

SDP/ENFORCEMENT PANEL WORKSHEET

EA-03-105; EA-03-106

Date of Panel: May 15, 2003¹

Licensee: Nuclear Management Company

Facilities: Kewaunee Nuclear Power Plant [50-305; DPR-43]
Point Beach Nuclear Power Plant [50-266; 50-301; DPR-24; DPR-27]

OI Report No. Kewaunee: OI Case No. 3-2002-004, dated 11/29/02²
Point Beach: OI Case No. 3-2002-020, dated 2/28/2003³

Panel Chairman (SES Sponsor):	C. Pederson
Responsible Branch Chief/Lead Inspector:	James Creed/Terry Madeda
Region III Enforcement Specialist:	C. Weil
OE Enforcement Specialist:	J. Dixon-Herrity
OGC Attorney:	J. Longo

1. Brief Summary of Issues/Potential Violations:

An OI investigation substantiated that a union employee, assigned as a Mechanical and Civil Welding Superintendent for a contractor, deliberately failed to report and take action after he received information from three contractor employees that they smelled an odor of alcohol on a foreman. The foreman, who was also employed by the same contractor, was apparently working in the contractor's fabrication shop, located outside of the licensee's protected area in the owner controlled area, when the information was reported to the superintendent. While it could not be determined when this information was specifically reported, it is believed that it occurred during late July 2001 (see OI Exhibit 14, page 9).⁴

OI also substantiated that the superintendent deliberately provided false information, to both OI and licensee investigators, about the FFD concern involving the foreman.

Potential Violations: The contractor superintendent apparently failed to properly implement FFD monitoring and testing procedures in Kewaunee FFD procedures NAD-01.04, Fitness for Duty Program, and GNP 1.4.4, Behavioral Observed Just Cause Testing. The contract superintendent's action in providing inaccurate information also appeared to be contrary to 10 CFR 50.5(a)(2). Only the individual would be cited for incomplete inaccurate information (10 CFR 50.9) since the licensee was not aware that the individual provided incomplete/inaccurate information to both the licensee investigator and to the NRC Office of Investigations.

¹ Original panel scheduled for February 13, 2003; however, panel delayed until May 15, 2003, to accommodate HQ scheduling conflicts.

² The OI report was processed by OI:HQ and dated November 29, 2002. Region III received the report on December 10, 2002, without the exhibits. The exhibits were received on 12/23/02.

³ OI Report No. 3-2002-020 for Point Beach was dated February 28, 2003, and the transmittal memo was dated March 6, 2003. OE did not receive a copy of the OI Report until April 18, 2003.

⁴ The foreman had unescorted access to Kewaunee from June 25, 2001, to December 1, 2001. As of September 17, 2002, a post employment additional information notation from Kewaunee, dated December 19, 2001, was in the Personnel Access Data System (PADS) under the foreman's "Plant Access Records." Neither the licensee's investigation nor the OI investigation developed information indicating the foreman's entry into the plant protected area during July 2001. However, he was later reassigned as the in-service inspection foreman which would require daily access to the protected area.

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2. **Purpose of Panel:** To reach a consensus on the significance of the investigation finding and to determine appropriate enforcement action.

3. **Regional Recommended Enforcement Strategy:**

A Severity Level III problem is recommended for both the licensee and the individual. Recommend a predecisional enforcement conference (PEC) with the licensee and a PEC be offered to the individual.

