

STATE OF ALASKA

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DEPARTMENT OF TRANSPORTATION
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November 9, 2004

Re: "Reply to Notice of Violation, EA-03-126"
("Notice of Violation and Confirmatory Order
Modifying License") (Effective Immediately)

U.S. Nuclear Regulatory Commission
Attn: Document Control Desk
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Dear Sir or Madame:

I. Introduction

In response to NRC Notice of Violation, EA-03-126, the State of Alaska Department of Transportation and Public Facilities, (hereafter "ADOT&PF" or the "Licensee"), set forth below is a reply which discusses, as requested, for each violation, (1) the reason for the violation, or, if contested the basis for disputing the violation or severity level; (2) the corrective steps that have been taken and the results achieved; (3) the corrective steps that will be taken to avoid further violations; and (4) the date when full compliance will be achieved.

II. Notice of Violation

The "Notice of Violation" provides in pertinent part:

"10 CFR 30.7(a) prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and privileges of employment. Under 10 CFR 30.7(a)(1)(i), the activities that are protected include, but are not limited to, the reporting by an employee to the Commission or his employer information about alleged regulatory violations.

Contrary to the above, between 1999 and 2002, the State of Alaska Department of Transportation and Public Facilities (ADOT&PF), and NRC licensee, discriminated against one of its employees, the Statewide Radiation Safety Officer (SRSO) in violation of 10 CFR 30.7(a). Specifically the licensee retaliated against the SRSO for raising safety concerns regarding radiation exposures to ADOT&PF employees, by taking the following actions against the terms, conditions, or privileges of the SRSO's employment:

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In September 1999 a three-month extension of the SRSO's probationary period; unacceptable rating in performance appraisals for the periods 4/16/99 to 10/16/99, verbal admonitions by the SRSO's supervisor in September 1999 for breaking the chain of command and in November 2000 in connection with an evaluation of radiation exposure to Subject A; direction by the SRSO's supervisor in February 2000 to cease performance of radiation safety duties; a November 15, 2000, Letter of Expectation; an August 25, 2001, Letter of Instruction; direction by the SRSO's supervisor in November 2001 to sign a letter to the NRC stating that the SRSO's report of a radiation exposure beyond NRC limits was in error; in April 2002, a direction by the SRSO's supervisor to limit radiation safety duties to 8% of the SRSO's time; a May 7, 2002 Letter of Reprimand; denial of the SRSO's requests for radiation safety officer-related training; and in September 2002 directing the SRSO to provide confidential correspondence between the SRSO and the NRC.

This is a Severity Level II violation (Supplement VII)."

III. The Reasons for the Violation or If Contested, the Basis for Disputing the Violation or Severity Level

A. Discussion

At the outset it should be stated that ADOT&PF does not believe that there was any discrimination against the SRSO. The personnel actions taken that are the subject of this matter were unrelated to protected activities, and were necessitated by unsatisfactory performance of the concerned individual's separate and unrelated contract management and material certification review duties. However, ADOT&PF is not continuing to litigate the accuracy of the allegations because it believes that the most effective course of action is to direct its resources to improving its radiation safety and SCWE programs. It therefore has decided to enter into the Confirmatory Order to amicably resolve this matter.

An appropriate starting point for ADOT&PF's response to the Notice of Violation reference is made by reference to the Letter of Frank Congel, Director of Enforcement, to Billy Garde, Esq., of April 5, 2004 (p. 1). The letter to counsel for the concerned individual provides, in pertinent part:

"In brief, we [NRC Staff] did not develop evidence that [ADOT&PF] managers acted deliberately with respect to NRC's requirements governing discrimination against those who engage in protected activity. To the contrary, it was apparent to us [NRC Staff] that ADOT&PF management lacked an awareness, and an appreciation, of NRC's requirements in this area."

“Based on this view, we focused our enforcement actions on improving knowledge and awareness of our requirements, and on bringing about lasting change in ADOT&PF’s work environment.” Letter from F. Congel, NRC to B. Garde, Esq. (April 5, 2004).

