

July 9, 2003

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United States Nuclear Regulatory Commission
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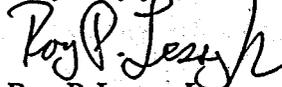
Subject: "Request for Reconsideration of Notice of Violation-IA-01-055"
[NRC Office of Investigations Report No. 3-2001-009]

Ladies and Gentlemen:

Mr. [Lynn Harder] has received a Notice of Violation issued on December 20, 2001. On April 10, 2003, NRC indicated that Mr. [Harder's] alleged violation of 10 CFR 50.5 "will stand as stated." By letter dated May 20, 2003, the NRC granted the request of Mr. [Harder] for additional time relative to this matter until July 10, 2003. The enclosed request for reconsideration is submitted on behalf of Mr. [Harder]. It is requested that the portions of this request for reconsideration, designated by brackets, 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. [Harder]

Attachments

cc: James E. Dyer, Regional Administrator, NRC Region III
Bruce A. Berson, Esq. Regional Counsel, NRC Region III
Frank J. Congel, Director, Office of Enforcement
Christopher S. Thomas, DB-1 Senior NRC Resident Inspector

I. Request for Reconsideration of Notice of Violation IA-01-055 [NRC Office of Investigations Report No. 3-2001-009]

A. Alleged Violation

In a letter dated April 10, 2003, NRC stated its current position that Mr. [Harder], a security supervisor, engaged in "deliberate misconduct" in violation of 10 CFR § 50.5, arising from the events on January 12, 2001. Specifically, Mr. [Harder] is alleged to have intentionally discriminated against Complainant, a security officer, for initiating a fact-finding meeting after Complainant attempted to file a Condition Report ("CR") without following company policy in place at the time, which required prior review of such CRs for safeguards information by a supervisor. Mr. [Harder] respectfully requests that the NRC reconsider its initial conclusion that Mr. [Harder] violated 10 CFR § 50.5, because, as demonstrated below, Mr. [Harder] did not intentionally or deliberately retaliate against the Complainant.¹

B. Request for Reconsideration

Contrary to NRC's initial finding, Mr. [Harder] did not have the requisite deliberate and retaliatory intent when he initiated a fact-finding arising from the delay and lack of supervisory review for safeguards information in the filing of Complainant's Condition Report. NRC enforcement action under § 50.5 is only appropriate when one acts with "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) provides that "any . . . employee of a licensee . . . may not . . . [e]ngage in

¹ This request for reconsideration also incorporates by reference the arguments made in Mr. [Harder's] April 1, 2002 Response to Notice of Violation ("April 2002 Response").

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. § 50.5.² The regulations define “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).

In addition to the standard set forth above, NRC has provided further clarification that action against the individual will not be taken if the improper action by the individual was caused by inadequate procedures or “management failures.” Enforcement Policy, § VIII at 39. To illustrate this concept, NRC provides several examples of such situations where action “will not be taken,” including, among others: “[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”; and “[i]nadvertent individual mistakes resulting from inadequate training or guidance provided by the facility licensee.” *Id.*

Moreover, an individual does not violate Section 50.5 if his act or omission results from “mere negligence,” “misjudgment,” or “miscalculations.” See, e.g., 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, ignorance, or confusion on the part

² See also NUREG/BR-0195, Rev. 2, § 7.3 (Aug. 1998) (“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”).

of the individual”). The Statement of Considerations for the Final Rule on Deliberate Misconduct states that:

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 light of this standard, it is clear that Mr. [Harder] should not be held liable for a violation of Section 50.5, because he did not intend to retaliate against the Complainant for engaging in protected activity nor, did Mr. [Harder] engage in any “deliberate misconduct.” Instead, as set forth below, Mr. [Harder] reasonably relied on legitimate Davis-Besse Nuclear Power Station (“DBNPS”) policy in effect at the time as well as training, and directions from Mr. [Harder’s] supervisor.