4. **Analysis of Significance/Root Cause:**

a. **Actual Consequence:** N/A IAW Section IV.A.1 of the Policy

b. **Potential Consequences:** N/A IAW Section IV.A.2 of the Policy

c. **Potential for Impacting Regulatory Process:** N/A IAW Section IV.A.3 of the Policy

d. **Willfulness:** Deliberate actions by an individual.

e. **Root Cause(s):** Deliberate action by a union employee working for a contractor as a superintendent

5. **Apparent Severity Level(s)/Color and Basis:** The individual's position in the overall organization of the contractor was considered in recommending a Severity Level III problem. While the individual was a supervisor, supervising labors, insulators, welders, pipefitters, steamfitters, he individual is a steamfitter by trade and a member of the local union. He stated that he that the only nuclear power plants he worked at Kewaunee and Point Beach and otherwise works at "wafer plants, chip plants and paper mills." His PADS "Plant Access Report" indicated that he had access at Point Beach 10/27 to 11/27/99, 3/29 to 4/20/00, 10/9 to 11/3/00, 4/2 to 5/4/01 and 12/12 to present (9/17/02); and a Kewaunee 5/1/01 to 2/22/02 (OI Ex 35, p 2).

6. **Application of Enforcement Policy**

a. **Enforcement/Performance History:**

A Severity Level III violation without civil penalty was issued to Wisconsin Public Service Corporation on October 19, 1999, for the deliberate failure by a security supervisor to annually test, during 1997 and 1998, several shotguns used by the security force at the Kewaunee Plant (EA 99-183).

b. **Identification:** To be determined following the PEC.

A vague FFD duty issue was included in several contractor welding issues identified to the NRC by allegation (AMS No. RIII-2001-A-0176. These issues were referred to the licensee and the licensee identified the parties involved in the FFD issue. The licensee concluded that several contractor employees did not provide FFD information to the superintendent and the licensee suspended the site access for those employees. The employees disputed the licensee's conclusion and contacted the NRC. AMS No. RIII-2002-A-0114 and OI Investigation 3-2002-004 were opened as a result of that contact. The OI investigation determined: (1) the employees provided the FFD information to the superintendent; (2) the superintendent deliberately failed to follow FFD procedures; and (3) the superintendent deliberately provided incomplete and inaccurate information to licensee and OI investigators.

c. Is Credit Warranted for Corrective Actions: To be determined following the PEC.

The licensee provided the following information in a February 8, 2002 letter in response to the allegation information from the NRC (AMS No. RIII-2001-A-0176). A copy of the licensee's letter was forwarded to OE and OGC on January 17, 2003.

On January 11, 2002, a "program reminder" was issued to all site employees restating the appropriate actions if an individual is suspected of being unfit for duty.

On January 11, 2002, the general employee training test question was revised to cover the situation when an employee believes a coworker has the odor of alcohol and the need to immediately contact a supervisor.

On January 24, 2002, the licensee changed its procedure, "Behavioral Observed Just Cause Testing" to add details on possible indicators of alcohol misuse. Similar temporary changes were made on January 11, 2002, to the licensee's procedures, "Fitness for Duty Policy and Procedure" and "NMC Access Authorization Program 4G."

On December 19, 2002, the Superintendent, who by the time of the licensee's investigation was working for the licensee at Point Beach, was coached and counseled by the licensee regarding his FFD responsibilities.

[NOTE: The licensee's February 8, 2002 letter, as are all responses to allegations referred by the NRC staff, is not on the docket.]

The licensee has not been made aware of the conclusion regarding the incomplete and inaccurate information.

The recommendation is to wait until after the PEC to determine whether or not credit is warranted for the corrective action adjustment factor.

d. Should Discretion Be Exercised to Mitigate or Escalate Sanction? N/A

7. **Is action being considered against individuals?** See Section 3 above.

8. Non-Routine Issues/Additional Information/Relevant Precedent/Lessons Learned:

Is generic communication (IN, GL, etc.) needed for this issue? No

Is inspection guidance needed? No

Is there a need for NRR or NMSS programmatic guidance or interpretation of requirements? No

Is there a relevant precedent? Precedents for failure to report/test FFD issues:

Duane Arnold, EA 97-064, May 9, 1997, two contract supervisors deliberately failed to take action after FFD information was reported. No enforcement action was taken on this 1992 violation based on: age of the violation; lack of records documenting a FFD incident; and other conflicting information.