Upon reflection and review, ADOT&PF agrees with the above letter of Mr. Congel that it lacked a full appreciation of NRC’s requirements and regulatory expectations regarding and underlying 10 CFR 30.7, including the 1996 NRC Policy Statement, “Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation.”

As Mr. Congel and the Office of Enforcement correctly stated in the above-referenced April 5th letter, the evidence developed showed that ADOT&PF managers did not act “deliberately with regard to NRC’s requirements governing discrimination against those who engage in protected activity.” *Id.*

With specific reference to the Notice of Violation, first of all, ADOT&PF agrees with the above quoted letter of Mr. Congel that ADOT&PF managers did not act deliberately with regard to any employee who engaged in protected activity. *Id.*

As described above, ADOT&PF has agreed to implement the provisions of the agreed upon Confirmatory Order (Effective Immediately) of March 15, 2004, to establish and maintain a healthy Safety Conscious Work Environment (“SCWE”) and safety culture.

These actions include: (1) ensuring that ADOT&PF’s internal policies and procedures establish and support a Safety Conscious Work Environment by providing for expert review of SCWE policies and procedures by independent contractors with experience and expertise in this area; (2) training of ADOT&PF employees, supervisors, and managers on NRC’s Employee Protection requirements and on maintaining and establishing a SCWE; and developing a long-term plan for maintaining a SCWE that includes safety culture surveys and annual refresher training. These activities were initiated by ADOT&PF on a timely (and expedited) basis after issuance of the Confirmatory Order.

The Commissioners’ recent decision in CLI-04-24, Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1, et al), 60 NRC ____ (August 10, 2004) (hereafter “TVA”), clarifies the law that an employer may prevail in a 50.7 (and a 30.7 case), where the employer provides clear and convincing evidence that the employer would have taken the same unfavorable personnel action notwithstanding the protected whistle blowing activity. CLI-04-24, Slip Op. at 4.

Notwithstanding ADOT&PF's substantially increased awareness of NRC requirements as a result of the SCWE training and safety culture surveys conducted pursuant to the Confirmatory Order, ADOT&PF believes it has addressed many, if not all, of the issues raised in the Notice of Violation in a manner which meets the test enunciated by the Commission in the TVA case. Each of the sub-issues, so addressed, is set forth below with certain performance-based comments applicable to each sub-issue.

1. Extension of Probationary Employment Period

For example, as to the extension of the probation period, the performance of a new employee may be extended for any state employee if the performance of the employee is in doubt during the standard probationary period (either six or twelve months). In such instance, management may extend the probationary period for an additional three months to allow time to further evaluate performance. The extension of the probationary period in this instance was based upon numerous complaints and observations regarding the performance of the concerned individual unrelated to the performance of RSO activities. All such complaints were centered in the non-RSO contract management and non-nuclear material certification review duties.

The extended probationary period was to permit the ADOT&PF additional time to monitor and evaluate the performance of a new State employee. An extended probationary period alternative is applicable to any new State employee. This extension of the probationary period occurred, in this instance, completely independent of any protected activity. At the end of the three month extension, the concerned individual was granted permanent status which further demonstrates that no discrimination occurred.

2. Denial of a Merit Increase for the Year 2000

The SRSO's job performance from January 16, 2000 through January 15, 2001, did not warrant a merit increase based on job performance issues. Merit increases under the State's compensation system are not automatic and are awarded to employees who are determined to have provided service that is of progressively greater value to the employer. The SRSO's work consistently contained errors, was not generally acceptable, and there was little indication of willingness to improve during the rating period. This was a performance driven matter independent of any protected activity.