At the threshold, Mr. [Harder] did not become the Supervisor, Security Operations at DBNPS until October of 2000 (Harder Tr. at 6), just a few months prior to the events at issue, which occurred in January 2001. See April 2002 Response at 7. Accordingly, Mr. [Harder] did not have a history of supervising the Complainant and did not have any reason to retaliate against the Complainant arising from any previous disciplinary incidents involving Complainant. See April 2002 Response at 8.

Furthermore, in addition to evidence cited in the April 2002 Response,³ the sworn testimony of Mr. [Harder's] supervisor at the time, Mr. [REDACTED], then [REDACTED] demonstrates that Mr. [Harder's] decision to conduct the fact-finding meeting in this instance was completely consistent with DBNPS policy at the time and with Mr. [REDACTED] own legitimate instructions and expectations. First, in his interview with Special Agent Kalkman, Mr. [REDACTED] explained on several occasions that the Complainant's decision to attempt to initiate a CR without first discussing the CR with his supervisor was directly contrary to the DBNPS policy:

Q: Okay. Then why, in this particular case, *in your estimation, why was the fact finding meeting required?*

A: To my knowledge, from what I have heard on this, that initial meeting between [Complainant] and the security supervisor never occurred. *And that was the expectations [sic]. Prior to initiating a CR you would meet with a supervisor, verify the information, verify there's no safeguards information and then you initiate it, submit it.*

Q: *Is this requirement to meet with the supervisor before you document, a condition? Is that a -- what type of a policy is that? I mean is that documented somewhere?*

A: *We put it in the turnover meetings for the officers....*

...
Q: So this was communicated to the officers --

A: Yes.

Q: -- in the turnover meetings?

A: That's correct. At minimum of turnover meetings.

³ See *id.* at 8-9.

[Skeel] Tr. at 13:24-14:21 (emphasis added).⁴ As explained in the April 2002 Response, this description of the DBNPS policy is consistent with Mr. [Harder's] description which he provided to Special Agent Kalkman. See April 2002 Response at 8 (citing OI Report at 12 and the [Harder] Tr. at 15).

Second, Mr. [Harder] should not be faulted for following and implementing this DBNPS policy that was in place at the time, in light of the valid safeguards and security concerns underlying the policy. As suggested by Mr. [REDACTED] in the quote above, discussing CRs with supervisors in the Security Department prior to initiation was considered necessary in order to ensure that safeguards information would not be improperly disclosed to the large audience with access to the electronic CRs:

A: Another thing in our particular area that we were very concerned about, was that the process -- the software process has no way to protect against *safeguards information*. So I instructed [Lynn Harder] to instruct the supervisors and the officers that prior to any initiation of CR we've got to make sure that there's no safeguards information on those CRs.

[Skeel] Tr. at 13:10-16.

The testimony by Mr. [REDACTED] and Mr. [Harder] concerning the protection of safeguards information is also consistent with the findings of an independent Root Cause Report prepared by a respected outside consulting group, and which is discussed below ("Root Cause Report").⁵

⁴ See also *id.* at 29:1-6 ("But the fact is that we did require, prior to the initiation of the CR, that conversation to take place. And when you -- and we have no problem -- I mean it happens routinely every day. Our folks initiate a lot of CRs, and it's not a problem....") (emphasis added).

⁵ The Root Cause Report was referenced in FENOC's January 2002 Response at 2 and in Mr. [Harder's] April 2002 Response at 15.

The Root Cause Report indicated as follows: “Specific to security, *the personnel interviewed* [21 people were interviewed from all managerial levels] *were trained that CR initiators should consult with their supervisor prior to inputting the data into the CREST system real time.* The reason was for the supervisor to screen the CR for *the need for immediate action(s) or safeguards information, and delete the safeguarded information as needed....* The training personnel stated that *personnel were instructed to consult with their supervision* as described above.... Based on documents reviewed, *security personnel were aware of the consultation expectation prior to submitting a CR.*” Root Cause Report at 10 (emphasis added).⁶

Third, Mr. [Harder] not only understood this policy requiring prior CR review with supervisors, but also recognized that part of his job as a supervisor was to ensure compliance with that policy. Indeed, as indicated in the testimony quoted above, Mr. [REDACTED] was clear that he “instructed” Mr. [Harder] to tell supervisors and officers that CRs need to be screened for safeguards information “prior to any initiation.”⁷ Moreover, Mr. [REDACTED] explained that Mr.

