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Nuclear LLC

September 8, 2004

Mr. Jeff Teator
Senior Special Agent, Region I, OI
Nuclear Regulatory Commission
475 Allendale Road
King of Prussia, PA 19406-1415

Re: PSEG Nuclear — Ms. Kymn Harvin Matter

Dear Mr. Teator:

In light of the recent Commission Order ("Order") in the TVA 10 C.F.R. § 50.7 case, I thought it would be beneficial to highlight several aspects of the Harvin matter that may be impacted by this Order.

Liability Standard/Affirmative Defense

In recent years, the NRC Staff developed a standard in Section 50.7 matters, which held that a licensee violates Section 50.7 if the NRC Staff concludes that an employee's protected activity contributed, in any part, to adverse action taken against the employee. Specifically, under this approach, in any "dual motive" case, or in any case where there is a "reasonable inference" of "dual motives", a violation of Section 50.7 would follow.

In the TVA Order, the Commission rejected the NRC Staff's standard and adopted another which mirrors the statutory standard expressly stated in Section 211 ("211") of the Energy Reorganization Act of 1974 ("ERA"). The new TVA standard requires the NRC Staff to consider first whether a *preponderance of the evidence* shows that protected activity *contributed to* the adverse action. Even if this is established, a violation would occur only if *clear and convincing evidence* establishes that the *employer would have made the same decision* regardless of the protected activity. In deriving this standard, the Commission reasoned that Section 50.7 does not immunize employees from employment action dictated by legitimate considerations. (10 C.F.R. § 50.7(d)). The Order continued:

> To give life to this provision, we must give employers defending whistleblower discrimination charges an opportunity to prove that "legitimate reasons" or "non-prohibited considerations" justified their actions. The most practicable way of doing this is by granting employers ... the right to defend against a whistleblower discrimination charge on the ground that they would have taken the same

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> personnel action regardless of the employee's protected activities.... Congress was careful in 211, as we are in today's decision, to preserve the flexibility nuclear employers require to take appropriate action against alleged whistleblowers who also are ineffective on the job or unneeded in the workplace.

In the Harvin matter, it is clear from the testimony that the original decision that eliminated her position was made as a result of an organizational decision in which Harvin's position was no longer needed. Additionally, high value consulting work conducted by GAP International, who performed work similar to Ms. Harvin's, was also eliminated in this timeframe. Moreover, the decision to eliminate Ms. Harvin's position was made well before she engaged in any alleged protected activity. In short, the evidence is clear and convincing that the decision was made for legitimate business reasons, and under the Commission's TVA decision, there was no violation of 10 C.F.R. § 50.7.

With regard to the decision to accelerate Ms. Harvin's out-processing date (which did not affect her termination date or the compensation paid to her), it is equally clear that that decision was made on March 18, 2003, two days prior to the alleged protected activity discussion with [redacted]. This forecloses any causation between the action of moving up the out-processing date and any protected activity. Even if protected activity arguably played some role in the decision to accelerate Ms. Harvin's out-processing date (we are aware of no such evidence, although there is temporal proximity) then under the Commission's decision, PSEG Nuclear has shown that the same result would have occurred despite any protected activity. The evidence clearly shows that Ms. Harvin's out-processing date was properly accelerated, given the concerns with several of her expense reports, her decision to move to a larger office, and her accepting assignments beyond her release date. Given these legitimate business considerations, it follows that there was no violation of 10 C.F.R. § 50.7 in connection with the out-processing decision.

Contributing Factor

The causal connection between protected activity and adverse action is a necessary element to sustain a discrimination claim. The Commission's decision addresses how the Staff should analyze whether protected activity in fact "contributed" to an adverse employment decision. The Commission held that protected activity is a contributing factor where it played "at least some role" in the adverse employment decision. An employer's knowledge of protected activity will not alone suffice as proof that the activity contributed to adverse action. Rather, the evidence "must allow a reasonable person to infer that protected activities influenced the unfavorable personnel action to some degree." The Commission in the TVA case, for example, seriously questioned the Staff and Board findings of causation that relied upon "temporal proximity" between protected activity and adverse action.

Applying this standard to the Harvin matter, there is no evidence that Ms. Harvin raised any safety concern before the decision to eliminate her position was made in late 2002. Consequently, there is no temporal proximity issue to consider with regard to that decision. As to the acceleration of Ms. Harvin's out-processing date, neither [redacted] communication of

that decision to Ms. Harvin nor [redacted] discussion with Ms. Harvin about that decision is sufficient to establish a causal connection. To the contrary, as shown by uncontroverted testimony, the decision to accelerate Ms. Harvin's out-processing date was made before Ms. Harvin arguably engaged in protected activity and there is no basis to infer causation and a violation of 10 C.F.R. § 50.7.

Protected Activity

The Commission's Order also clarifies the scope of activities protected under § 50.7. In general terms, the Commission defined protected activity under the regulation as "providing safety-related allegations." The Commission specifically addressed the question of whether an employee engages in protected activity when that activity is limited to resolving a concern identified by someone else. The Commission held that such an activity is *not protected.* Thus, to the extent that Ms. Harvin was solely helping to remedy potential safety problems discovered by others, she was not engaged in protected activity. This point is critical, because to the extent Ms. Harvin was raising technical plant and/or communication issues, these concerns were previously raised by others and entered into the Corrective Action Program ("CAP"). The evidence indicates that the plant technical issues were being addressed and well-vetted by the CAP process. The Safety Conscious Work Environment issues were identified by prior surveys (including Gallup and the Employee Concerns Program), known and communicated to senior management and addressed in Nuclear Review Board presentations.

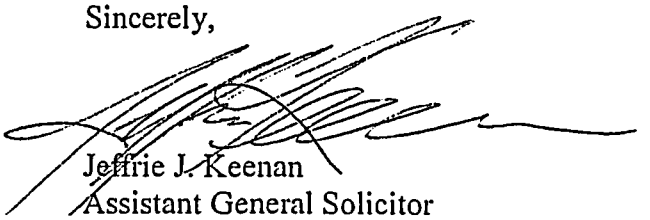
All of Ms. Harvin's claims were either raised by others or already incorporated into formal processes. In short, Ms. Harvin's after-the-fact attempts to establish that she had engaged in protected activity cannot withstand scrutiny in light of the Commission's TVA decision.

Conclusions

The Commission's TVA decision establishes clear lines of authority that preclude any finding of a 10 C.F.R. § 50.7 violation in the Harvin matter. In this case, the evidence is clear and convincing that: (1) the decisions to eliminate Ms. Harvin's position and accelerate her out-processing date were made for legitimate business reasons; (2) Ms. Harvin's alleged protected activity played no role in either decision; and (3) Ms. Harvin's participation in resolution of issues raised by others did not constitute protected activity. Consequently, there is no basis for any violation of 10 C.F.R. § 50.7.

Should you have any questions on this information, please contact me at 856-339-5429.

Sincerely,



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