3. Verbal Admonitions by Supervisor in September, 1999 (Chain of Command) and November, 2000 (Evaluation of Radiation Exposure)

- a. This paragraph deals with two separate incidents involving two different supervisors. First, regarding the verbal reprimand for breaking the chain of command, this occurred either in July or September of 1999. ADOT&PF acknowledges that it did occur. Based upon the recorded interview of the supervisor (who is now retired), it was done, not out of an effort to silence the SRSO, but out of frustration because the supervisor had, just moments before, passed on the information to his supervisor only to find the RSO repeating this same information without affording the supervisor the opportunity to address the concern. So, in the eyes of the RSO's supervisor, the SRSO was appeared to be wasting the time of all concerned. ADOT&PF acknowledges that the criticism leveled at the SRSO by his supervisor, was inconsistent with a Safety Conscious Work Environment (SCWE). However, ADOT&PF contends that this incident does not constitute discrimination, and that no retaliation for breaking the chain of command occurred.
- b. Turning to the November 2000 incident, at the annual RSO meeting, the SRSO distributed a report concerning possible exposures to Subject A in excess of regulatory requirements. The SRSO's supervisor verbally admonished the SRSO because he had been given a directive to clear all written documents with the supervisor prior to distribution to others. ADOT&PF believes that while it was appropriate for the SRSO to discuss the incident at the annual meeting of the RSO's, he should have cleared distribution of the written report with his supervisor first. This likely would have prevented the SRSO from mentioning Subject A by name, which was not appropriate.

4. Direction by Supervisor to Cease Performance of Radiation Safety Duties

In his video taped statement shown at the Predecisional Enforcement Conference, the SRSO's supervisor denied the allegation that he directed the SRSO to cease the performance of his radiation safety duties. Rather, the supervisor explained that the SRSO did not have the supervisory authority over a Regional RSO. He explained to the SRSO that he was expected to utilize the chain of command to address the matter.

5. November 15, 2000 Letter of Expectation

The supervisor of the SRSO had been overseeing the job performance of this employee for over six months with little sign of improvement. The November 15, 2000 letter was written in advance of the upcoming annual evaluation to permit the SRSO time to improve his performance. This notice represented what is standard state personnel practice in such circumstances and was intended to provide notice and guidance about expected job performance, not otherwise. This letter represents standard performance management practice and was written independently of protected activities.

6. An August 25, 2001 Letter of Instruction

ADOT&PF endeavors to be reasonable regarding any individual's use of leave, whether it be emergency leave or other types of leave. It is respectfully asserted, that it is neither unreasonable nor discriminatory for a supervisor to require that the supervisor be notified directly when the SRSO is going to be absent from the office for an unplanned unexpected purpose or reason. This constitutes what is a standard state leave practice which is further embodied under the applicable labor agreement, GGU Master Agreement. Paragraph 25.02 C.4 of the GGU Master Agreement states that "it shall be the responsibility of the employee to notify the employee's supervisor of the absence immediately and to report periodically the anticipated duration of the absence." The contract provision goes on to state: "Failure to notify the supervisor may result in disciplinary action, up to and including termination." The Letter of Instruction reiterated standard State policy that taking unapproved leave can result in the assessment of unauthorized leave without pay. This letter did not represent anything other than standard personnel practice. The leave policy in question is applicable to all State employees.

7. Requested Modification of Over-Exposure Report

This was a substantive issue, not an act of discrimination. The substantive question was whether "Subject A" would fall under the occupational category rather than a member of the public category. While the SRSO was correct as to the major exposure category "Subject A" should fall into, this matter represented, at bottom, a desire by the supervisor of the SRSO to have an accurate report filed relative to the radiation exposure of "Subject A." While the original report filed with respect to "Subject A," upon review, turned out to be accurate, it is not unreasonable for a supervisor to question and seek to assure the accuracy of the information submitted. In the event the information originally submitted was not accurate as to this

point, a draft letter to that effect was prepared for review and discussion with the concerned individual.

8. Direction to Limit Radiation Safety Duties to Eight Percent

ADOT&PF believes that a careful review of the e-mail records from the Spring of 2002 between the SRSO and his supervisor will document that the supervisor did not direct the SRSO to limit his SRSO duties to 8%. The SRSO's supervisor was attempting to help prioritize the SRSO's various duties, which included not only SRSO work but contract management and material certification review as well. The record reflects that the supervisor believed that it would not have been unreasonable for the SRSO to spend as much as one third of his time on SRSO work.

