



**UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, DC 20555 - 0001**

August 3, 2004

EA-04-119  
EA-03-211

Mr. Dennis Smith  
President and General Manager  
Hayward Tyler, Inc.  
P.O. Box 680  
480 Roosevelt Highway  
Colchester, VT 05446

**SUBJECT: APPARENT VIOLATION OF EMPLOYEE DISCRIMINATION REQUIREMENTS  
(U.S. DEPARTMENT OF LABOR ADMINISTRATIVE LAW JUDGES CASE  
NO. 2001-ERA-00043)**

Dear Mr. Smith:

This is in reference to an apparent violation of NRC requirements prohibiting discrimination against employees who engage in protected activities, i.e., 10 CFR 50.7, Employee Protection. The apparent violation involves the discriminatory actions of Hayward Tyler, Inc. (HTI) against Mr. Dennis M. Doherty, a former Quality Control inspector at HTI. This apparent violation was discussed with you on August 3, 2004.

The apparent violation is based on findings from a U.S. Department of Labor (DOL) Administrative Law Judges (ALJ) proceeding (ALJ Case No. 2001-ERA-00043). The ALJ found in its Decision, Preliminary Order and Recommended Final Order, issued September 23, 2003, that Mr. Doherty was the subject of employment discrimination in August 2000 when HTI terminated his employment in violation of the Energy Reorganization Act's (ERA) employee protection provision. A copy of the ALJ's Decision, Preliminary Order and Recommended Final Order is enclosed.

On September 30, 2003, HTI filed a petition for review of the ALJ decision to the DOL Administrative Review Board (ARB). Subsequently, in December 2003, HTI asked the ARB to dismiss the appeal because HTI anticipated that a settlement with Mr. Doherty would be completed before January 1, 2004. On March 5, 2004, HTI and Mr. Doherty filed with the ARB a Settlement Agreement, Joint Motion for Approval of Settlement Agreement, Dismissal with Prejudice and Confidential Treatment of Settlement Agreement which the ARB was asked to review. On May 28, 2004, the ARB issued a Final Order Approving Settlement and Dismissing Complaint.

It would be beneficial at this point to explain the differences in the responsibilities of DOL and NRC in discrimination cases. DOL is authorized by the ERA to provide personal remedies to an individual found to have been discriminated against by an NRC licensee or contractor for engaging in protected activities. DOL, however, does not take action to ensure that the underlying cause of the discrimination is corrected. On the other hand, the NRC is responsible for regulating the nuclear industry and ensuring that industry employees can raise safety

concerns without fear of discrimination. The NRC is authorized by the ERA and the Atomic Energy Act to take enforcement action against a licensee or contractor who discriminates against an employee for engaging in protected activities. In doing so, the NRC also may require the licensee or contractor to address the employer/employee relationship or the work environment that resulted in the discrimination at the employer's facility. The DOL ARB's Final Order Approving Settlement and Dismissing Complaint does not foreclose or eliminate the need for NRC enforcement action.

After reviewing the ALJ's decision, the NRC staff concludes that the action taken against Mr. Doherty was in apparent violation of 10 CFR 50.7. Therefore, this apparent violation is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. The current Enforcement Policy can be accessed on the NRC's Web site at [www.nrc.gov](http://www.nrc.gov); select "What We Do, Enforcement, then Enforcement Policy." The NRC is not issuing a Notice of Violation at this time; you will be advised by separate correspondence of the results of our deliberations on this matter.

The NRC, in a letter to HTI dated December 31, 2003, expressed concern that, because the ALJ decision concluded that Mr. Doherty was terminated for engaging in activity protected by the ERA's employee protection provision, the potential for a chilling effect on the safety conscious work environment exists at the HTI facility. Our concern is that HTI employees could be reluctant to identify or raise potential safety concerns for fear of similar retaliation. In your response letter, dated January 26, 2004, you stated that, because the case has been settled and the appeal dismissed without any admissions of liability by HTI, NRC's concerns are moot and that you have no plans to take any further action. As noted above, the ARB decision neither relieves NRC of its responsibilities nor forecloses NRC enforcement action. Accordingly, the concerns expressed in our December 31<sup>st</sup> letter are still valid and your January 26<sup>th</sup> response did not adequately address those concerns. For example, your letter states that most of your employees were not aware of the case and that more than half of your current employees were not there when Mr. Doherty's employment was terminated. Your letter provided no basis for the assertion that your employees were unaware of the case. Furthermore, the assumption that those current employees, not employed at the time of the termination, are unaware of the case is similarly unsupported. As explained below, your response to this letter should address the corrective actions that have been or will be taken to avoid further violations of NRC's employee protection regulations. In addition, please respond to the concerns discussed above regarding the adequacy of your January 26<sup>th</sup> letter.

Before the NRC makes its enforcement decision, we are providing you an opportunity to either: (1) respond in writing to the apparent violation within 30 days of the date of this letter or (2) request a predecisional enforcement conference. Please be aware that neither option is a forum for relitigating the DOL decision. The DOL decision was based on an adjudicatory hearing in which HTI participated as a party. As a result, that decision is binding upon Hayward Tyler, Inc. Therefore, we do not expect you to dispute or to discuss the factual or legal conclusions forming the basis for the DOL decision. Rather, our primary interest is that HTI discuss the corrective actions it has taken, is taking or plans to take in order to address the environment for raising concerns at HTI. If a conference is held, it will be open for public observation. The NRC also will issue a press release to announce the conference. Please contact Mr. Doug Starkey, Enforcement Specialist, NRC Office of Enforcement,

at 301-415-3456, within seven days of the date of this letter to notify the NRC of your intended response.

Should you choose to respond to this letter in writing, your response should be clearly marked as a "Response to An Apparent Violation" and should include for the apparent violation: (1) the corrective steps that have been taken and the results achieved and (2) the corrective steps that will be taken to avoid further violations. Your response may reference or include previously docketed correspondence if the correspondence adequately addresses the required response. If an adequate response is not received within the time specified, or an extension of time has not been granted by the NRC, the NRC will proceed with its enforcement decision.

In addition, please be advised that the characterization of the apparent violation may change as a result of further NRC review. You will be advised by separate correspondence of the results of our deliberations on this matter.

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter and its enclosure will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the Public without redaction.

Sincerely,

**/RA/**

Frank J. Congel, Director  
Office of Enforcement

Docket No.: 999-0345

Enclosure: DOL ALJ Decision, Preliminary Order and Recommended  
Final Order, dated September 23, 2003

D. Smith

4

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