Braidwood, EA 98-058, IA 98-009; 010 and 011, July 2, 1998, a pipefitter violated the five hour abstinence rule for consuming alcohol before regular scheduled work tour. The

pipefitter admitted his alcohol use to his coworkers and asked his coworkers not to report or file an FFD report. One of the pipefitter, while not currently

EA 98-058, Exercise of Enforcement Discretion for Commonwealth Edison: (1) ComEd identified the violation; (2) ComEd immediately notified the NRC; (3) ComEd investigated the matter; (4) ComEd took disciplinary action against each of the individuals; and (5) the incident was isolated and involved low-level employees without the knowledge of management.

EA 98-010, Severity Level III violation to the individual for violating the five hour abstinence rule.

EA 98-009 and EA 98-011 Severity Level IV violation to the coworkers for failing to report the FFD violation of the pipefitter. All of the involved personnel were low level employees.

EA-00-075 and IA-00-075 concerned a site supervisor with alcohol on his breath who met with the Braidwood Plant Nurse. The supervisor had supervisory FFD training at another licensed facility. The site nurse, a supervisor, failed to have an employee FFD tested. However, the employee was not on site for work; rather, to visit the nurse following a leave of absence. Severity Level IV violation with no response required to the licensee (corrective actions were already taken) and a closeout letter to the nurse (voluntary resignation).

Are there any other lessons learned?

No

Are these issues related to an allegation? RIII-2001-A-0176 and RIII-2002-A-0114.

Is there any other information about this case that should be considered and is important to note? The employment discrimination allegation at Point Beach arose from the FFD issue at Kewaunee. The former Kewaunee employees contended that they told NMC about the Kewaunee FFD issue which resulted in their unescorted access to Point Beach being denied. The OI investigation into alleged employment discrimination at Point Beach did not substantiate the discrimination complaint. However, the OI investigation did establish that the employees had told the contractor supervisor at Kewaunee about the FFD issue involving the foreman. While a violation of 10 CFR 50.7, "Employee Protection," does not appear to exist at Point Beach, the Office of General Counsel suggest that the licensee be asked to assess this issue for any potential "chilling effect."

Attachments:

1. Draft Notice of Violation - Licensee
2. Draft Notice of Violation - Individual
3. Factors for the Sanction in actions against individuals
4. Draft Conference Letter to NMC

FILE NAME: G:\EICS\BOARDPKG\030515 Kewaunee FFD and 50-9 - DRS

Draft Notice of Violation to Licensee

- A. 10 CFR 26.20 requires, in part, that each license subject to 10 CFR Part 26 establish and implement written policies and procedures designed to meet the general performance objectives and specific requirements of 10 CFR Part 26, including policies to address the abuse of legal drugs (e.g. alcohol).

10 CFR 26.24(a) requires, in part, that the licensee implement chemical testing programs for persons subject to 10 CFR Part 26 to provide a means to deter and detect substance abuse, including testing for-cause, i.e., as soon as possible after receiving credible information that an individual is abusing alcohol.

Kewaunee Nuclear Power Plant Nuclear Administrative Directive (NAD) 01.04, "Fitness for Duty Program," Revision C, November 16, 1999, implements the requirements of 10 CFR Part 26 with the goal of maintaining a work environment that is free from the effects of drug and alcohol abuse. Section 2.1 of NAD 01-04 provides, in part, that NAD 01.04 applies to all persons who have applied for or who have been granted unescorted access to the Kewaunee Nuclear Power Plant.

Section 7 of NAD 01.04 lists the procedures that have been established to implement the Kewaunee Nuclear Power Plant Fitness for Duty Program. General Nuclear Procedure (GNP) 1.4.4, "Behavioral Observed Just Cause Testing," is one of the implementing procedures described in Section 7 of NAD 01.04.

Section 2.0 of GNP 1.4.4, Revision A, April 18, 1995, provides, in part, that the procedure applies to all persons granted unescorted access to the Kewaunee Nuclear Power Plant.

