RECORD #141

TITLE: Employee Protection From Employers for Revealing Safety V
iolations

FICHE: 36845-304

DCS

HPPOS - See Appendix, Page 5

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

JUN 30 1986

Docket Nos. 50-413
50-414
License Nos. NPF-35
NPF-48
EA 84-93

Duke Power Company
ATTN: Mr. Warren H. Owen, Executive Vice President
Engineering, Construction, and
Production Group
422 South Church Street
Charlotte, North Carolina 28242

Gentlemen:

This acknowledges receipt of your letter dated October 1, 1985, in response to the Notice of Violation and Proposed Imposition of Civil Penalty (NOV) in the amount of Sixty Four Thousand Dollars ($64,000) sent to you with our letter dated August 13, 1985. The NOV concerned alleged discrimination against an employee for engaging in protected activities.

In your response dated October 1, 1985, you denied the violation set forth in the NOV and requested remission of the proposed civil penalty on that and other grounds. After careful consideration of your response, we have concluded, for the reasons given in the enclosed Order and Appendix, that the violation occurred as stated but that a sufficient basis exists for reduction of the severity level of the violation from a Severity Level II violation (Civil Penalty - $64,000) to a Severity Level III violation. Further, as discussed in the enclosed Order and Appendix, the proposed civil penalty has been mitigated in recognition of your prompt and extensive corrective actions at the Catawba Nuclear Station. Accordingly, we hereby serve the enclosed Order on Duke Power Company imposing a civil penalty in the amount of Twenty Thousand Dollars ($20,000).

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," Part 2, Title 10, Code of Federal Regulations, a copy of this letter and its enclosure will be placed in the NRC Public Document Room.

The responses directed by this letter and the enclosed Notice are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, PL 96-511.

Sincerely,

James M. Taylor, Director
Office of Inspection and Enforcement

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

APPENDIX
EVALUATION AND CONCLUSION

With a letter dated October 1, 1985, from Mr. W. H. Owen to the Director, Office of Inspection and Enforcement, the licensee submitted a response to the Notice of Violation and Proposed Imposition of Civil Penalty issued by the Director, Office of Inspection and Enforcement, on August 13, 1985. The licensee denied the violation set forth in the Notice of Violation and Proposed Imposition of Civil Penalty and requested remission of the proposed civil penalty on that and other grounds. Following the restatement of the violation, a synopsis of the licensee's arguments and the NRC staff's evaluation of the licensee's response is given below.

Restatement of Violation

10 CFR § 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The activities protected include reporting of quality assurance discrepancies and nuclear safety problems by an employee to his employer.

Contrary to the above, Duke Power Company discriminated against Gary E. "Beau" Ross, who was engaging in a protected activity as a licensee quality control inspector. Mr. Ross had been given low November 1982 interim and 1982-83 performance ratings because of his efforts to bring safety concerns to the attention of Duke Power Company's management.

This is a Severity Level II violation (Supplement VII).
(Civil Penalty - $64,000).

Summary of the Licensee's Response

The licensee denied the violation and raises a number of defenses in support of its position. Some of the licensee's arguments were raised in its April 22, 1985 response to a § 2.206 petition related to this enforcement action and, consequently, these arguments were addressed in the Director's decision under 10 CFR § 2.206, which ultimately led to issuance of the Notice of Violation and Proposed Imposition of Civil Penalty. See generally DD-85-9, 21 NRC 1759 (1985). The licensee's defenses against the violation are, primarily: (1) the incident was an isolated incident that had no impact on public health and safety; (2) since the incident had no impact on public health and safety, the NRC is without jurisdiction to find a violation; (3) the NRC lacks authority to find a violation of § 50.7 absent a prior determination by the U.S. Department of Labor that the licensee had violated § 210 of the Energy Reorganization Act; (4) the NRC staff erred in relying on the record developed by the Atomic Safety and Licensing Board as the factual basis for the enforcement action; and (5) the NRC staff misconstrued the legal scope of 10 CFR § 50.7 and § 210 of the Energy Reorganization Act in finding that a violation had occurred. Each of these arguments is treated in turn below.