⁶ The Root Cause Report also indicated that “station security personnel are all trained in what constitutes safeguards information and know that safeguards information is not to be included in CREST, as it is a ‘public’ document – inside the plant.” *Id.*

⁷ Mr. [REDACTED] also testified that it was DBNPS policy to encourage officers to report facts, as opposed to opinions, in CRs. *See, e.g.* [REDACTED] Tr. at 13:5-9; 13:19-23 (“Part of the process we discussed about initiating CRs was, when you initiate a CR you encourage folks to simply state the facts and the process carry through and find out, you know, what the root cause was of the issue.... Stick with the facts and leave your opinions out of it, and let the CR handle itself. That was what I -- my expectations to the Security Operations Group and for the whole group actually.”).

[Harder] was expected to initiate fact-finding meetings without having to discuss it first with Mr. [REDACTED] Tr. at 12:13-16 (“... It would not be unusual, and *I would expect him [Mr. [Harder]] in his position, to conduct fact findings without contacting me.* That would be totally normal to do that.”) (emphasis added).

Fourth, in initiating the fact-finding meeting, Mr. [Harder] was also reasonably relying on his training in the MARC (Management Associated Results Company) principles. As discussed in the April 2002 Response, Mr. [Harder] explained to Special Agent Kalkman that the fact-finding process was part of the MARC training; Mr. [Harder] also explained that the MARC training indicated that such meetings are not intended to be disciplinary. See April 2002 Response (quoting [Harder] Tr. at 23 (“You know fact finding and discipline are two separate entities in themselves.”)). Again, Mr. [REDACTED] testimony is consistent with these points:

Q: ... The immediate supervisor has the fact finding meeting with the subordinate?

A: That is correct.

We have had training. All of our supervisors have had MARC training.... Management Associated Results Company.

And in that training we discuss the process of accumulating facts and taking any actions. The very first step of that process is to make sure you have the correct information. To do that you sit down and have a fact finding.

Now the fact finding, in our training, is discussed in detail that fact finding is not discipline. ...

In this particular case [Complainant] also had that training.

Q: Okay. *This is a non-disciplinary process?*

A: *Absolutely.*

Q: To gather information about an issue that management needs more information about?

A: Absolutely correct.

[Skeel] Tr. at 18:3-19:3 (emphasis added); see also Root Cause Report at 13 (“*The instructor for the MARC program stated that Fact Finding and Coaching are not a part of the discipline. Fact Finding is simply data collection....*”) (emphasis added).

In light of (1) the DBNPS policy in place at the time; (2) Mr. [REDACTED] instructions and expectations, and (3) the MARC training, it was not intentionally discriminatory for Mr. [Harder] to initiate a fact-finding meeting after learning that the Complainant attempted to initiate a CR without discussing the CR first with Complainant’s supervisor. By doing so, Mr. [Harder] was not engaging in “deliberate misconduct”; he was simply attempting to enforce a DBNPS policy and a procedure that was intended to protect safeguards information. Moreover, Mr. [Harder] used a well-established procedure taught in the MARC training that is intended not as discipline, but merely as a method to collect information. As set forth above, the NRC should not find a violation of Section 50.5 based on Mr. [Harder’s] compliance with “inadequate procedures” unless he “used a faulty procedure knowing it was faulty and had not attempted to get the procedure corrected.” Here, Mr. [Harder], a new supervisor at the time, had no reason to believe this procedure was faulty, at least until he subsequently became aware that the Complainant had alleged that the procedure as applied here could be construed as retaliatory.

