action. The Notice of Violation has had a substantial impact on Mr. [redacted]; and there have been important lessons learned by him as to maintaining a Safety Conscious Work Environment.

IV. Conclusion

For the reasons set forth above, it is respectfully requested that the December 20, 2001 50.5 letter to Mr. [redacted] be withdrawn.

INTRA-COMPANY MEMORANDUM
ED 6268-e

FirstEnergy

TO All Nuclear Security Personnel

DATE January 21, 2002

FROM [redacted] Security

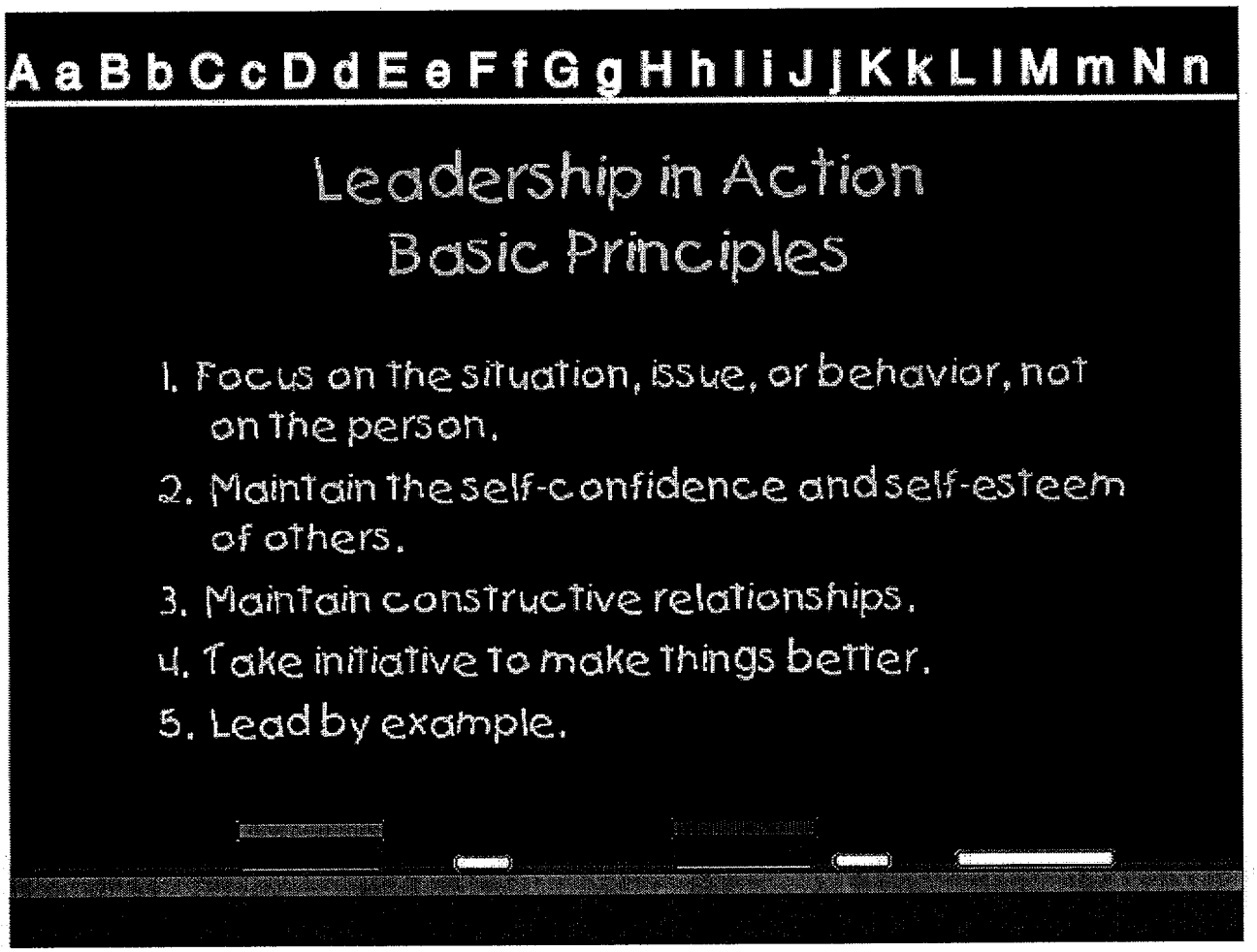
MAIL STOP 4000

SUBJECT Condition Reports

PHONE 2322

The Security Department previously had an expectation that all issues identified by nuclear security officers were to be discussed with the Security Shift Supervisor prior to initiation of a Condition Report. This expectation was established to ensure that safeguards information was not inadvertently entered into a Condition Report. Because Condition Reports are entered into an electronic tracking system, personnel on site have access to the information contained in the Condition Report as it is being entered into the electronic system. However, since security officers are trained in the control of safeguards information, the expectation that all issues be discussed with the Security Shift Supervisor prior to initiation of a Condition Report is being eliminated effective immediately. Security officers may, however, still discuss issues with the Security Shift Supervisor prior to initiating a Condition Report in order to have an independent check performed that the Condition Report contains no safeguards information.

GAS/maw


A a B b C c D d E e F f G g H h I i J j K k L l M m N n
Leadership in Action
Basic Principles
1. Focus on the situation, issue, or behavior, not on the person.
2. Maintain the self-confidence and self-esteem of others.
3. Maintain constructive relationships.
4. Take initiative to make things better.
5. Lead by example.

INTRA-COMPANY MEMORANDUM
ED 8268-e

FirstEnergy

TO	Supervisors and Above	DATE	February 13, 2002
FROM	H. W. Bergendahl, Vice President – Nuclear Davis-Besse	MAIL STOP	3080
SUBJECT	Compliance with 10CFR50.7 Employee Protection	PHONE	8588
			NVP-02-00004

This communication covers a critical issue that can directly impact your career in the nuclear industry. Experience has shown that violations of 10CFR50.7 can occur unless you are constantly sensitive to potential violation scenarios. To help you maintain this sensitivity, this training document provides you with a reminder, a requirement, and a recommendation. Please review the following and sign indicating your understanding. Forward the memorandum with your signature to your training coordinator for completion into FITS. The training coordinator should then forward the original to Regulatory Affairs, mail stop 3065. A healthy safety conscious work environment is critical for our success. If you have any questions, you may contact me, the Site Ombudsman, or Regulatory Affairs for clarification.

Reminder: The FirstEnergy Nuclear Operating Company has a policy for maintaining a safety conscious work environment. This document can be found on the FENOC web site (under Policies and Procedures / Human Resources / Employee Concern Resolution) and clearly communicates that failure to comply will constitute a violation of Company policy.

Requirement: Employee performance management activities such as coaching, counseling, or disciplinary processes shall never include or refer to Condition Reports. Condition Reports are problem identification tools that allow all of our employees to document concerns or problems. Concerns must always be addressed first and separate from performance issues. Performance problems requiring actions by you shall be addressed by referencing facts and behaviors, **not** Condition Report documents.

Recommendation: In order to keep separation between Condition Report investigations and performance management, the following is recommended: Investigations for Condition Reports that may involve performance concerns should, as much as practical, be performed by personnel outside of the individual's supervisory chain or department. This will ensure no bias from previous experiences with the individual.

HB:ski

_____ _____

Signature Date

_____

Social Security Number