NRC Evaluation of Licensee's Response

Showing Necessary to Find a Violation

The licensee argued that the Ross incident had no impact on public health and safety and, consequently, the NRC is without jurisdiction to find a violation in the absence of such a nexus with the alleged violation. In support of its assertion that the Ross incident had no impact on public health and safety, the licensee pointed to the record in the operating license proceeding for Catawba regarding harassment and intimidation of quality control workers, including Mr. Ross. In this regard, the licensee emphasized the testimony of Mr. Ross to the effect that he was not deterred from doing his work by the performance appraisals in question and the Board's general conclusion that harassment and intimidation was not a widespread problem at Catawba that seriously affected the quality assurance program. See LBP-84-24, 19 NRC 1418, 1444, 1519-20, 1531-32 (1984).

The staff has not alleged that harassment and intimidation of quality assurance personnel was a widespread problem at Catawba. However, the licensee has incorrectly construed the requirements for a finding of a violation of § 50.7 or, for that matter, any other Commission regulation or license condition. The licensee would require, in addition to a statement of its failure to meet its duty under the regulation, a demonstration of a particular impact on public health and safety as a prerequisite to finding a violation of the regulation. While its actual or potential impact on public health and safety affects the seriousness and consequent severity level of a particular violation, a licensee may be cited for a violation solely upon specification of the manner in which it failed to meet the regulation or requirement at issue. No separate showing of actual or potential impact on public health and safety is necessary to sustain the finding of a violation.

Section 50.7, as well as other regulations, is a reflection of the Commission's judgment that a licensee's adherence to the standard of conduct prescribed by the regulation is important to ensuring adequate protection of public health and safety. See Atlantic Research Corp., CLI-80-7, 11 NRC 413, 425 (1980). In promulgating § 50.7 and its other employee protection regulations, the Commission stated the importance to its regulatory responsibilities of protecting employees from discrimination for raising safety issues:

> The Commission, to effectively fulfill its mandate, requires complete, factual, and current information concerning the regulated activities of its licensees. Employees are an important source of such information and should be encouraged to come forth with any items of potential significance to safety, without fear of retribution from their employers.

47 Fed. Reg. 30452 (July 14, 1982). The enactment of § 210 of the Energy Reorganization Act reflected congressional judgment that protection of employees who raise safety concerns is important to protection of public health and safety as a whole.

In this case, the NRC staff has alleged those facts that it believes are sufficient to establish a violation of § 50.7.

Authority to Find Violation in Absence of Department of Labor Findings

The licensee argued that no violation of § 50.7 can be found here because the U.S. Department of Labor did not make a prior determination that § 210 of the Energy Reorganization Act was violated. In the licensee's view, the Commission has limited itself to taking enforcement action for violations of § 50.7 to those instances in which the Department of Labor has found a § 210 violation. The licensee also raised this argument in its earlier § 2.206 response. See DD-85-9, 21 NRC 1759, 1766-68 (1985).

The licensee's view of § 50.7 misperceives the complementary, yet independent, authorities and responsibilities of the NRC and the Department of Labor in protecting employees from discrimination and retaliation for raising matters bearing on nuclear safety. Section 210 empowers the Department of Labor to grant remedies directly to employees who have suffered discrimination for engaging in protected activities, but that statute did not limit the Commission's pre-existing authority under the Atomic Energy Act to investigate alleged discrimination and take action to combat it. Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-527, NRC 126, 132-39 (1979); 124 Cong. Rec. S 15318 (daily ed. Sept. 18, 1978) (remarks of Sen. Hart). Nothing in § 50.7 or the accompanying Statements of Consideration expressly limits the exercise of NRC's independent authority to enforce its own regulations only to those circumstances in which the Department of Labor has acted. The comments cited by the licensee from the Statements of Consideration for § 50.7 were made only in context of (1) emphasizing that employee discrimination could result in Commission sanctions as well as awards by the Department of Labor to compensate a wronged employee and (2) rejecting a proposal that the Commission provide, in its rules, sanctions against individuals who made frivolous complaints to harass an employer.