Section 5 of GNP 1.4.4 provides, in part, that the licensee is committed to a program of continued observation of employees, contractors and vendors for indication of any on-the-job behavior which may impair job performance. When such behavior is detected, corrective measures shall be taken, including an investigation of the circumstances and an evaluation of the risk involved in continuing unescorted access to the Kewaunee Nuclear Power Plant.

Contrary to the above, during July 2001 a supervisor for Day and Zimmerman Nuclear Power Systems (Day and Zimmerman), a contractor at the Kewaunee Nuclear Power Plant, failed to take corrective measures after receiving credible information about on-the-job behavior which may impair the performance of a Day and Zimmerman employee. Specifically, three Day and Zimmerman employees reported to the supervisor that they had detected the odor of alcohol on another Day and Zimmerman employee, who had unescorted access to the Kewaunee Nuclear Power Plant. After receiving that information, the supervisor, who had received continuous observation behavior training for fitness for duty issues, failed to initiate an investigation of the circumstances. Further, the supervisor failed to perform an evaluation of the risk in continuing to allow the individual unescorted access to the protected area of the Kewaunee Nuclear Power Plant.

- B. 10 CFR 50.9(a) provides, in part, that information provided to the Commission by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the licensee shall be complete and accurate in all material respects.

Contrary to the above, an individual provided incomplete and inaccurate information to the licensee and to the NRC. Specifically, a supervisor employed by Day and Zimmerman

Nuclear Power Systems (Day and Zimmerman), a contractor at the Kewaunee Nuclear Power Plant, was interviewed by a licensee investigator on December 5 and December 11, 2001, and interviewed, under oath, by a Special Agent of the NRC Office of Investigations on June 6 and September 12, 2002. During these interviews, the supervisor stated that he was not aware of any fitness for duty issues involving employees of Day and Zimmerman Nuclear Power Systems at the Kewaunee Nuclear Power Plant. However, during July 2001 three Day and Zimmerman employees told the supervisor that they had detected the odor of alcohol on another Day and Zimmerman employee, who had unescorted access to the Kewaunee Nuclear Power Plant. The information provided by the supervisor during the interviews was material to the NRC because both the NRC and the licensee were investigating fitness for duty issues involving Day and Zimmerman employees at the Kewaunee Nuclear Power Plant.

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Draft Notice of Violation to Individual

- A. 10 CFR 50.5(a)(1) provides, in part, that an employee of a contractor of a licensee may not engage in deliberate misconduct that causes, or would have caused, if not detected, a licensee to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission.

10 CFR 50.5(c) provides, in part, that for the purposes of 10 CFR 50.5(a)(1), deliberate misconduct by a person means an intentional act or omission that the person knows would cause a licensee to be in violation of any rule, regulation or order; or any term, condition, or limitation of any license issued by the Commission.

10 CFR 26.20 requires, in part, that each license subject to 10 CFR Part 26 establish and implement written policies and procedures designed to meet the general performance objectives and specific requirements of 10 CFR Part 26, including policies to address the abuse of legal drugs (e.g. alcohol).

10 CFR 26.24(a) requires, in part, that the licensee implement chemical testing programs for persons subject to 10 CFR Part 26 to provide a means to deter and detect substance abuse, including testing for-cause, i.e., as soon as possible after receiving credible information that an individual is abusing alcohol.

Kewaunee Nuclear Power Plant Nuclear Administrative Directive (NAD) 01.04, "Fitness for Duty Program," Revision C, November 16, 1999, implements the requirements of 10 CFR Part 26 with the goal of maintaining a work environment that is free from the effects of drug and alcohol abuse. Section 2.1 of NAD-01-04 provides, in part, that NAD 01.04 applies to all persons who have applied for or who have been granted unescorted access to the Kewaunee Nuclear Power Plant.

