

March 4, 2004

IA-01-055

Mr. Lynn R. Harder  
[Home Address Deleted  
Under 10 CFR 2.390(a)]

SUBJECT: REQUEST FOR RECONSIDERATION OF NOTICE OF VIOLATION

Dear Mr. Harder

This is in reply to your July 9, 2003, letter requesting the U.S. Nuclear Regulatory Commission (NRC) withdraw a Notice of Violation (Notice) issued to you on December 20, 2001. The Notice pertained to a violation of the NRC regulation prohibiting deliberate misconduct, 10 CFR 50.5, in association with a violation of 10 CFR 50.7, "Employee Protection." The violation occurred at the FirstEnergy Nuclear Operating Company's (FENOC) Davis-Besse Nuclear Power Plant during January 2001. In requesting withdrawal of the Notice, you stated that you did not have the requisite deliberate and retaliatory intent because you were following an expectation of your management to determine why the author of a Condition Report (CR) did not have the CR reviewed by a security supervisor to assure the CR did not contain any Safeguards Information (SGI). You also contend that in initiating the investigation, you relied on your training under the Management Associated Results Company (MARC) principles and fact-finding investigations were not disciplinary in nature under the MARC process. In an April 1, 2002, letter you made similar assertions and requested the violation be withdrawn. On April 10, 2003, the NRC staff denied your prior request.

Notwithstanding your position that your actions were not deliberate or retaliatory and the fact-finding investigation under the MARC process was not disciplinary, information developed during the investigation conducted by the NRC Office of Investigations (OI) indicated that you had deliberate retaliatory reasons for initiating the fact-finding investigation. You did not limit the fact-finding investigation to the purported expectation of your management to determine why the CR was not reviewed for SGI. Rather, you expanded the inquiry beyond the lack of a review for SGI and inquired about individual's reasons for creating the CR and asking the author if he wanted to continue with the CR. As a result of that fact-finding investigation, the author rewrote the CR and deleted information that was critical of managers in the Security Department. At the time the CR was written, you were one of the managers in the Security Department; therefore, you were included in the critical comment. Information critical of security department managers, which included yourself, was deleted from the CR because of the fact-finding investigation. Further, the use of a fact-finding investigation under the MARC process was not previously used for similar issues. By initiating a fact-finding investigation in this instance, the author of this CR was treated differently from other authors of CRs which is considered disparate treatment of the author of the CR. Additionally, you directed that notes created during the fact-finding investigation be retained in the employee's file. Individuals interviewed by OI, including your supervisor, indicated that a purpose of a fact-finding

investigation is to obtain information that can be used in a subsequent disciplinary action and the notes from such an investigation can be used in assessing the performance of an employee. Therefore, the NRC staff concluded that your actions were deliberate and your letters did not provide a sufficient basis or additional information to withdraw the violation. Consequently, the violation will stand as stated in the Notice.

You also stated in your letter that we had not placed in proper context a statement from FENOC's January 22, 2002, response to the Notice, that you inappropriately tied the fact-finding investigation to a potential disciplinary process for using the CR process. That statement was used to summarize how the violation occurred. Regardless of the context of that statement, the FENOC Site Vice President wrote at the time of the violation that your actions did not meet FENOC's standards for maintaining a safety conscious work environment with regard to the generation of condition reports.

You requested that we withhold from public disclosure certain information that would normally be confidential because the disclosure of that information, notably your name, would constitute an unwarranted invasion of personal privacy. We will not redact your name from the Notice or related correspondence since the violation is not being withdrawn. Information in your July 9, 2003, letter identifying other individuals interviewed during the OI investigation will be redacted. However, all other information (except for your home address and telephone number) will be made available to the public in accordance with 10 CFR 2.390 of the NRC's "Rules of Procedure." The information will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of the NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/.html> (the Public Electronic Reading Room).

Please contact Mr. James Creed at telephone number 630-829-9857 with questions.

Sincerely,

*/RA/*

Frank J. Congel, Director  
Office of Enforcement

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