The licensee suggested that the NRC can bring, in any event, enforcement actions for violations of 10 CFR Part 50, Appendix B (particularly of Criterion I, which requires organizational freedom and independence for quality assurance personnel) to protect public health and safety from the potential harm caused by a licensee's wrongful actions against employees. The licensee did not explain why the Commission must elect to proceed under Appendix B in discrimination where no complaint under § 210 is filed or the Department of Labor does not reach the merits of the complaint, but may proceed under § 50.7 on the same facts only if the Department of Labor decides the merits of a complaint in favor of an employee. While Appendix B to Part 50 and § 50.7 are complementary, neither regulation nor Commission policy requires the election suggested by the licensee. The instance cited by the licensee in which the staff proceeded under Criterion I to Appendix B was based on facts that occurred prior to the effective date of § 50.7, and Appendix B was the only legal basis on which the Commission could proceed at that time.

The licensee also cited a memorandum of the former Executive Legal Director commenting on a bill containing the provision that became § 210. It is difficult to understand how that memorandum, written about the earlier legislation, is particularly pertinent to Commission regulations adopted four years later. The memorandum was written in the context of posing the question whether the Commission should administer the remedies provided directly to the employees under § 210. The same memorandum acknowledges the NRC's power to take appropriate enforcement action, including civil penalties, against licensees for discrimination. In fact, Commission regulations prohibited discrimination against workers who worked under radiological conditions before § 210 was enacted. See 10 CFR 19.16(c) (1978) (promulgated in 1973); see also Union Electric Co., supra, 9 NRC at 136.

To be sure, the Commission recognizes the importance of coordinating its efforts with the Department of Labor to ensure effective protection of employees from discrimination for raising nuclear safety concerns. To that end the agencies have entered into a Memorandum of Understanding. 47 Fed. Reg. 54,585 (Dec. 3, 1982). Nonetheless, the Commission is not required to forego enforcement of its anti-discrimination rules because the Department of Labor has not acted on a complaint.

Sufficiency of the Evidence of the Violation

The licensee did not offer any new factual information to the record developed before the Licensing Board and discussed in the Board's decision. Instead, the licensee argued that the staff is not entitled to rely on the record before the Board or its findings because the Board was not charged with determining a violation. The licensee asserted that the record is incomplete on the subject and that the licensee was concerned with showing in the licensing proceeding only that its quality assurance program was effective rather than in rebutting the alleged discrimination. The licensee argued that neither the Board's findings nor the evidence would support a finding of a violation under the standards applied in other federal discrimination cases.

The staff recognizes, as it did in the § 2.206 decision, that a determination of a § 50.7 violation was not central to the Board's decision on the issue of whether the licensee should have received a license for the Catawba Nuclear Station. See DD-85-9, supra, NRC at 1768-69. Nonetheless, the Licensing Board received a substantial amount of documentary and testimonial evidence regarding the treatment of Mr. Ross. The staff may reasonably rely, as it did here, on such evidence and the conclusions drawn from it by the Board in determining whether to initiate separate enforcement proceedings. Reliance on such evidence is little different from the staff's reliance on the results of inspections or investigations as a basis for taking enforcement action. The licensee has a full opportunity under 10 CFR 2.205 to convince the staff or the presiding officer in the enforcement proceeding that the evidence is not sufficient to support the violation.

The licensee suggested that the record was incomplete, yet it offered no other evidence to complete that record. The licensee suggested that the Board (and, for that matter, any other agent of the Commission) lacked sufficient expertise to give a true assessment of the facts, yet the licensee did little to demonstrate specifically how the evidence developed by the Board would lead to a finding of no violation. The licensee has not explained why Mr. Ross' evaluations were proper. The staff believes, based on the available evidence which includes the evidence before the Licensing Board, that the preponderance of evidence indicates that Mr. Ross received unfair performance appraisals for raising safety concerns and that the evidence is sufficient to proceed with imposition of a civil penalty for the violation.