9. May 7, 2002 Letter of Reprimand

In this instance, the SRSO refused a directive from his supervisor to work on a materials inspection contract that was urgent and required prompt action. This work should have required no more than three hours to complete.

The SRSO argued with his supervisor, claiming that more routine nuclear gauge inventory work, with no near term deadline, had priority. Finally, the SRSO conceded and performed the urgent task.

State employees are expected to respond to reasonable direction and urgent requests from their supervisors. It is important to note that the SRSO not only initially refused to perform the urgent assignment as requested, but delayed work on the more routine nuclear gauge inventory task for a year and a half.

10. Request for RSO Training

Shortly after the SRSO was hired in the fall of 1998, he received the required 8 hour RSO training in Seattle. In the following year, an additional 40 hours of training for the SRSO was identified as desirable but not required. The SRSO did not submit a training request to his supervisor, as is required for all employees requesting training. Therefore, no additional training was considered.

In January 2003, the additional 40 hour training was provided to the SRSO and the three Regional RSOs in Gaithersburg, MD.

There is no evidence that discrimination occurred by not providing additional training that was not required by NRC regulations.

11. Confidential Correspondence

The request for a copy of correspondence written on State of Alaska letterhead to the NRC was rescinded, as soon as ADOT&PF was notified by the NRC Staff that the correspondence was confidential. When the managers made their initial inquiry of the SRSO, he gave no indication that the letters were confidential. Instead, the SRSO indicated to his supervisors that he would give them the correspondence after they made their request in writing.

The supervisor's motivation was to identify alleged safety problems referenced in the correspondence, so that management could act to correct them. Management was simply not aware, at the time, and prior to the Safety Conscious Work Environment training agreed to under the Confirmatory Order, that such communication of safety issues was fully protected activity. Management is now aware that this constitutes protected activity.

B. Summary of Above

It is ADOT&PF's intent and desire to develop and maintain an environment where all licensee employees, (and contractors) feel free to raise safety and other concerns either to their management and/or to the NRC, without fear of retaliation. ADOT&PF has expeditiously contracted with known experts in the field to achieve and maintain both a SCWE and a safety culture, where safety is first. In addition, ADOT&PF, is in the process of developing an Employee Safety Concerns Program, as well as the review and expert analysis of safety culture to address, minimize, and prevent not only any form of employment discrimination but also any perception of discrimination.

The SCWE training and safety culture assessments agreed to under the Confirmatory Order have been made available to required employees in the Department. As a result, the Department as a whole has benefited, and will continue to benefit from the SCWE training and safety culture assessments. ADOT &PF at all levels, is committed to achieving these goals.

In implementing these goals, we believe the NRC is mindful of the particular challenges thrust upon us. As explained above, and consistent with the Commission's recent decision in TVA, we believe that certain personnel were not fully aware of all of NRC's regulatory expectations in the area of SCWE and safety culture. ADOT&PF personnel, however, did not engage in any actions, which were designed or intended to be inconsistent with or violate 10 CFR 30.7.

IV. The Corrective Steps That Have Been Taken and the Results Achieved

ADOT&PF agreed to and has actively been implementing the terms of NRC's "Confirmatory Order Modifying License (Effective Immediately) Issued on March 15, 2004."¹ Under the terms of the Confirmatory Order, first ADOT&PF has submitted to the NRC for approval, a plan to review the Licensee's internal policies and procedures pertaining to assuring compliance with 10 CFR 30.7 and to establish and maintain a Safety Conscious Work Environment as referenced in the May 14, 1996, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation." In conformance with the Confirmatory Order, ADOT&PF has submitted to the NRC for approval such a plan. By letter dated May 20, 2004, ADOT&PF submitted for NRC approval, ADOT&PF's plan to review its policies and procedures to conduct training on 10 CFR 30.7, and NRC's SCWE policy and guidance. By letter dated May 28, 2004, supplemental information was provided to the NRC in response to additional information requested by NRC. See, Letter from G. Christensen to F. Congel (May 28, 2004). By letter dated June 22, 2004, NRC advised ADOT&PF of its approval of ADOT&PF's "plans to review internal policies and procedures for conducting initial training on NRC's Employee Protection Regulations and the attributes of a SCWE, consistent with conditions 1 and 2 of the Confirmatory Order." Letter from F. Congel, NRC, to G. Christensen (June 22, 2004).