Despite the facts discussed above, NRC nonetheless found that Mr. [Harder] acted with “deliberate misconduct.” However, it is respectfully suggested that this conclusion appears based upon a small sample of disconnected statements, taken somewhat out of context from various reports, as opposed to the factual setting as a whole. For example, in NRC’s April 10, 2003 letter to Mr. [Harder], a citation is made to FENOC’s January 22, 2002 “Response to Notice of Violation” and it is state therein that FENOC “points out” in its response that Mr.

[Harder] “inappropriately tied a potential disciplinary process to the use of the Condition Report Process.” However, contrary to NRC’s April 10, 2003, characterization of FENOC’s response, FENOC did not determine that Mr. [Harder’s] *decision to initiate a fact-finding meeting* was “inappropriate,” much less discriminatory. Instead, when the quoted language above is read in context, it is clear that FENOC was concerned that Mr. [Harder] allegedly “*did not clearly communicate the reason* for the fact-finding meeting.” The following is the complete quotation from the FENOC response:

On January 11, 2001, a nuclear security officer initiated a condition report documenting concerns regarding training for certain security equipment. A fact-finding meeting was held on January 12, 2001, to determine why the nuclear security officer apparently did not follow the expectation of Security Department management to review issues with their immediate supervisor prior to initiation of a Condition Report. This expectation was established to ensure safeguards information was not inadvertently entered into a Condition Report. The Security Supervisor who requested the fact-finding meeting be conducted *did not clearly communicate the reason for the fact-finding meeting. As a result*, this meeting inappropriately tied a potential disciplinary process to the use of the Condition Report Process.

FENOC Response at 1 (emphasis added). Here, FENOC is pointing to a primary failure of communication (i.e., the reason for the meeting) rather than finding that Mr. [Harder] acted with the requisite discriminatory intent in initiating the fact-finding meeting.⁸ Accordingly, FENOC’s statement does not provide support for NRC’s initial conclusion that Mr. [Harder] engaged in “deliberate misconduct” by initiating the fact-finding meeting. As the result of that failure of communication, not as a result of any retaliatory animus, the fact finding meeting

⁸ Thus, FENOC’s position is consistent with the testimony of Mr. [REDACTED] who explained that Mr. [Harder’s] decision to initiate the fact-finding meeting was consistent with the DBNPS policy at the time.

“inappropriately tied a potential disciplinary process to the use of the Condition Report Process.” FENOC Response at 1. In other words, an employer’s discipline of an employee, Mr. [Harder], arising from a primary failure of communication, as described above, does not necessitate or justify a finding of intentional or deliberate discrimination.

FENOC’s statement relied upon by NRC is further placed in its proper context when viewed alongside FENOC’s statement later in the same Response that the investigation associated with the Root Cause Report “revealed that conditions may arise which result in an undesired and unintended overlap of the Condition Report program and the disciplinary process.” FENOC’s January 22, 2002 Response, p. 2 (emphasis added). In fact, the Root Cause Report recommends that “[f]or consistency, as security personnel have been trained as to what constitutes safeguards information, *the plant may elect to give security personnel the option to consult with supervision prior to submitting a CR review*, if they are uncertain as to the inclusion of safeguards information. Otherwise, they submit [CRs] without review, as with all other station personnel.” Report at 11 (emphasis added). Indeed, FENOC has followed this recommendation. As explained in the April 2002 Response, FENOC has, as a result of this Root Cause analysis, *removed* the expectation that all issues identified by security officers be discussed with a supervisor prior to initiation of a CR. See FENOC January 22 Response, p. 2. This was done pursuant to a memorandum from the Manager – DBNPS Security to all nuclear security personnel dated January 21, 2002. Surely, Mr. [Harder], a new supervisor, should not be held in violation of Section 50.5 for intentional discrimination for adhering to a policy that was modified by FENOC after a subsequent independent review by an expert in the field.