Internal Safety Complaints are Within the Scope of "Protected Activities" under 10 CFR 50.7

The licensee disputed the NRC's view that "protected activities" under § 50.7, as well as under § 210 of the Energy Reorganization Act, include the reporting of quality assurance discrepancies and nuclear safety problems by an employee to his employer. The licensee argues that an employee must contact the NRC "or some other competent organization of government." The licensee based its view on the decision of the U.S. Court of Appeals for the Fifth Circuit in Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984), in which that court held that "employee conduct which does not involve the employee's contact or involvement with a competent organization of government is not protected" under § 210 of the Energy Reorganization Act. 747 F.2d at 1036.

As indicated in the § 2.206 decision related to this case (DD-85-9, 21 NRC at 1764-66), the Commission believes that the better view of "protected activities" under § 210 is that employees are protected from retaliation and discrimination under the statute for purely internal safety activities that involve no contact with representatives of the Commission. The Ninth Circuit and, more recently, the Tenth Circuit Court of Appeals have adopted this construction of § 210 and have rejected the analysis of the Fifth Circuit. See Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162-63 (9th Cir. 1984); Kansas Gas and Electric Co. v. Brock, 780 F.2d 1505, 1510-12 (10th Cir. 1985). The Commission follows this view in the application of its own employee protection regulations such as 10 CFR § 50.7. Although Mr. Ross apparently did not contact NRC representatives prior to his receipt of the poor performance appraisals, such actions are not a necessary element to the finding of a violation under § 50.7.

Summary of Licensee's Request for Mitigation of Civil Penalty

In its separate response to the Notice of Violation and Proposed Imposition of Civil Penalty, the licensee urged the staff to withdraw or substantially mitigate the proposed penalty on a number of grounds. As discussed above, the licensee denied the violation. The licensee also argued that the violation was an isolated event that had no effect on quality assurance personnel, that the violation was improperly categorized at Severity Level II, that corrective

actions have long been in effect for the violation, and that other extenuating circumstances warrant mitigation or remission of the penalty. Each of these arguments is addressed below in turn.

NRC Evaluation of Licensee's Request

Propriety of the Severity Level II Classification

Although the licensee acknowledged that violations which involve "action by plant management above first-line supervision in violation of § 210 of the ERA against an employee" may be categorized at Severity Level II under Supplement VII to the enforcement policy, the licensee believed that this classification was inappropriate in this instance because there was no impact on the public from this violation. The licensee also argued that the classification was inappropriate because there has been no § 210 adjudication by the Department of Labor in this case, which the licensee interprets the Supplement to contemplate.

The facts alleged in this case fit example B.4 in Supplement VII to the enforcement policy. The improper performance evaluations were made by persons who serve in positions above first-line supervision. (Mr. Ross was himself a supervisor, being a foreman over a group of welding inspectors). Thus, the violation is like the example in the enforcement policy. Whether or not there has been a Department of Labor adjudication under § 210 is of no consequence to the selection of the severity level here. Although the enforcement policy uses § 210 in the descriptions of examples of Severity Level II violations in Supplement VII, the description is, as the licensee acknowledges, only an example and a violation need not reflect an example in every detail to be classified at that severity level. Here, the violation was of the type generally described in the policy, and the Severity Level II classification was made appropriately on the basis of the example.

The staff recognizes that the Ross incident was a relatively isolated event, that the quality assurance and control program worked generally well at Catawba, and that the poor performance evaluations may not have deterred Mr. Ross from performing his duties. The fact that the violation occurred at the management level that it did made the violation of significant concern to the NRC. Although the licensee's conduct may not have actually deterred Mr. Ross, this fortuitous circumstance would not normally cause a reduction of the severity level.

However, the fact that the Ross incident was a relatively isolated event, and that the licensee's management of the quality assurance and control program was generally good are persuasive in determining that the severity level of this violation should be reduced. The enforcement policy recognizes that the regulation of nuclear activities does not lend itself to a mechanistic treatment and that the Director, IE must exercise judgment and discretion in determining the severity levels of violations. On reevaluation of the particular facts in this incident, the staff has concluded, though the violation could be classified at Severity Level II, that Severity Level III is the appropriate classification for this violation. Reduction of the severity level in itself warrants a reduction of the proposed civil penalty to $40,000, the base civil penalty for a Severity Level III violation at the time this violation occurred.

