

EDO Principal Correspondence Control

FROM: DUE: 09/03/08

EDO CONTROL: G20080528  
DOC DT: 08/03/08  
FINAL REPLY:

Thomas Saporito  
Jupiter, Florida

TO:

Borchardt, EDO

FOR SIGNATURE OF :

\*\* GRN \*\*

CRC NO:

Leeds, NRR

DESC:

ROUTING:

2.206 - Request for Notice of Violation and  
Proposed Imposition of Penalty (FP&L)  
(EDATS: OEDO-2008-0580)

Borchardt  
Virgilio  
Mallett  
Ash  
Ordaz  
Cyr/Burns  
Carpenter, OE  
Cyr, OGC  
Marco, OGC  
Mensah, NRR

DATE: 08/05/08

ASSIGNED TO:

CONTACT:

NRR

Leeds

SPECIAL INSTRUCTIONS OR REMARKS:

Template: EDO-001

E-logs: EDO-01

# EDATS

Electronic Document and Action Tracking System

**EDATS Number:** OEDO-2008-0580

**Source:** OEDO

## General Information

**Assigned To:** NRR

**OEDO Due Date:** 9/3/2008 5:00 PM

**Other Assignees:**

**SECY Due Date:** NONE

**Subject:** 2.206 - Request for Notice of Violation and Proposed Imposition of Penalty

**Description:**

**CC Routing:** OE

**ADAMS Accession Numbers - Incoming:** NONE

**Response/Package:** NONE

## Other Information

**Cross Reference Number:** G20080528

**Staff Initiated:** NO

**Related Task:**

**Recurring Item:** NO

**File Routing:** EDATS

**Agency Lesson Learned:** NO

**Roadmap Item:** NO

## Process Information

**Action Type:** 2.206 Review

**Priority:** Medium

**Signature Level:** NRR

**Sensitivity:** None

**Urgency:** NO

**OEDO Concurrence:** NO

**OCM Concurrence:** NO

**OCA Concurrence:** NO

**Special Instructions:**

## Document Information

**Originator Name:** Thomas Saporito

**Date of Incoming:** 8/3/2008

**Originating Organization:** Citizens

**Document Received by OEDO Date:** 8/4/2008

**Addressee:** Borchardt, EDO

**Date Response Requested by Originator:** 9/4/2008

**Incoming Task Received:** 2.206

August 3, 2008

Executive Director for Operations  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

**RE: 10 CFR 2.206 PETITION – DOCKET NOS.: 50-250, 50-251  
LICENSE NOS.: DPR-31, DPR-41**

**REQUEST FOR NOTICE OF VIOLATION AND PROPOSED  
IMPOSITION OF CIVIL PENALTY - \$100,000 (Department of Labor  
Case Nos. 89-ERA-07/17)**

**§ 2.206 Requests for action under this subpart.**

(a) Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper. Requests must be addressed to the Executive Director for Operations and must be filed either by hand delivery to the NRC's Offices at 11555 Rockville Pike, Rockville, Maryland; by mail or telegram addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; or by electronic submissions, for example, via facsimile, Electronic Information Exchange, e-mail, or CD-ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at <http://www.nrc.gov/site-help/e-submittals.html>, by calling (301) 415-0439, by e-mail to [EIE@nrc.gov](mailto:EIE@nrc.gov); or by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The request must specify the action requested and set forth the facts that constitute the basis for the request. The Executive Director for Operations will refer the request to the Director of the NRC office with responsibility for the subject matter of the request for appropriate action in accordance with paragraph (b) of this section.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision.

(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in

whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

(3) The Secretary is authorized to extend the time for Commission review on its own motion of a Director's denial under paragraph (c) of this section.

[39 FR 12353, Apr. 5, 1974, as amended at 42 FR 36240, July 14, 1977; 45 FR 73466, Nov. 5, 1980; 52 FR 31608, Aug. 21, 1987; 53 FR 43419, Oct. 27, 1988; 64 FR 48948, Sept. 9, 1999; 68 FR 58799, Oct. 10, 2003; 69 FR 2236, Jan. 14, 2004; 69 FR 41749, July 12, 2004; 70 FR 69421, Nov. 16, 2005; 72 FR 33386, Jun. 18, 2007]

## **§ 50.7 Employee protection**

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act. (1) The protected activities include but are not limited to: (i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes; (ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer; (iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements; (iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text. (v) Assisting or participating in, or is about to assist or participate in, these activities. (2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation. (3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any

requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended. (b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The department of Labor may order reinstatement, back pay, and compensatory damages. (c) A violation of paragraph (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for-- (1) Denial, revocation, or suspension of the license. (2) Imposition of a civil penalty on the licensee, applicant, or a contractor or subcontractor of the licensee or applicant. (3) Other enforcement action. (d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non prohibited considerations. (e)(1) Each licensee and each applicant for a license shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c). This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination. (2) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter, by calling (301) 415-5877, via e-mail to [forms@nrc.gov](mailto:forms@nrc.gov), or by visiting the NRC's Web site at <http://www.nrc.gov> and selecting forms from the index found on the home page. (f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities.