In its April 10, 2003 letter, NRC also cites an Ombudsman Report claiming that Mr. [Harder] “used poor judgment by pursuing the CR initiation, content and reason for initiation, through a fact finding, documenting a fact finding, and subsequently placing in [Complainant’s] personnel file.⁹ Discipline has been administered relative to the incident for Mr. [Harder].” However, a review of the Ombudsman report indicates that the Ombudsman apparently did not consider the fact that Mr. [Harder’s] actions were consistent with DBNPS policy in effect at the time and the legitimate instructions and expectations of his supervisor. If anything, the Ombudsman report suggests that the policies and expectations in place at the time were “inappropriate,” like the Root Cause Report similarly determined at a later date. Furthermore, neither the Ombudsman nor FENOC addressed or even purported to address the question of whether Mr. [Harder] had engaged in “deliberate misconduct” in violation of Section 50.5.

As quoted above, the Statement of Considerations for the Deliberate Misconduct Rule makes it clear that “Enforcement actions directly against individuals are not to be used for activities caused by merely negligent conduct. These persons should 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.” 56 Fed. Reg. at 210,681.

⁹ As explained in the April 2002 Response, Mr. [Harder] explained in his interview with Special Agent Kalkman that Mr. [Harder] was trained through the MARC procedures to “contain and retain” all information gathered. See April 2002 Response at 11.

The NRC's Enforcement Policy has provided three examples of where individual enforcement action "will not be taken." Those examples are:

- (a) "violations resulting from inadequate procedures unless the a faulty procedure knowing it was faulty and had not attempted to get the procedure corrected;" and
 - (b) "Inadvertent individual mistakes resulting from inadequate training or guidance provided by the facility licensee;" and
 - (c) "Compliance with an express direction of management, such as the Shift Supervisor or Plant Manager, result[ing] in a violation."
- Enforcement Policy, VIII at 39.

It is respectfully submittal that viewing the record as a whole, Mr. [Harder] should not be found individually for a 50.5 violation, based upon either or both example (a) or (c) above from the Enforcement Manual. Mr. [Harder] was relying on a procedure which was subsequently found to be faulty (as in example "a") and Mr. [Harder] was acting in response to his supervisor's instructions and expectations, based upon those procedures in place at the time (as in example "c").

Holding Mr. [Harder] individually liable for intentional discrimination with all of the personal and professional implications thereof, is not warranted under the facts and record.

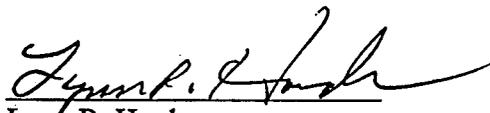
II. Conclusion

In light of the foregoing discussion, it is respectfully submitted that Mr. [Harder] did not engage in "deliberate misconduct" arising from the events of January 2001. Instead, Mr.

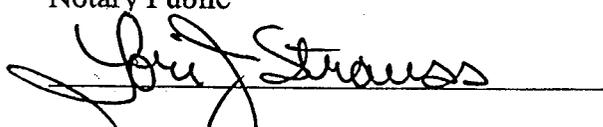
[Harder] was acting in reasonable reliance on the DBNPS policies in place at the time, as well as on his supervisor's instructions and expectations, also based on the DBNPS policies in place at the time.

As noted above, the Davis-Besse policies in place at the time have been modified. Mr. Harder has received further detailed training on the importance of maintaining a Safety Conscious Work Environment and is alert to the importance of clear communications and the integrity as well as the importance of the Condition Reporting process.

Accordingly, Mr. [Harder] respectfully requests that NRC reconsider its initial determination that Mr. [Harder] has violated Section 50.5 and that the 50.5 violation be withdrawn.

ATTEST: 
Lynn R. Harder

Subscribed and sworn to before me this 8th day of July, 2003
at Oak Harbor, Ohio.

Notary Public

LORI J. STRAUSS
Notary Public, State of Ohio
My Commission Expires 3/24/2008