Section 7 of NAD 01.04 lists the procedures that have been established to implement the Kewaunee Nuclear Power Plant Fitness for Duty Program. General Nuclear Procedure (GNP) 1.4.4, "Behavioral Observed Just Cause Testing," is one of the implementing procedures described in Section 7 of NAD 01.04.

Section 2.0 of GNP 1.4.4, Revision A, April 18, 1995, provides, in part, that the procedure applies to all persons granted unescorted access to the Kewaunee Nuclear Power Plant.

Section 5 of GNP 1.4.4 provides, in part, that the licensee is committed to a program of continued observation of employees, contractors, and vendors for indication of any on-the-job behavior which may impair job performance. When such behavior is detected, corrective measures shall be taken, including an investigation of the circumstances and an evaluation of the risk involved in continuing unescorted access to the Kewaunee Nuclear Power Plant.

Contrary to the above, during July 2001, while employed as the Mechanical and Civil Superintendent for Day and Zimmerman Nuclear Power Systems (Day and Zimmerman), a contractor at the Kewaunee Nuclear Power Plant, you knowingly failed to take corrective measures after receiving credible information about the on-the-job behavior which may impair the performance of a Day and Zimmerman employee. Specifically, you were told by three Day and Zimmerman employees that they had detected the odor of alcohol on another Day and Zimmerman employee. After receiving the information, you knowingly failed to initiate an investigation of the circumstances and you knowingly failed to perform an evaluation of the risk in continuing to allow the individual unescorted access to the protected area of the Kewaunee Nuclear Power Plant.

- B. 10 CFR 50.5(a)(2) provides, in part, that an employee of a contractor of a licensee may not deliberately submit to the NRC, a licensee, or a licensee's contractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

Contrary to the above, you provided incomplete and inaccurate information on December 5 and December 11, 2001, to an investigator representing Nuclear Management Company, L.L.C. (licensee) and during sworn interviews with the U.S. Nuclear Regulatory Commission (NRC) Office of Investigations on June 6 and September 12, 2002.

Specifically, you stated that you were not aware of any fitness for duty issues involving employees of Day and Zimmerman Nuclear Power Systems (Day and Zimmerman), a contractor at the licensee's Kewaunee Nuclear Power Plant. However, during July 2001 while you were employed by Day and Zimmerman Nuclear Power Systems as the Mechanical and Civil Superintendent, three Day and Zimmerman employees told you that they had detected the odor of alcohol on another Day and Zimmerman employee, who had unescorted access to the Kewaunee Nuclear Power Plant. This information was material to the NRC because both the NRC and the licensee were investigating fitness for duty issues involving Day and Zimmerman employees at the Kewaunee Nuclear Power Plant.

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FACTORS FOR THE SANCTION IN ACTIONS AGAINST INDIVIDUALS

✓ Based on OI Report No. 3-2002-004

Based on inspection Report No.

Other:

In the case of an action against an individual, factors that may be considered in determining whether to escalate enforcement sanctions include:

1. **The level of the individual within the organization**
 - Corporate executive in large organization
 - RSO, SRO or manager above first line supervisor (e.g., President of small business, plant manager)
 - First line supervisor or other licensee official (e.g., authorized user, chief technologist, RO, radiographer)
 - User (e.g., AO, assistant radiographer, technologist, technician, QA)
 - ✓ Not normally involved in NRC-Licensed activities (e.g., laborer, carpenter, millwright etc.)
 - ✓ Other, Explain: Individual held title of Mechanical and Civil Superintendent for a contractor, by trade he is a steam fitter hired from the union local.
2. **Culpability, the individual's training and experience as well as knowledge of the potential consequences of the wrongdoing**
 - Prior individual action against individual by NRC or significant discipline to individual for similar wrongdoing by licensee
 - Well-trained, experienced, no excuse for not appreciating the significance of wrongdoing, or management told individual not to do the wrongdoing
 - Knows it is wrong but does not appreciate the significance of the wrongdoing (does not care)
 - Newly hired, little or no experience, Knows it is wrong but does not appreciate the significance of wrongdoing; following culture of the organization
 - ✓ Deliberate Careless disregard No prior nuclear employment Not likely to work nuclear in the future
 - ✓ Other, Explain: Individual received Continuous Behavior Observation Training (see OI Exhibit 35, page 7).
3. **The safety consequences of the misconduct**
 - Overexposure to individual(s)
 - Misadministration to individual(s)
 - Release of radiation or radioactive material
 - Other, Explain:
 - Loss of redundancy or inoperable safety system
 - Affect public health and safety
 - ✓ Low consequence
 - No consequence
4. **The benefit to the wrongdoer**
 - Significant tangible gain (e.g., Monetary, financial decision, promotion, clear motive)
 - Tangible gain (e.g., avoidance of discipline, concerned about NRC inspection or licensee audit, clear motive)
 - No real benefit (e.g., leave early, get job done more quickly)
 - ✓ Other, Explain: There does not appear to be any clear benefit to the wrongdoer for the FFD violation, other than to possibly spare a coworker from FFD testing. The benefit to the incomplete/inaccurate information violation would be cover/limit any repercussions for the FFD issue.
5. **The degree of supervision of the individual**
 - Close supervision (e.g., supervisor in area most of the time)
 - Moderate supervision (e.g., supervised occasionally or audited occasionally)
 - No supervision
 - ✓ Other, Explain: Limited supervision; available information indicates that the supervisor had the individual take care of all problems.
6. **The employer's response**
 - Very significant impact to individual (e.g., dismissal, denied unescorted access, placed in PADS etc.)
 - Substantial discipline (e.g., fine, demotion, probation, additional licensee oversight of individual, removal from licensed activities if viewed as adverse action)
 - Some discipline (e.g., counseling)
 - None
 - ✓ Other, Explain: Licensee is unaware of the OI findings and believes that other employees were not truthful.
7. **The attitude of the wrongdoer**
 - Significant interference with investigation (e.g., actions such as destroying records, persuading others to lie)
 - ✓ Interference with investigation (e.g., affirmative lying)
 - Does not accept responsibility during investigation, exculpatory "no," does not provide testimony (e.g., exercising the Fifth Amendment privilege is neutral under this element)
 - Admits to wrongdoing and acceptance of responsibility
 - Cooperates during inspection and/or investigation
 - Voluntarily identified and self reported the wrongdoing with minimal expectation that it would be discovered
 - ✓ Other, Explain: On first interview with OI the individual maintains he has no knowledge of FFD issues. On second interview, with specific cautions by OI, still maintains no knowledge of FFD issues.
8. **The degree of management responsibility or culpability**
 - Management directed and employee complains
 - Management directed; however, employee does not question even though employee knows it is wrong
 - Not directed by management but management does not provide resources to get the job done such that management is implicitly inviting cutting of corners, and individual does not complain
 - Management Knew of questionable conduct and took no action to correct conduct
 - ✓ No management involvement
 - ✓ Other, Explain: No know involvement on the part of licensee management.
9. **Who identified the misconduct**
 - Individual
 - ✓ Third party (e.g., allegor, union, newspaper, etc.)
 - ✓ Other, Explain: Allegation to the NRC.
 - Licensee (through audit, LER, and/or investigation)
 - NRC (through inspection, LER, and/or investigation)
10. **Duration of violation**
 - Repetitive or continues over time; How long _____
 - Isolated or relatively isolated

Information indicates that the specific individual may have reported to work on several occasions with the odor of alcohol. However, only one occasion appears to have been reported to the individual who is the subject of this Individual Action Worksheet.
11. **Other**
 - The individual directed or coerced others to engage in the wrongdoing at issue
 - Unusual event with significant health and safety consequences such as death or serious injury
12. **Sanction**
 - ✓ NOV SL III
 - Order; removal for Year(s) _____
 - DFI
 - Prior Notice, Once _____, Year(s) _____
 - Other, Explain: TBD