Mitigation for Corrective Action

The licensee relied on its corrective actions for general harassment and intimidation concerns at Catawba in arguing for mitigation of the penalty. The licensee stated that it took prompt and substantial actions prior to the operating license hearings and the issuance of the Board's decision to investigate and resolve concerns raised by welding inspectors at Catawba regarding their treatment by management. The licensee's actions, which arose out of its welding inspector task forces, included assignment of an employee relations assistant to the quality assurance department, initiation of employee forums with second-level supervisors, issuance of the formal recourse procedure, training of supervisors in communications skills, and instructions to supervisors that retaliation would not be tolerated. The licensee cited testimony of welding inspectors that conditions had improved at Catawba as a result of the licensee's actions. The licensee also emphasized that the Board did not require remedial action with respect to Mr. Ross' evaluations, but only required revision of the licensee's anti-harassment policy to improve a lack of clarity, which the licensee suggests stemmed "as much from inadequate staff guidance concerning the protection of employees from harassment or discrimination as from any failure by Duke to mitigate prompt and extensive corrective action." Response at 12. The licensee asserted that it purged Mr. Ross' personnel file of the retaliatory evaluations on its own initiative. The old evaluations are being kept in a separate sealed file, the licensee explains, solely to preserve evidence for any potential collateral litigation involving Mr. Ross.

The staff had previously drawn a negative inference from the licensee's retention of Mr. Ross' initial appraisal in a separate sealed file. Based on the plausible explanation given by the licensee, the staff believes that the negative inference was unwarranted. On reevaluation of the licensee's prompt and voluntary actions to remove the cloud regarding Mr. Ross's appraisals at Catawba, and its actions generally to ensure that workers' concerns are acted upon without reprisal, further mitigation of the proposed civil penalty to $20,000 is appropriate for prompt and extensive corrective actions. This amount reflects a 50% reduction of the base civil penalty of $40,000 for a Severity Level III violation.

Mitigation for Other Policy Reasons

The licensee also argued against imposition of a civil penalty because licensees will decline to discipline employees if they may be subject to NRC proceedings based on "isolated violations" of § 50.7 which have not been considered initially by the Department of Labor. The licensee also suggested that taking enforcement action here on the basis of the record developed in the licensing proceeding will lead to protracted licensing hearings, because licensees will be encouraged to litigate ancillary issues in licensing proceedings to avoid subsequent enforcement proceedings. Neither of these arguments are persuasive. The licensee in effect suggests that employers will decline to discipline employees for legitimate reasons, because discipline may lead to NRC enforcement proceedings. However, employers have to fear NRC enforcement sanctions only where their actions against employees are based on impermissible discrimination. The NRC has no intention of becoming a roving

watchdog over the day-to-day workings of employee-management relations, but it is vitally concerned where management crosses the line and disciplines employees for raising safety concerns.

The licensee's assertion that the licensing process will be adversely affected is speculative at best. If a matter is truly ancillary to the licensing proceeding, the Board may limit its inquiry as it sees fit. Licensees have an opportunity to be heard on all NRC enforcement actions under Subpart B to 10 CFR Part 2 if the staff imposes sanctions, and, therefore, no particular need or incentive should exist for licensees to defend against truly collateral issues in a licensing proceeding.

Mitigation for Other Extenuating Circumstances

The licensee points to several other circumstances in arguing that the civil penalty should be mitigated. The licensee states that the Ross incident was isolated, that it had no effect on public safety, and that quality control personnel did their tasks properly. The licensee also emphasized that any problems involving harassment or intimidation of workers were confronted and resolved in 1982 and 1983. In view of these circumstances, the licensee argued that a civil penalty here will not positively affect the conduct of this licensee or other similarly situated persons. The staff has considered the licensee's arguments regarding the isolated nature of the incident and its effect on the public health and safety and on other quality control personnel in determining the severity level of the violation and in mitigating the penalty by 50 percent and has determined no further mitigation is appropriate.

Conclusion

The violation occurred as stated. For the reasons discussed above, the severity level of the violation has been reduced from a Severity Level II violation to a Severity Level III violation. Further, as discussed above, the proposed civil penalty has been mitigated to $20,000. Accordingly, a $20,000 civil penalty will be imposed.