[58 FR 52410, Oct. 8, 1993, as amended at 60 FR 24551, May 9, 1995; 61 FR 6765, Feb. 22, 1996; 68 FR 58809, Oct. 10, 2003; 72 FR 63974, Nov. 14, 2007]

## **Basis and Justification**

On June 3, 1994, the Secretary of Labor ("SOL") issued a decision in Department of Labor Case Nos. 89-ERA-7/17. The June 3 decision stated that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under the [ERA]." Decision and Remand Order (D.&R.O.) at 1. It also held that "[c]overed employers who discipline or discharge an employee for such [protected] conduct have violated the ERA," D.&R.O. at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." D.&R.O. at 6. The final decision in this particular case ultimately found in favor of FPL; however, the latter decision has no effect on the SOL's June 3, 1994 decision that FPL violated the ERA in discriminating against Saporito for having engaged in protected activity. To this extent, the NRC is required to take enforcement action under 10 CFR 50.7 against its licensee FPL.

Notably, on July 16, 1996, the NRC issued a Notice of Violation and Proposed Imposition of Civil Penalty - \$100,000 (Department of Labor Case No. 92-ERA-010) against FPL. In its Notice of Violation, the NRC stated that, "While any discrimination against a person for engaging in protected activities is cause for concern to the NRC, this violation is of very significant regulatory concern because it involved discrimination by a member of management above the first-line supervision. The NRC places a high value on the freedom provided to nuclear industry employees to raise potential safety concerns to their management and to the NRC. . . . Therefore, to emphasize the importance of ensuring that employees who raise real or perceived safety concerns are not subject to discrimination for raising those concerns and that every effort is made to provide an environment in which all employees may freely identify safety issues without fear of retaliation or discrimination, I have been authorized . . . to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalty in the maximum amount of \$100,000 for the Severity Level II violation.

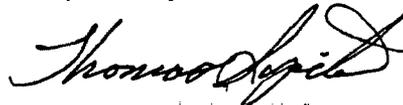
Again on June 5, 2003, the NRC issued a Notice of Violation (U.S. Department of Labor ALJ Case No. 2000-ERA-5, ARB Case No. 00-070 against FPL for discriminating against a nuclear employee who engaged in protected activity. Specifically, the Administrative Law Judge ("ALJ") found, under a dual motive analysis, that complainant was demoted in violation of the ERA, but that FPL had successfully shown that it legitimately would have demoted complainant even if he had not engaged in protected activity. For this reason, the complainant was denied the relief he sought and his complaint was dismissed. Subsequently, complainant appealed the ALJ's Recommended Decision and Order ("RDO") to the Administrative Review Board ("ARB"). On February 27, 2003, the ARB issued a Final Decision and Order, affirming the ALJ's decision denying complainant any relief on his claim of discrimination. In its June 5, 2003 NOV, the NRC stated that, "The NRC agrees that both the ALJ and ARB determined that no remedy

would be awarded the complainant because FPL successfully demonstrated that it would have taken the same action against him even in the absence of his protected activity. The NRC does not agree, however, with FPL's conclusion that there was no violation of the ERA. The ALJ, under Section II (Dual Motive) of the RDO, expressly found that in addition to his being legitimately and appropriately disciplined for continued, regular violation of Respondent's sick leave policy, . . . complainant was also demoted for the illegitimate reason of retaliation for his protected activity." In a footnote to this finding, the ALJ concluded that "Complainant has thus established that Respondent's proffered reason for the adverse action taken against him, i.e., that he was demoted solely for violation of its sick leave policy, is pretextual." Similarly, the ARB, at page 10 of its Final Decision and Order, concurred that the record supported the ALJ's conclusion that FPL violated the Act when it demoted complainant, and that FPL successfully demonstrated that it would have demoted complainant in the absence of protected activity. Thus, it is clear that both the ALJ and ARB concluded that complainant's demotion was motivated, in part, by the illegitimate reason of complainant's protected activity, and these findings form the basis for the NRC's conclusion that a violation of its Employee Protection regulation occurred. *Id.* at 1.

### **Conclusion**

For the reasons stated above, neither the NRC nor FPL can refute that a violation of NRC regulation under 10 CFR 50.7 occurred in Department of Labor Case Nos. 89-ERA-7/17 where, as in Case No. 00-070, FPL was found to have violated the ERA in discriminating against its nuclear employee. Therefore, the NRC is required to take enforcement action against FPL as a matter of law under its regulation.

Respectfully submitted,



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A copy of the foregoing was provided to the following by regular U.S. mail service on 03 AUG 2008:

J.A. Stall, Senior Vice President Nuclear  
and Chief Nuclear Officer  
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Hon. George W. Bush  
President of the United States of America  
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