As required by the Confirmatory Order, the plan included a discussion of the outside, expert contractors who shall conduct the reviews in the area of SCWE and Safety Culture Assessment. Pursuant to State procedures and requirements, an RFP was issued and a contract awarded for both training, review, and safety culture assessments. The Plan specifies the categories of ADOT&PF workers, supervisors and managers to be trained and has included provisions for individuals who missed the training due to unforeseen circumstances.

The initial required training and safety culture assessments have been conducted on an expedited basis in time for the summer construction schedule in Alaska in the summer of 2004.

Further, as required by the Confirmatory Order, the Plan includes additional training for supervisors and managers on how to effectively evaluate and resolve safety concerns, "while balancing safety concerns with other daily activities, especially when dealing with conflicts in the work place."

¹ As mentioned at the outset of this letter at page 2 Section III A, ADOT&PF does not believe that there was any discrimination against the SRSO.

In addition, ADOT&PF submitted to NRC on October 22, 2004, in conformance with the Confirmatory Order, a long-term plan for maintaining a SCWE. The plan includes a discussion of the results of the initial review of ADOT&PF's SCWE and safety culture conducted by the outside, expert contractors referenced above. As required and agreed to under the Confirmatory Order, the long-term plan addresses a time period through calendar year 2005 and includes safety culture assessments; annual refresher training of workers including temporary workers, who are involved in the use of licensed material in the radiation safety program, as well as the supervisor and managers of these individuals.

As to the results achieved, ADOT&PF employees and managers have a significantly greater awareness of NRC's requirements relating to establishing and maintaining a SCWE program and NRC's May 14, 1996 "Policy Statement for Nuclear Employees Raising Safety Concerns Without Fear of Retaliation."

Finally, in addition thereto, ADOT&PF has obtained a copy of and is reviewing for both guidance and implementation, NRC's proposed generic communication, dated October 7, 2004, entitled "Establishing and Maintaining a Safety Conscious Work Environment." In summary, ADOT&PF believes that there has been a substantially increased awareness of NRC's policy, regulations, and emerging developments and regulatory expectations regarding compliance with 10 CFR 30.7, SCWE, and safety culture issues.

V. The Corrective Steps That Will Be Taken to Avoid Further Violations

As noted above, the Confirmatory Order establishes continuing requirements to maintain a SCWE and a positive and constructive safety culture. The Confirmatory Order requires additional training and refresher training in calendar year 2005 by individuals independent of ADOT&PF who are highly qualified and ADOT&PF's plan will specify and continue to specify the minimum qualification for individuals who may provide SCWE training in subsequent years.

Finally, having become more familiar with NRC's policy, procedures and regulatory expectations in this important area, ADOT&PF will continue to review and implement new NRC regulatory policies and directives with the goal of full compliance with 10 CFR 30.7 and related NRC policy statements and guidance. This does not mean, however, that there may not be continuing challenges in the workplace. It does mean, however, that ADOT&PF is substantially in a better and more enlightened position to address the challenges in a manner fully consistent with the Confirmatory Order; 10 CFR 30.7; and NRC's regulatory issuances and proposed generic communications referenced above.

VI. The Date When Full Compliance Will Be Achieved

The Licensee believes that it has been in full compliance at least as of March 15, 2004, with ADOT&PF's consent to, and implementation of, the Confirmatory Order.

If there are any questions related to the above or you wish to discuss any item in more detail, please do not hesitate to contact the undersigned at the number provided.

Sincerely,



Mike Barton
Commissioner

cc: Frank Congel, Director, Office of Enforcement
Doug Starkey, Office of Enforcement
Dr. Bruce Mallett, Regional Administrator
Michael Vasquez, NRC Region IV